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THE

Weekly Reporter,

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, VIZ., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE CALCUTTA AND MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF HER MAJESTY'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

By D. SUTHERLAND, Middle Temple.

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See Original Jurisdiction (5)

CONSOLIDATION (*of Suits*).

See Valuation (1)

CONSTRUCTION.

(1) Where a sum found due under an arbitration-award was to be paid in annual instalments, and, if one was in default, the judgment-creditor was to be entitled to recover upon the whole sum at the rate of 1 per cent. interest per mensem (instead of 6 annas), and a default took place after annual kists had been paid for several years: HELD that interest at 1 per cent. per mensem must be paid on the balance due at the time of the default, from the date of the award 111

(2) Where by a *solehnamah* entered into about 100 years ago between plaintiff's and defendant's predecessors, the collection of certain tolls and cesses was reserved to the zemindar (plaintiff), and certain *julkur* rights to the defendants, the *ijaradars*: HELD that the re-building of a *khuttees* or fish-market or exchange by the plaintiff upon his own land (the former having been destroyed during his minority) was not in excess of his rights or a contravention of the *ruffanamah*, and though the *khuttees* would divert profit from the defendants to the plaintiff, yet the loss was a *damnum absque injuriâ* 142

(3) A decree which declared plaintiffs entitled to a certain share of offerings *by right of inheritance*, was construed to refer to existing, not future, offerings 202

(4) Where a lease contained two provisions, one for payment of rent and the other for forfeiture and re-entry on default of payment; and by a later *solehnamah*, the rent is put an end to, and the lessor receives back a portion of his land, and by a subsequent *solehnamah*, the lessees agree to pay a new rent, and no provision is made for re-entry or forfeiture; the clause as to forfeiture and re-entry in respect of the original rent do not apply to the rent under the last *solehnamah* 244

(5) Where a bond provided for the payment of interest from the date of the bond on failure of payment of the principal on a certain date, and the decree awarded "the entire sum of money covered by the bond" 277

See Agreement (1) (2)

See Original Jurisdiction (3)

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See Privy Council Rulings (2) (3) (19) (20) (21) (30)

See Settlement (1)

CONTRACT.

(1) In a suit for damages for breach of—— where the Statute of Fraud does not apply, and there has been an interchange of bought and sold notes, plaintiff may prove by parol evidence the existence and terms of a —— on which he can maintain the action 414

(2) There may be a binding —— if the parties intend it, although bought and sold notes are to be exchanged, or a more formal —— is to be drawn up 414

(3) Where bought and sold notes do not agree, they cannot be used as evidence of a ——; but the fact of their differing, and not being returned, does not show that, at the conclusion of the negotiations, the parties did not agree 414

(4) A —— against public policy and intended to evade the course of law, cannot be enforced in a Court of Justice; and money paid under such a —— cannot be recovered 450

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CONTRACT CONTRA BONOS MORES.

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CONTRIBUTION.

Where one member of a defunct firm sues another for——to recover money paid in liquidation of a debt due by the firm, if there has been no adjustment of accounts, it is necessary to make all the partners parties to the suit ... 408

See Hindoo Widow (1)

See Parties (1)

CONVENIENCE.

See Partition (3)

CONVEYANCE (*of Rent*).

See Notice (1)

CO-SHARERS.

(1) Where a co-sharer, at his own expense, improves *puteet* land, converting it into a village, another co-sharer is not entitled to claim possession of a specific share of the village; but only to demand a partition in which he would obtain an equivalent elsewhere for the portion brought into cultivation 12

(2) A co-sharer who takes over into his own hands from the Receiver the management of his share, is entitled to sue, or to be made a party, under s. 73 Act VIII of 1859, to a suit already brought for rents which accrued before the Receiver's discharge 16

(3) Where a managing co-sharer obtains from the Collector a temporary settlement in his own name of *char* lands accreting to the parent estate, his possession thereunder is not adverse to the other co-sharer, who is entitled to participate in the settlement 198

(4) The Court refuses to issue an injunction to a co-sharer not to cultivate ijmalee lands, because of alleged interference with the rights of the ——; holding that the remedy lies in an action for damages 408

See Act VI (B.C.) of 1862 (2)

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(1) Withheld for ill-will and malice ... 14

(2) An appeal should not be dismissed generally with ——where the effect would be to make the first defendant liable for——of other defendants also who were made co-respondents, particularly where one of these was not entitled to have his —— 57

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(3) Where a judgment contained a remark to the effect that two persons had been improperly made defendants and ought to have their ——; but the decree contained no such recital, the Court declined to allow execution for——to issue in favor of the two defendants ... 111

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CRIMINAL PROCEDURE CODE.

Section 320. *See Jurisdiction* (16)

CRIMINAL PROSECUTION.

A party convicted in a Criminal Court of cheating, and compelled to return the consideration-money which he had taken, and for which he had not delivered the goods, cannot be sued in a Civil Court for breach of contract for non-delivery 248

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(1) May not always be adequately measured by interest at the bazar rate. The Judge should take into consideration the circumstances presumably within the knowledge of the defendant when he did the act which is the cause of action, and allow for consequences 337

(2) Mere verbal abuse without consequent injury gives no claim to——, but the Court refuses to interfere with an award of —— where a person of some position has been assaulted and grossly abused ... 531

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(1) In a suit for declaration of title under a pottah under which plaintiffs had been in possession since it was granted in 1843, defendants were held by their acquiescence for 12 years to have concluded themselves from saying that the pottah was illegal and beyond the Collector's power to grant ... 57

(2) A zemindar can take steps to have the service for which a——is given performed, but he cannot sue for khas possession 472

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(1) The Court refused to allow a —— to stand which gave to the plaintiffs something (*i. e.* lands whose boundaries were) unascertained, and which might not be ascertainable 34

(2) A —— for exclusive possession of a plot of land of which the judgment-debtors are not the sole owners is incapable of execution, when the shares of the shareholders have not been exactly defined, and no partition has taken place 43

(3) Where a —— was sought to be altogether set aside, and there were no materials for separating the legal from the illegal part, the Court declined to set aside a part of it 269

(4) Where a decree-holder enters into a *solehnamah* under which the judgment-debtor arranges to pay a certain sum and makes other conditions, the —— gives place to this compromise which can only be enforced by a fresh suit within the period of limitation 279

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(5) Where a —— shows the intention of the Court, but leaves something undetermined for further inquiry, such inquiry must be held as intended to be made by the Court to which the —— is sent to be carried into effect 512

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A —— allowed by law must be exercised as well as properly exercised, otherwise a superior Court will be warranted in interfering ... 16

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Merely keeping another out of possession may not be wrongful ——, nor is the party who does so necessarily a wrong-doer against whom everything must be presumed, so as to render him liable for mesne profits which he was prevented from realizing by virtue of a judicial decree. To be a wrong-doer, the party must have power and control, and then act wrongfully 318

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(1) In a suit for——defendant was not allowed to take in special appeal the objection (not taken before) that plaintiff having allowed him to hold over and cultivate could not eject him without sufficient notice to quit 148

(2) A decree for——under s. 78 Act X of 1859, made in a suit for arrears of rent of a transferable tenure, to which a person claiming as mortgagee was no party, cannot confer upon the decree-holder (the purchaser in execution of a decree against the mortgagor), the right to avoid the mortgage, and is no bar to a suit by the mortgagee to question the validity of the decree and the Collector's power to make it 206

(3) The only suits for——contemplated by Act VIII (B. C.) of 1869 are those for non-payment of arrears of rent. A suit for —— from land assigned for building purposes brought upon a contract is not barred by reason of an order for —— on an application under s. 25 Act X of 1859 208

(4) In a suit by tenant against landlord to recover possession, in which an intervenor was made a party, plaintiff failed to prove the illegal —— on which he relied. HELD that the error, if any, of allowing the intervenor to be made a party where his allegations were contrary to those of either plaintiff or defendant, was one of procedure only, and that the *onus* was on the plaintiff to show that the determination against him of the issue was erroneous or was affected by the evidence adduced by the intervenor... 313

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ENDOWMENT.

(1) The mere fact that a portion of the profits of land has for some time been used for the worship of an idol, is no proof of an——, and does not make the party in possession liable as a shebait 399

(2) A shebait may lease endowed lands, appropriating the proceeds to the worship of the idol, and a mokuddum under such a lease may hold possession during the lessor's lifetime, or the period during which he continues to be shebait ... 439

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Upon an appeal under s. 15 of the Letters Patent from the decision of a senior Judge of a Division Bench (differing in opinion from the junior Judge) dismissing a petition of a late Moonsiff, complaining of his removal from office by the English Committee: HELD that no Division Bench has any power to re-consider, review, or set aside a decision of the English Committee, or order the Judges of that Committee so to deal with their decision ... 209

ENHANCEMENT.

(1) Lands used for building purposes are not liable to——under Act X of 1859 235

(2) Where a tenant has had full and timely notice of the grounds on which his landlord claims a *kubooleut* at enhanced rates, the landlord is entitled to a decree for a *kubooleut* for what he may prove to be a fair and legal demand, notwithstanding his failure to prove his right to a *kubooleut* at the rate fixed by him 272

(3) Where in a suit for——decreed by the first Court, the Lower Appellate Court finds that defendant has no talooka rights, and that the notice under Act X of 1859 s. 17 is valid, HELD that this is equivalent to finding that defendant has only a right of occupancy, and the first Court's finding as to rate of rent should be accepted 528

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ENHANCEMENT.—(*Continued.*)

(4) Where in a suit for——defendant is found to hold an intermediate position, and not to be liable for the rates of rent paid by simple occupant ryots, he is still amenable to Act X of 1859 s. 17 528

(5) The omission of the words "same class of ryots" in a notice under Act X of 1859 s. 17, invalidates a claim for —— 532

(6) *Quære.*—Would the omission of the words "same class of ryots" in a notice under Act X of 1859 s. 17 invalidate a claim for——, if the ryot knew all the grounds on which enhanced rent was demanded of him and defended himself on all 532

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ERROR IN LAW.
See Evidence (4) (5)
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ESTATES TAIL.
See Privy Council Rulings (30)

ESTOPPEL.

(1) A Collector's decision in a distraint case is not conclusive as to the genuineness of a *kubooleut* not put in issue; nor can a decree be given on the strength of a *kubooleut* which is still in contest in a regular suit 30

(2) *Quære.*—Is an investigation of a talookdar's title commenced in the Revenue Court, and either decided there or carried up in appeal to the Civil Court, a bar to a suit by him to recover possession and mesne profits? 469

See Admission (4)
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EVIDENCE.

(1) A Court is not bound to send for documentary——which is with the record of another case, but is required by a party to prove his case, on the ground that he was unable to procure the originals, and that copies would be useless, as he could not get them attested. His proper course would be to proceed under s. 136 or 138 Act VIII of 1859 ... 13

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EVIDENCE.—(*Continued.*)

(2) Where there is sufficient——to prove a plaintiff's claim, he is entitled to a decree, notwithstanding his failure to attend to a summons under s. 170 Act VIII of 1859 ... 16

(3) In a suit by a zemindar to recover possession, where defendant refused to give his——and displace the finding of the Lower Court that his *dur-putnee* was a nominal transaction, the finding was upheld, notwithstanding collateral evidence by other witnesses called for a different purpose 45

(4) The improbability of plaintiff having received payment for one bill, while an older one *remained* unpaid, is no reason for refusing to consider —— adduced by him, and such refusal is an error of law ... 53

(5) For a Lower Appellate Court to ignore an entry in a day-book on which the first Court decided the case, is an error of law and a subject for special appeal 53

(6) A Judge disbelieving the——of certain mortgagors as to plaintiff's hereditary occupancy is not bound to take into consideration documentary —— sworn to by the same witnesses 60

(7) Objections to —— as not being the best, should not be allowed in special appeal, but should be taken at the time when the —— is offered 105

(8) Where the Lower Appellate Court has weighed the——on both sides, the giving in the course of its observations of a reason which may not be considered good, is not a ground of special appeal ... 110

(9) The Lower Court, though requested to send for the records of a former suit in which the decree afforded important —— in support of plaintiff's case, not having done so, the case was remanded with a view to the omission being supplied 127

(10) Case in which Lower Appellate Court was held justified in referring to a written statement, although not admissible as —— ... 145

(11) The deposition of a serving-peon is ——, but the report of the Nazir not being on oath, or on anything on which perjury can be charged, is not —— 197

(12) The examination by commission of a *purdah-nusheen* is not necessary where she can be examined in Court in a palkee, or otherwise, on a proper identification 230

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EVIDENCE.—(*Continued.*)

(13) A person who swears that he was present at the execution of an instrument, is not a *secondary* witness merely because he was not a subscribing witness 245

(14) Mere absence of attestation cannot be fatal to the admission of a document purporting to be of very ancient date and coming from the proper custody 314

(15) No Court, much less an Appellate Court, is justified in ruling that, in the absence of documentary ——, mere oral —— is not sufficient to prove plaintiff's case when supported by a number of witnesses whose testimony is believed by the first Court 314

(16) It is an error to suppose that oral ——, not supported by documentary ——, is of no importance for the determination of the merits of a case 323

(17) A Court may find a question of fact not amounting to high treason or any offence specifically laid down in the Evidence Act, on the testimony of a single witness ... 340

(18) Where a copy of a schedule map had been relied upon and admitted on previous occasions by both the parties to a suit, plaintiff cannot sue for a fresh measurement and demarcation, and the Judge is wrong in not considering the copy binding on the plaintiffs 346

(19) A Judge maintaining that oral evidence is of no value without a pottah and *kubooleut* to prove the quantity of defendant's *nukdee kasht* land and the amount of rent, misdirects himself in point of law as to what——is necessary in deciding the facts 348

(20) Where two sets of jumma-bundee papers put in by parties to a suit are such that either would be inadmissible if objected to by the opposite party, each party by insisting on his own papers, bars himself from objecting to those of his adversary 502

(21) Proceedings under Act XL of 1858 and Act XXVII of 1860 are not conclusive ——, but they are corroborative —— where they involve an admission by the opposite party 514

(22) Where khusrah papers forming the essence of the action are not produced by the plaintiff within the time prescribed by law, the Court of first instance is justified in rejecting them when subsequently tendered as —— 515

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EXCESS LAND.

See Land (1)

EXECUTION.

(1) Where an——case was struck off because the decree-holder did not deposit the travelling allowance of the officer deputed to sell the attached property, the attachment was held to subsist up to the date of the striking off and an application made within three years therefrom to be in time 7

(2) The Lower Appellate Court was held to have erred in not referring to two maps not expressly referred to in a decree, so as to assist in ascertaining the amount of mesne profits due under the decree ... 170

(3) Where a judgment-creditor attached land in——, but allowed the sale to be postponed to enable the judgment-debtor to raise the money by mortgage, and whilst the attachment was pending, the property was sold at the instance of another creditor: HELD that the former judgment-creditor was entitled to proceed against other property belonging to the judgment-debtor ... 174

(4) Where a decree provides for the ——of a conveyance of land, but not for the payment of money, and a portion of the land is taken away by Government for railway purposes subsequently to decree, the decree-holder must bring a separate suit to recover compensation-money 189

(5) A later decree confirmed on appeal supersedes an earlier decree between the same parties, for all purposes of —— 192

(6) A decree for the performance of a particular act (*e. g.* the removal of obstructions in a pathway) can be enforced only under s. 200 Act VIII of 1856 282

(7) In determining the venue of appeal against an order passed in ——, the "subject-matter in dispute" in the sense of s. 22 Act VI of 1871, must be taken to exclude the interest which accrued subsequently to the date of the decree 316

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(8) Error in construing a decree which was not properly drawn, if it leads to just and proper execution. cannot be considered as affecting the decision on its merits 336

(9) Where in —— of a decree for khas possession, it is necessary to remove any of the defendants from the land covered by the decree, the Court, on application, may remove such person; but if the decree is silent as to a building on the land. the Court executing cannot have the building pulled down ... 527

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EX-KING OF DELHI.

See Privy Council Rulings (31)

EX-PARTE DECISION.

(1) Where defendant is prevented by plaintiff's fraud from appearing on the last day of hearing, the suit is decided *ex-parte*, and the first Court is right in restoring the case under Act VIII of 1859 s. 119 ... 457

(2) Act VIII of 1859 s. 119 gives no remedy to a defendant wilfully or carelessly failing to appear on due service of summons; and when he fails to make out any right to a re-opening of the case under that Section, he is not allowed the extraordinary remedy provided by s. 15 of the High Court's Act 474

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FICTITIOUS SALE.

An agreement entered into by a lessor with another person to get rid of his lessee by means of a fictitious sale for arrears of rent, and to share the profits of the transaction, is a fraud against the lessee.

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FICTITIOUS SALE.—(*Continued.*)

The person with whom such an agreement is made has not the rights of an auction-purchaser under Act VIII (B. C.) of 1865, but only those of a private purchaser 240

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Although the High Court is not limited to the express —— of the Courts below, but is justified in assuming inferences of fact clearly intended; yet, when the judgment of the Lower Court shows that it did not intend to express any opinion on a particular point, the High Court cannot infer that the Lower Court did determine that point. As when the Sub-Judge said that he decided the case "without regard to the question of limitation," the Court could not suppose him to have intended to determine that there was no possession by plaintiff 149

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(1) Defendants, *purda-nusheen* ladies, having unsuccessfully pleaded tender of payment and deposit in Court, HELD that it was too late for them in appeal to urge —— on the part of plaintiff ... 334

(2) *Quære.*—Can the mere payment of a stamp calculated on an undervaluation, be treated as of itself a —— which *ipso facto* deprives a party of his right of appeal ... 494

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(1) According to Regulation XXIX of 1814, the zemindar retains an interest in —— 91

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(2) Where a zemindar sold a ghatwalee mehal as *mâl* land, and the vendee, in collusion with the former ghatwal, granted him a mokururree tenure, thus changing the nature of the tenure, HELD that the Government had a right to sue, so as to maintain its own nominee in possession of the land as ghatwal, and that the limitation of 60 years was applicable to such a suit 130

(3) Any presumption against the right of a ghatwal to grant mokururree leases cannot hold good against such leases, when granted in good faith, for the clearance of jungle 376

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(1) A certificate of —— was sanctioned under s. 21 Act XL of 1858 in a case where the guardian, without sufficient cause or justification or legal advice, withdrew an appeal to set aside a sale of the estate and dealt with the auction-purchaser and obtained a putnee of a portion in his wife's name ... 169

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(1) By the rules of Hindoo succession, on the death of brothers of a joint family without issue, the sons of surviving brothers take *per capita*, and not *per stirpes* 32

(2) Construction to be put on the Full Bench decision in 12 W. R., F. B., 1, and on the judgment of the Division Bench, *ib.*, Civil Ruling, 478, as to the power of a member of a Mitakshara family, either to alienate or to sue for and recover his undivided share 48

(3) In a suit by the sons of the reversionary heir, to recover property sold by his widow 50 years ago to defendant's predecessors, the Court considering the lapse of time, the adequacy of the consideration, the due registration, &c., of the deeds, the reversionary heir's knowledge of the alienations, his conduct to the time of death, and the delay in bringing the suit, HELD the defendants entitled to a strong presumption that their predecessors had purchased after due inquiry and after satisfying themselves of legal necessity ... 77

(4) According to —— a party need not be incurably insane in order to be incapable of inheriting. A madman, though excluded from inheritance, is entitled to maintenance 305

(5) A brother's daughter's son can inherit in the absence of any nearer heir 331

(6) A son cannot control his father's power of alienation in respect of property the succession to which is liable to obstruction 477

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(1) A suit to recover principal and interest on a bond executed by a ——, whilst possessed of her late husband's property, cannot be brought at her death against his reversionary heirs on the ground of some supposed equity arising out of the possession of the estate by the defendants obliging them to pay a portion of the money which was expended in recovering it 121

(2) The institution of a suit by a —— may be beneficial to her, as well as those who will succeed her, and yet not a *necessity* ... 121

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(3) There is no necessity for a —— to borrow money, when she has an income more than sufficient to pay the expenses of litigation ... 121

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(1) Costs in the suit carry —— unless the contrary is distinctly stated in the decree 34

(2) Disallowed in a suit for compensation for the use and occupancy of demised lands where lessor had known that the lessees were nominally such, and their husbands the beneficial lessees 132

See Bond (5)
See Construction (1) (5)
See Damages (1)
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See Surety (1)
See Usufructuary Mortgage (1) (2) (3)

INTERVENOR.

See Benamee (2)
See Ejectment (4)
See Special Appeal (1)

INTERVENTION.

(1) Defendant having intervened and been made a party under s. 73 Act VIII of 1859 in a former case, in which not only was no decision come to, but the decree expressly reserved all questions as between himself and plaintiff, the case was held not to come under s. 2 61

(2) A party is not bound to intervene in a suit brought against certain representatives of his ancestor's vendor, where he cannot be affected by any decision passed ... 314

IRREGULARITY.

See Sale in Execution (8) (15)
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ISSUES.

(1) Averments upon which no issue is framed must be taken to be admitted 287

(2) Where the first Court has fixed and tried a wrong issue, the Judge in appeal should give the parties ample opportunity of adducing evidence upon the proper —— which he may lay down ... 297

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See Privy Council Rulings (2) (16) (34)

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JAGHEER.

See Privy Council Rulings (28)

JOINDER OF PARTIES.

See Suit for Rent (1)

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JOINT CONTRACT.

A party getting a judgment in a suit on a ——, which is not also several, cannot bring a fresh suit against the persons jointly liable with the defendant, but not included in the former suit; this being prohibited by Act VIII of 1859 s. 2 458

JOINT DECREE.

Plaintiff and defendant, two brothers, were liable under a —— for possession and mesne profits. By virtue of a partition of the inheritance between them, property, the mesne profits of which had been decreed to the decree-holder, fell to the defendant's exclusive share in 1268, and remained in his exclusive possession until 1271, when the decree-holder recovered possession in execution. Plaintiff now sues to make defendant exclusively liable for the whole of the mesne profits due to the decree-holder between 1268 and 1271. HELD, that the defendant's admission of his exclusive possession between 1268 and 1271 was not sufficient to establish plaintiff's case; and that in the absence of the deed of partition, the division must be presumed to have been made in equal shares between plaintiff and defendant... ... 291

JOINT FAMILY.

(1) The mere circumstance of a bond being executed in the name of the eldest brother of a ——, and of a lease being taken in the name of the younger, does not lead to the conclusion that the latter is a fictitious document 245

(2) Where the property in dispute was admitted to have been originally ancestral property, and was found to have been mortgaged, but subsequently to have reverted to the family and to have been in its possession jointly; such reversion and the conduct of the parties were held to be sufficient to show that the sale was only a mortgage 256

See Hindoo Law (1)
See Onus Probandi (7) (8)

JOINT PROPERTY.

The presumption is in favor of a decree-holder who, in execution of his decree, attaches the share of his debtor, one of five brothers, in a ——, that the property is undivided, and the *onus* is on the debtor to show that there has been a partition 258

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JOINT PROPERTY.—*(Continued.)*

See Decree (2)
See Ijmalee Estate (1)

JUDGMENT.

See Costs (3)

JULKUR RIGHTS.

(1) Where the Lower Appellate Court reverses a decree establishing a right of fishery in a river, on the ground that it was possible that the narrow inlet connecting the river with the disputed body of water which occupied what was once its bed, might silt up later in the year, its decision is wrong in law 460

(2) When a flowing stream dries up, and defendants acquire a right to the land by the law of accretion, the right will be subject to the exercise by plaintiffs of their prior right of fishery ... ... *ib.*

See Construction (2)

JURISDICTION.

(1) In a suit for recovery of money paid to an *ijaradar* on account of arrears of rent, when the same has not been applied to the purpose for which it was given, or when a receipt for it is withheld... 25

(2) A suit will lie for the recovery, or the value, of property attached under s. 81 Act VIII of 1859, and afterwards made away with by the defendants in collusion with the attaching officer, without a criminal prosecution previously instituted 27

(3) Where a Deputy Collector determined a question relating to an interest in land, although he had given an opinion that a Revenue Court was not competent to entertain the question, the appeal was held to lie to the Judge: as this objection however was not raised in the Lower Appellate Court, it was not admitted in special appeal 35

(4) The Revenue Courts were held not competent to try a question of *benamee* and equitable liability ... *ib.*

(5) Where defendant objected to the —— in the first Court, but did not in the Lower Appellate Court, the High Court considered the objection waived (foot-note) ... 37

(6) The High Court declined under s. 15 of the Charter Act to set aside an order lawfully made by a Judge under s. 269 Act VIII of 1859, upon a complaint of resistance or obstruction under s. 264, and would not interfere even if the

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JURISDICTION.—(*Continued.*)

order had been made without —— after the delay, petitioner's remedy being in a regular suit 87

(7) The provision in Act VIII (B. C.) of 1869 for suits under it to be entered in a separate register was for statistical purposes, and not to separate the jurisdiction exercised by one Court, so as to render a suit brought under that Act liable to be struck off, in order to a fresh suit being brought under Act VIII of 1859, even if that suit was not really a suit for rent ... 99

(8) A Revenue Court cannot take cognizance of a suit under Act X of 1859 to recover rent on the ground that defendant was the beneficial owner, and that the ostensible tenants were mere *benamdars* 126

(9) It is beyond the power of the Civil Courts to make a partition under Regulation XIX of 1814, which means an apportionment by the Revenue authorities of lands into shares and an assignment of the fair and proportionate jummas and arrears according to those shares... 147

(10) A Subordinate Judge has the power to review his predecessor's decision, but should exercise it very sparingly 198

(11) Mofussil Small Cause Courts can take cognizance of suits brought under s. 53 of Act XX of 1866 199

(12) In an application for re-hearing of a case in which the decree was passed by a Deputy Collector ... 252

(13) A suit for the sale of mortgaged property in satisfaction of the mortgage-debt is a "suit for land" within the meaning of s. 5 Act VIII of 1859. A decree in a suit in the mofussil for the recovery of a mortgage-debt with interest, and in default for sale of the mortgaged property, enables the plaintiff to sell the mortgaged property as it stood at the time of the mortgage and clear of all subsequent encumbrances. Such a sale bars redemption 269

(14) A clear finding of the fact upon evidence whether the subject-matter of a suit was within the —— of a Court at the time when the application for execution was made, is necessary to determine whether the Court has —— in the matter 278

(15) In a suit for money paid by an unsuccessful claimant under s. 246 Act VIII of 1859, in order to save from sale his share of an estate which had been attached in execution 283

(16) In a suit to get rid of the effect of an order under s. 320 Criminal Procedure Code, declaring a river to be a thoroughfare, and to have it declared that plaintiffs are entitled with others to use the water by raising dams in the bed of the stream as heretofore ... 284

(17) In a suit for the enforcement of a mortgage lien and for a decree that the money due be realized from the property 287

(18) The High Court will only interfere under s. 15 of the Charter Act where the Lower Court has either declined or improperly exercised —— 289

(19) A Subordinate Judge, disposing of an appeal referred to him under Act VI of 1871 s. 26, does so as District Judge, and has the same power of review as a District Judge has under s. 376 Act VIII of 1859 292

(20) In a suit for deferred dower or *muwajjal*, payable to the wife by the husband upon her divorce, or upon the husband's death ... 304

(21) In a suit in which the principal defendant was resident beyond the jurisdiction of the Small Cause Court, but within 20 miles of its local limits 312

(22) S. 24 Act X of 1859 does not give——to Revenue Courts to try claims against agents for damages from alleged neglect of duty ... 339

(23) Under s. 24 Act X of 1859, a Revenue Court has——to allow a set-off for sums paid by an agent to his principal directly, or used for his benefit with his sanction ... *ib.*

(24) In a suit for *dustoorut*, which is a suit for rent 343

(25) Where the Judge, after the Sudder Ameen's Court at Gya ceased to exist, made an order transferring certain proceedings in execution to the Subordinate Judge ... 345

(26) Of the Recorder's Court of Rangoon, in a suit against a defendant dwelling in Surat, though the cause of action arose in Rangoon 397

(27) Where a Subordinate Judge, under Act VIII of 1859 s. 246, declares a decree-holder entitled to enforce his mortgage lien against attached property in the possession of the claimant on his own account 402

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JURISDICTION.—(*Continued.*)

(28) Money which defendant has contracted to pay as rent, cannot be sued for under Act XI of 1865 ... 444

(29) In a suit brought by a purchaser at a sale, under Act XI of 1859 s. 54, of a share of an aymah estate, for possession of the lands in the occupation of the sharer whose rights and interests he has purchased 461

(30) Of a Subordinate Judge, where there is no difficulty as to the authority of a manager under Act XL of 1858 to bring a suit under Act XIV of 1859 s. 15 ... 465

(31) The High Court is not prepared to say that, under Act IV of 1870 (B. C.) s. 11, a Collector has not power to give authority to a manager to bring a suit; and where no substantial injury has been done, it refuses to interfere *ib.*

(32) Where plaintiff takes a lease from defendant, and a *bakijai*, and pays him a certain sum of money on the faith of this latter; and on suing the tenants for the same is met by pleas of payment, and at last sues defendant for a refund 484

See Alluvial Formations (1)
See Appeals (3)
See Full Bench Decisions by 4 Judges.
See Misjoinder (1)
See Privy Council Rulings (15) (27) (31)
See Prohibitory Orders (1)
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See Small Cause Court (2) (3)
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KHAS POSSESSION.

Where a pottah and kubooleut exist, but the former is inoperative owing to the plaintiff not having delivered it, he cannot take advantage of his own breach of contract and recover —— ... 437

See Debuttur Land (2)
See Partition (2)

KUBOOLEUT.

See Enhancement (2)
See Estoppel (1)

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LAKHIRAJ TITLE.

See Limitation (3)

LAND.

Where a plaintiff describes —— which he claims as of a certain quantity and within certain boundaries; and if he obtains a decree which gives those boundaries, these must prevail even if the —— exceeds the stated quantity ... 25

LANDLORD AND TENANT.

(1) Ryots failing to establish a talookdaree right set up by them cannot plead adverse possession as against the landlord's right to recover rent 443

(2) A landlord cannot attach everything in the ryot's possession which he considers liable to satisfy the rent; but he can treat the rent as a debt due, and attach it as such 463

(3) A tenant's statement that he has a good title as against a person alleging himself to be the assignee of the original landlord, does not constitute a forfeiture of the tenure in favor of the landlord, or warrant the latter in suing for khas possession 465

See Suit for Rent (1)

LAWFUL EXCUSE.

See Act VIII of 1859 (4)

LEASE.

(1) There is nothing incompatible in the two remedies of damages and forfeiture for breach of the conditions of a —— 218

(2) An obligation (as by a lessee) to do successive acts is broken if one of them is omitted when the time for its performance comes. The lessor need not wait until the term expires; nor is the lessee liable to successive suits, and then to a general penalty; nor is it usual to bring two suits, one to inquire into the existence of the breach, and the other to enforce the penalty ... *ib.*

(3) The mere registration of a —— is no proof of its genuineness, especially where it is first produced as a valid instrument nearly nine years after execution, and is alleged to have been granted by a *purdanusheen* lady, but no satisfactory evidence is given that she put her signature and seal to it, and that she did so with a knowledge of the nature and contents of the instrument 238

See Construction (4)
See Endowment (2)

LESSEE.

(1) Where a —— has no explicit notice of purchase, and no apportionment has been made with her

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LESSEE.—(*Continued.*)

consent of the rent payable on the share sold, she would be justified in continuing to pay the rental as a whole to the original lessor ... 508

(2) Where a —— has already paid rent to the original lessor, she is not liable to pay it again to the plaintiffs who have purchased a share of the land leased ... ... *ib.*

LETTERS PATENT APPEALS.

Section 15. *See English Committee* (1)
See Enhancement (1)

LIBEL.

See Original Jurisdiction (6)

LIFE-INTEREST.

See Privy Council Rulings (30)

LIMITATION.

(1) A party who fails to take out execution of an appealed decree, and takes no steps to appear in the Appellate Court, is not entitled to a fresh starting point from the date of the decree of the Appellate Court 7

(2) A zemindar's suit for arrears of rent for 1271, recoverable on a liability arising out of matters not within the cognizance of a Revenue Court, having been held not to be governed by the special limitation prescribed by s. 32 Act X of 1859, but by the ordinary law of limitation, a subsequent claim of a similar nature in respect of the year 1872 was held as not barred by s. 29 Act VIII (B. C.) of 1869 8

(3) Twelve years' —— applies to a suit to establish plaintiff's title as *lakhirajdar* and the fact of the lands not being those of the judgment-debtor, in execution of a decree against whom defendants purchased the land, and under color of that sale ousted plaintiff 21

(4) The plea of —— was held to fail in a case where it was impossible to distinguish the defendant's possession as farmer of the plaintiff... 34

(5) A zemindar, indebted on a bond, gave an assignment on the putneedars for a portion of the rent until the debt was liquidated. The bond-holder, not receiving the money, sued the zemindar in the Small Cause Court, whereupon the zemindar sued the putneedars for the rent due. The Lower Appellate Court held that —— ran from the time plaintiff knew of the non-payment of the rent. HELD, upon the principle of the decision of the P. C. in 11 W. R., P. C., p. 2, that plaintiff was entitled to recover, the suit having been brought within three years of such knowledge ... 59

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(6) A *bonâ fide* petition by a decree-holder for execution in one suit of money attached in another is a proceeding within the meaning of s. 20 Act XIV of 1859. The fact that it was in the end abortive does not take from it the character of a proceeding to enforce the decree 76

(7) How applied in a suit for compensation for the use and occupancy of lands demised 132

(8) The confirmation of a sale made in execution is a *bonâ fide* proceeding sufficient to keep the decree in force. The decree-holder is not answerable for the Court's delay in confirming the sale 156

(9) A time-expired decree cannot be made alive again by subsequent executions, albeit not objected to 190

(10) An application for execution filed within eight days of the expiry of the period of —— was held to be a *bonâ fide* proceeding to keep the decree alive, though the notice upon the judgment-debtor, which had to be served in another district, had not actually been served ... 193

(11) Mere informalities in a petition for execution, cannot affect the *bona fides* of the proceeding so as to bar —— 254

(12) Kists cannot be regarded as the dates of cause of action for arrears of rent; limitation in such cases being governed by s. 29 Act VIII (B. C.) of 1869 272

(13) As applied under s. 21 Act XI of 1865 to an application for a re-trial 454

(14) Where an account has been signed and a balance struck, thus bringing all partnership transactions to a close, these accounts do not fall within s. 8 of Act XIV of 1859, but under s. 1, cl. 9 467

(15) Where a judgment-debtor makes over certain property to a decree-holder on the agreement that in case the latter is dispossessed owing to the former's defective title, he should realize the unrealized portion of the decree, the judgment-debtor is held to have waived the benefit of the law of —— in case of the decree-holder's dispossession 497

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See Act VIII (B. C.) of 1869 (7)

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See Alienation (1)
See Breach of Contract (1)
See Cause of Action (1)
See Co-sharers (3)
See Decree (4)
See Execution (1)
See Findings (1)
See Ghatwalee Lands (2)
See Landlord and Tenant (1)
See Privy Council Rulings (33)
See Sale in Execution (1)
See Special Appeal (3)

LOAN.

See Bond (4)

LUNATIC INQUIRIES.

See Act XXXV of 1858 (1)

LUNATIC'S ESTATE.

An adoptive mother is entitled to the management of a —— in preference to an uterine brother ... 340

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MAHOMEDAN LAW.

(1) According to ——, a public acknowledgment by A that B is his son clearly throws on the party who disputes the fact the *onus* of proving that such parentage was an impossibility 250

(2) In a suit to establish a right of pre-emption, the requirements of the —— have not been complied with, if plaintiff's statement that he has purchased and is the pre-emptor was not made in the presence of the purchaser or of the seller, or of the premises which were the subject of sale ... 530

See Pre-emption (1)

MAHOMEDAN WOMAN.

See Bond (4)
See Privy Council Rulings (12)

MAINTENANCE.

A decree for —— creates a debt payable out of the estate, and liable to be met out of any portion passing to the son. When, from circumstances, the original allowance ought not to be continued, application for review should be made to the Court making the decree. The propriety of the sum allowed cannot be questioned in execution 473

See Hindoo Law (4)
See Privy Council Rulings (30)

MANAGER.

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MAPS.

See Execution (2)

MEASUREMENT.

See Act VI of 1862 (*B. C.*) (1) (2)

MERITS.

Where the Lower Appellate Court dismissed a suit for rent, on the ground that a former decision, though not barring the suit, was strong evidence against the plaintiff in declaring a *kubooleut* inadmissible, it was held that there had been a decision on the —— ... 196

MESNE PROFITS.

(1) The right to —— in execution depends on the terms of the decree. Where the first Court awarded —— to the time of decree, and the Appellate Court simply dismissed the appeal from that decree, plaintiff could recover —— subsequent to date of decree, in proceedings under s. 11 Act XXIII of 1861 123

(2) *Semble.* He might bring a separate suit for such —— ... ... *ib.*

See Dispossession (1)
See Execution (2)
See Joint-decree (1)

MINORITY.

See Alienation (1)
See Relinquishment (1)

MINORS.

A guardian has no right or interest in a minor's property, and the Courts ought to be extremely careful with regard to allowing the property of —— to be sold in execution ... 55

See Privy Council Rulings (22)
See Sale in Execution (7)

MISDIRECTION.

See Evidence (19)

MISJOINDER.

Where defendants having separate interests bring separate special appeals which are dismissed, and on an application for review on the part of two of them the decrees are modified, but on grounds not applicable to all the defendants, HELD that, where the decrees are separate, the High Court cannot modify the decrees in which there is no application for review ... 464

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MOKURURREE RIGHTS.

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MOKURURREE TENURE.

Only a reversioner and those having some interest in the estate can contest alienations by Hindoo widows of shares in a hereditary——. The zemindar may, if necessary, cause the sale of the tenure for arrears of rent, but he cannot take khas possession by force .. 406
See Ghatwalee Lands (3)

MONEY-DECREE.

(1) In a —— the Court has no authority to direct the realization of the money out of any named property 503
(2) Where a —— makes the money a charge upon any named property, which is sold before attachment, the title conveyed by the sale is not affected, and the decree-holder's remedy lies against the judgment-debtor ... ... *ib.*

MOOKTEARS.

Where a mooktear, who has been practising in one district, applies to the Judge of another district for renewal of a certificate dated nearly three years prior to the date of his application, it is quite reasonable to require from him some certificate from the Judge of the former district. Where an application was refused for want of some such certificate, and the applicant having come up in appeal to the High Court, the three years expired while the matter was under discussion, applicant was allowed six weeks to procure the requisite certificate 295

MOONSIFF.

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MORTGAGE.

(1) An ambiguous description in a —— must be taken most strongly against the mortgagor ... 63
(2) Plaintiff had a first —— of half of a mouzah, and a second of the whole. Subsequently the mouzah was sold in execution of a decree obtained by her under s. 53 Act XX of 1866 upon her first ——, and purchased by defendant with notice of the second ——: HELD that the defendant was not entitled to have the second —— held as void against him, but that as purchaser under the sale of 8 annas was entitled to have priority over the second —— ... 279

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MORTGAGE.—*(Continued.)*

(3) A party with whose money a —— has been satisfied, may sue for enforcement of lien as assignee of such ——, but not for possession as absolute owner 404
See Ejectment (2)
See Jurisdiction (13) (17)
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See Privy Council Rulings (2) (31)

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NATTORE RAJ.

See Privy Council Rulings (18) (19) (20) (21)

NAZIR.

See Surety (1)

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NEW DOCUMENT.

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NEW RULES.

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NEW SUIT.

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NEW TRIAL.

See Act XI of 1865 (2)
See Limitation (13)

NON-APPEARANCE OF DEFENDANT.

Where a defendant, not having appeared till nearly a month after the date fixed for the first hearing, applies for a re-hearing on the ground that the summons had not been duly served, HELD that the service of summons, found as a fact by both the Lower Courts, must be taken for granted in the special appeal 400
See Act VIII of 1859 (8)

NON-CULTIVATION.

See Relinquishment (1)

NOTES (BOUGHT AND SOLD).

See Contract (2) (3)

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NOTICE.

(1) A person by whom —— of enhancement was served at the time when the rent was payable to him is entitled, either entirely by a sale, or partially by a lease, to convey to the purchaser or lessee the rent with the incident of its being liable to enhancement under that ——. The purchaser or lessee is not obliged to serve fresh —— of enhancement 144

(2) A —— of enhancement is good if, without containing the exact terms of the law, it states with sufficient precision the nature, amount, and grounds of the claim, so that the ryot can clearly comprehend the case he has to meet 203

(3) A plea of informality of —— on the ground that it contained all the possible grounds of enhancement allowed by the law, was disallowed, inasmuch as the ryot was not prejudiced thereby, or had been in any difficulty as to what he was to answer 272

(4) A person arrived at majority is not required to give any —— to the person holding his property under an alienation improperly made by his guardian, or to perform any preliminary acts before suing to set it aside 404

(5) No —— of enhancement is required in the case of a suit for arrears of rent at a rate fixed by arbitration, where both parties agreed to submit their claims to arbitrators ... 533

See Act VIII of 1859 (9)
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NOTIFICATION.

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OBJECTIONS.

See Jurisdiction (5)
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OBSTRUCTION (*on public Road.*)

See Original Jurisdiction (3)
See Right of Suit (1).

ONUS PROBANDI.

(1) The mere putting what is perhaps a greater burden of proof on one party than on the other, is no ground for reversing a decree in special appeal, where the decision on the merits has not been affected 106

(2) In a suit to recover possession, the —— is on the defendant when he pleads that he is a *bonâ fide* purchaser for value without notice of plaintiff's title 151

(3) The *benamee* system being one of the recognized institutions of the country, a purchaser does not discharge himself of the *onus* which lies upon him, by looking only to the apparent title. Nor is the *onus* discharged by the mere fact of the name of the defendant's vendor being alone registered in the zemindar's books as the exclusive owner of the putnee, or of the vendor being only sued by the zemindar for the rent of the putnee 151

(4) Where defendants plead *lakhiraj*, the rule as to —— may be altered according to circumstances, as where plaintiff's title as landlord has been admitted and the plea not set up until years after the suit is brought 191

(5) In a suit to establish title to, and for possession of, a jote, which was admittedly the *rajbaree* jote of defendant's ancestor 192

(6) The *onus* of showing that the admitted rental was not recovered during A's wrongful possession is on A 251

(7) Where, in a suit brought by the son of K K's daughter against the widow of the youngest of K K's three sons, the two elder having died unmarried, for a share in a joint family estate, the defendant alleges that the two elder sons were disqualified 375

(8) Where, in a suit for a share of a joint family estate, defendant claims a certain portion as the exclusive property of her husband under an alleged gift 375

(9) Where plaintiff having obtained a decree in a suit for possession finds difficulty in executing it owing to judgment-debtor's preventing identification of the land decreed 527

See Act VIII of 1859 (2)
See Adoption (1)
See Ejectment (4)
See Hereditary Occupancy (1)
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See Mahomedan Law (1)
See Privy Council Rulings (2)
See Usufructuary Mortgage (4)

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ORAL EVIDENCE.

See Evidence (15) (16)

ORIGINAL JURISDICTION.

(1) In estimating the amount of the *ad valorem* fee chargeable under cl. II Sch. I of the Court Fees' Act, 1870, the fee must be paid in respect of the property, without deducting the amount of the debts to be paid out of it ... 153

(2) The *ad valorem* fee should be charged on the value of a house, and not on the rent of it 153

(3) Where, upon the construction of a conveyance, the plaintiffs are considered to have acquired, not a right in the soil of a passage, but only a right of way, HELD that they can only complain of obstructions in the enjoyment of the right of way, and are entitled to an injunction against future obstructions, the use of doors opened out into the passage to clean privies being a serious obstruction ... 379

(4) A creditor receiving from the principal debtor, without the knowledge of the surety, a sum on account of interest in excess of that then due on a promissory note, discharges the surety from liability 416

(5) In a suit under Act V of 1866 on a promissory note, part of the consideration for which was legal, and part illegal: HELD (*per Couch, C. J.*) that plaintiff could not sue on the note, but that he might amend his plaint and recover so much of the consideration as was not illegal. The agreeing not to enforce a contract which is void for illegality is an illegal consideration, and the contract is void. An agent who has sold goods for his principal and received the price, is bound to pay it over to his principal, although the contract of sale is illegal and void 424

(6) It is a question for the Court whether the words complained of in an action for libel constitute a ground of action, and they must be set out in the plaint. If they are not a libel, the plaintiff cannot make them one by alleging intention to injure, &c.; nor can he make them libellous by alleging that they are ironical, if they do not appear to the Court to be so 516

OVER-CLAIM.

Where a party sues for the whole of a property as well as for khas possession and mesne profits and fails to prove more than a proprietary right to a small portion, his entire claim ought to be dismissed 507

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PARENTAGE.

See Mahomedan Law (1)

PAROL EVIDENCE.

See Contract (1)

PARTIES.

Defendant having in his hand one-half of the immoveable property on the mortgage of which the loan was originally advanced, was held to have been properly sued in respect of half the original liability; no question of contribution by the purchasers of the other half arising 61

See Act VIII of 1859 (3)

PARTITION.

(1) A Hindoo widow being competent to claim —— as against her co-sharers, a purchaser of her estate at an execution-sale may do so likewise 23

(2) Property of which neither party was entitled to *khas* possession, and *debuttur* lands expressly reserved, were held not to be subject to —— 23

(3) Where a —— is objected to in appeal, as not consulting convenience, appellant is bound to show some arrangement which will better satisfy all parties, and be more equitable 498

See Co-sharers (1)
See Joint Decree (1)
See Joint Property (1)
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PARTNERSHIP.

—— transactions having ceased between the parties, plaintiff may sue C for balance of salary and money in C's hand, but his claim is not to be regulated by Act XIV of 1859 Section 1 Clause 16 ... 466

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(2) A pleader's statement that if the thak map shows that the lands in dispute were surveyed as part of plaintiff's talook, his client will give up his claim, is not within the scope of the pleader's authority to make, and is not binding on the client 436

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(1) After a pre-emptor has deliberately refused to exercise his right of ——, and another party purchases the property, the former cannot avail himself of the incidental rule of Mahomedan law that the pre-emptor's title to purchase is not extinguished till the property has actually passed 401

(2) The right of —— ceases when there ceases to be an owner who is bound by the law either as a Mahomedan or by custom.. 440

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(2) Because in a partition-deed of 1260, in the column showing the shares of the different members of the family, N's son's name is inserted instead of N's name, it does not follow that N was then dead ... 32

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A party has a right to open a door in his own property even if it interferes with the —— of his neighbour's family; the right of —— not being an inherent right of property, but requiring to be proved by local usage, permission, or grant 14

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(9) No —— decision is binding on a question of fact 469

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(10) Where in a suit the stamp originally paid was on an amount very much less than Rs. 10,000, and the whole course of the litigation and the stamps had had reference to this valuation, though the property was really of the value of Rs. 10,000, the Court refused an application for leave to appeal to the —— 494
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(1) Appellant to Privy Council had obtained a decree establishing her *mokurruree* right as purchaser from the heir to a former proprietor against grantees from deceased widows. In taking out execution, she was opposed by respondents, who claimed as holding a *dur-putnee* granted in 1849 by the purchaser of the land, when it was sold for arrears due by the former *putnee-dar*. This claim was tried as a regular suit, and decided in favor of the respondents: HELD that a proceeding before the Magistrate in 1841, which showed that actual possession was in the grantees of the widows, was conclusive, and that the possession of the grantees was referable solely to the title which was now vested in the appellant, and which could not be affected by the acquisition of the putnee-title in 1849 1
(2) Principles upon which the Courts of India are to decide issues depending before them.

Native deeds and contracts ought to be construed liberally, regard being had to the real meaning of the parties, rather than to the form of expression.

Under the Hindoo law, the right of a *bonâ fide* incumbrancer, who has taken from a *de facto* manager a charge in lands created honestly, for the purpose of saving the estate or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title.

The question as to the *onus* of proof in such cases is one not capable of a general and inflexible answer, but the presumption proper to be made will vary with circumstances. Thus a mortgagee, who is setting up a charge in his favor made by one whose title to

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PRIVY COUNCIL RULINGS.—(*Continued.*)

alienate he knew to be limited, must prove the facts which embody the representations made to him of the alleged deeds of the estate, and the motives influencing his immediate loan; but such proof must not be required from one not an original party, after a lapse of time and enjoyment and apparent acquiescence. Where also a charge is created by the substitution of a new security for an older one, and the consideration for the older one was an old precedent debt of an ancestor not previously questioned, the presumption will arise in favor of a consideration that binds the estate.

Under the Hindoo law, the power of a manager for an infant heir to charge an ancestral estate is a limited and qualified one, to be exercised in a case of need or for the benefit of the estate. The lender is bound to enquire into the necessities for the loan, and to satisfy himself that the manager is acting for the benefit of the estate. But if he does so enquire and acts honestly, the real existence of an alleged and sufficiently accredited necessity is not a condition precedent to the validity of his charge, and he is not bound to see to the application of his money. The mere creation of a charge by a manager, securing a proper debt, cannot be viewed as improvident management; and a *bonâ fide* creditor should not suffer when he has acted honestly and with due caution, but is himself deceived ... 81

(3) Mode of taking accounts when the mortgagee is himself in possession (see *foot note*) ... 81

(4) In this case the Privy Council held that the plaintiffs (respondents) had failed to prove either title or possession. It seemed to their Lordships that the High Court, having originally treated the title of the plaintiffs as depending upon a release by the Judicial Commissioners, and finding that the release was not made out, fell back upon a proceeding of the Deputy Collector, and had not given sufficient consideration to the nature of the proceedings of that officer and the manner in which they were dealt with by his official superiors 91

(5) Suit for a portion of *chur* land thrown up by a tidal and navigable river. The appellants, who were seeking to disturb a possession of nearly 7 years' duration, and who proved the land to be a re-formation on a site identical with lands originally included in their zemindary, and afterwards swept away, were held to have a better title to it than the respondents, who claimed it as an accretion to their settled *chur*, but failed to prove that it was such a gradual and imperceptible accretion as the Civil law contemplates 113

(6) Review of the law of alluvion in Bengal as declared by Regulation XI of 1825 and decided cases ... 113

(7) In this case, which turned upon the validity of the bond on which plaintiffs sued, the decision of the High Court in favor of defendant was reversed, as based upon the assumed probabilities of the case instead of the evidence before them, and in forgetfulness of the most startling improbability of all, *viz.*, that the defendant should, if his case of fraud and forgery were true, have failed to attempt to substantiate it by his own testimony and that of his brother ... 120

(8) A, who was entitled to certain property, but had not the means to institute a suit for the recovery of the same, agreed by deed to sell B a moiety thereof in consideration of a sum of money which B was to pay for the purpose of carrying on the suit in the names of A and B as plaintiffs. Shortly afterwards A entered into a deed of compromise with C, who was the claimant and in actual possession of the greater part of the property in question, by which a portion of the property was divided between them. HELD in a suit brought by B against A and C that the first deed did not operate as a present transfer of the property, but only as an agreement to transfer it upon certain contingencies which had not happened 140

(9) *Benamee* purchases in India, not having been declared by law to be illegal, must be recognized and have effect given to them by the Courts, except so far as positive enactment stands in the way and directs a contrary course. There is nothing in Section 260, Act VIII of 1859, either taken by itself or taken in connection with Sections 259 and 261 to 266, from which an inference can be drawn of an

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intention to prohibit *benamee* transactions 157

(10) One of the grounds on which plaintiff sought to disturb defendant's long uninterrupted possession since 1790 of land (which had once been alluvial) lying between two branches of a river, or between two rivers, the volume of water in which from time to time shifted, so that alternately one of those channels was deep and the other fordable, was by an alleged custom in the district: HELD that the custom which plaintiff was bound to establish was that the ownership and right of possession of the intermediate tract shifted with the volume of the water always attaching to the riparian proprietor on the side of the channel which happened to be fordable. As to the other ground on which plaintiff relied, that it was not in the power of the then zemindar to impress upon the land a *quasi* servitude, or to burden it with a covenant which would run with it into the hands of any possessor of it by any title; and that consequently a contract between two former zemindars that the ownership and right of possession should shift in the manner above mentioned, was not binding upon the defendant who derived his title from a person who was a stranger to the arrangement 160

(11) Where a plaintiff in a former suit admitted that no portion of the land then sued for was included within her talook as originally settled and defined by the *dowl*, but that she had as talookdar acquired title to the talook as *towfeer*: HELD that she could not, under Section 2 Act VIII of 1859, bring her present suit and claim to fall back upon the other title.

The Privy Council saw no ground in this case for departing from the general rule of allowing but one set of costs to respondents in the same interest, since the Collector, as Court of Wards and representing the infant defendant, would sufficiently have discharged his duty, and have exercised a sound discretion, if he had left the defence in the hands of the other defendants, or at the most applied for leave to join in their case ... 163

(12) It is a principle of natural equity, which must be universally applicable, that where one allows another to hold himself out as the owner of an estate, and a third purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry which, if prosecuted, would have led to a discovery of it.

There is nothing in the position of a vendor being a Mahomedan woman living with her children upon the estate, and sometimes letting it, which should put any one upon enquiry whether she was the real owner or not.

The mere fact of a man building upon, or spending money to improve property belonging to the woman with whom he was living, cannot lead to the inference that, contrary to the apparent title, he had purchased the land for himself; and neither this, nor the circumstance of the deed-of-sale from a Mahomedan woman containing the apparently usual clause that she had made the sale with the consent of the family, was sufficient to put the purchaser on inquiry.

Without laying down any general rule as to the circumstances which should prompt enquiry in cases of this kind, the Privy Council were of opinion that the circumstances must be of such a specific character that the Court can place its finger upon them and say that upon such facts some particular inquiry ought to have been made 166

(13) A party desirous of executing a judgment or order of Her Majesty in Council, ought to apply to the Court from which the appeal was finally brought, and such Court ought to give directions to the Court by which the suit was originally tried 175

(14) A declaration of Her Majesty in Council amounts to a direction to the Court below to clothe it in the form of a mandatory order, and to give effect to such order 175

(15) A former decision by the Courts in India, confirmed by the Privy

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PRIVY COUNCIL RULINGS.—(*Continued.*)

Council, adjudging the land in dispute to be an accretion to the respondent's settled estate in Shahabad, was held to be a bar under s. 14, Act VIII of 1859, to the jurisdiction of the Ghazeepore Courts to try the present suit for the same land 182

(16) It is the duty of a Court to act upon the issues and proofs in the case, and not to throw aside the whole evidence and give effect to its suspicion. A plaintiff and his witnesses have great cause of complaint, if pronounced guilty of an offence without being heard, and without evidence or even allegation 183

(17) Where a decree has been properly passed, and proceedings taken under it to obtain execution against a party in a representative character, such person should be considered a party to the suit within the meaning of s. 11, Act XXIII of 1861, with respect to any question which may arise between him and the other parties relating to the execution. A suit to set aside an execution sale which was effected under color of a decree, is not barred by Act XXIII of 1861, where no decree existed authorizing execution against plaintiff's estate 185

(18) The Privy Council held that the judgment of the High Court [in the case of the Nattore Raj] was right; that there was direct evidence of the execution of the *onoomotee potro* and of the *kotrito potro*, which was at least so satisfactory that, in the absence of contrary evidence, or very strong presumptions to the contrary, it ought to prevail; whilst the presumptions very strongly preponderated in favor of the execution of these deeds. It would be very much for the interest of proprietors in India, if, in executing deeds giving their widows power to adopt, they registered the deeds.

In this case, the widow did not adopt a son until 6 or 7 years after the Rajah's death, and an inference was sought to be drawn therefrom hostile to the adoption with reference to the obligation upon the widow to act upon the power given to her by her husband as speedily as possible, and its great importance as a religious duty. But the Privy Council considered that the presumption against the adoption arising from the neglect of duty by the widow was not so great as the presumption in favor of the Rajah leaving the power to adopt; because the stronger the duty to adopt, the stronger was the presumption in question ... 221

(19) From the insertion of an express power of alienation in a subsequent *hibbanamah*, no intention to restrain alienation can be inferred from the omission of such a power in a former *hibbanamah*, unless the two deeds are parts of one design, or form a connected series so as to be construed as a whole ... 226

(20) The general presumption that endowments of idols are usually made by Hindoos with the object of preserving the *sheba* or worship on families, rather than of conferring a benefit on individuals, is not sufficient of itself to impress that construction upon an endowment 226

(21) How the Privy Council construed two deeds; one as denoting an intention to perpetuate the worship in the family, and the other as an absolute gift to the donee ... 226

(22) It is not for the public benefit, that where two parties knowingly deal with the sale and purchase of property of infants, one of the parties (the purchasers) who obtain possession in a manner calculated to injure the infants should be able to sue the other party (the vendors) for damages. The Privy Council refused to give costs to either, considering them both *in pari delicto* 230

(23) Where the sole question raised in both Courts in India was whether or not certain documents purporting to be an allowance of plaintiff's accounts by the defendant's agent were signed by the agent, the Privy Council declined to allow the defendant to raise before them the question as to the authority of the agent to bind him (the defendant) 233

(24) Referring to a Principal Sudder Ameen's observations as to certain witnesses, the Privy Council observed that, though it was a legitimate objection to a man's credit that he was a professional witness, yet to state broadly and generally that a witness had given evidence in other cases, and therefore became unworthy of credit, could only tend to increase the indisposition of respectable persons to come into Court as witnesses, which was one of the social evils of India ... 285

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PRIVY COUNCIL RULINGS.—(*Continued.*)

(25) The Privy Council will only under very special circumstances grant an appellant from a judgment of the High Court passed in special appeal, *nunc pro tunc*, special leave to appeal on the facts. In this case, the Privy Council declined to grant that leave, and agreed with the High Court that a certain *chitta* was fairly admissible as evidence, and that it tended very much to negative the case put forward by the appellant 299

(26) The description contemplated by s. 26 of the Code of Civil Procedure includes all those titles by which a party is known; and if a plaintiff from animosity, or anything but a *bonâ fide* dispute as to the right to a title, refuses to give his adversary that title by which he is generally recognized, the Court will exercise a sound discretion under s. 29, in first requiring the plaintiff to amend his plaint, and afterwards in rejecting the plaint if its order is contumaciously disobeyed 301

(27) The jurisdiction of a Principal Sudder Ameen to deal with a decree referred to him for execution by the Zillah Judge under Act V of 1836 does not cease by his striking the case off his file after partial execution, so as to render necessary a subsequent reference by the Judge to enable the Principal Sudder Ameen, upon a fresh application being made for execution, to restore the case to the file 319

(28) Where a sunnud granted to the holder of a jagheer was only a confirmation by the Government and the Rajah of the tenure under which the jagheer was held, and authorized the jagheerdar to remain in possession and in performance of the services with his brothers, without describing the kind of service: HELD that the Rajah could not resume the land without proof that the services to be performed by the jagheerdar were personal services only to the Rajah 321

(29) As to Badshapore, the Privy Council, held upon the fair construction of the treaty or agreement made by the British Government in August 1805 with the Begum Sumroo, that the Begum was for her life to hold her territories in the Doab from the East India Company as she had held them under Scindia, and that as she was not a Sovereign Princess, but a mere jaidadar (*i. e.*, a jaghiredar under obligation to keep up a body of troops to be employed when called upon, in the service of the Sovereign) under Scindia, she was to remain such under the Company; that the resumption of those lands by the British Government, upon the death of the Begum and the determination of the jaidad tenure, was not an act of State, but an act done under a legal title; that the direct evidence in favor of the sunnuds under which the representatives of the Begum set up a title to a hereditary and transmissible *lakheraj* or rent-free estate, was not sufficient to rebut the presumption arising from the non-production of the original sunnud, and the failure to account for it, as well as the still stronger presumption arising from the acts, representations, and conduct of the Begum in her lifetime. As to the Arms suit, the Privy Council also held that the seizure of arms and stores was not an act of State, but an act done as under a supposed legal right on the resumption of the jaidad upon the Begum's death 349

(30) The distinction adopted by the law of England in the course of inheritance, between inheritable freeholds and personalty is not known in Hindoo law.

According to the Hindoo Law of Inheritance (unlike the law of England), the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the testator.

A gift *inter vivos*, or by will, cannot prevail against the Law of Inheritance.

A benignant construction should be used in the case of transfers by gift, the real meaning of the document being enforced, if it can be reasonably ascertained from the language used. All estates of inheritance created by gift or will, so far as they are inconsistent with the Hindoo Law of Inheritance, are void as such, and no person can succeed thereunder as heir to the estates described in terms which in English law would designate estates-tail.

A person capable of taking under a will must be such a person as can take a gift *inter vivos*, and

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PRIVY COUNCIL RULINGS.—(*Continued.*)

therefore must either in fact, or in contemplation of law, be in existence at the death of the testator.

Trusts of various kinds have been recognized and acted on in India in many cases.

Under the guise of an unnecessary trust of inheritance, a testator cannot indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust.

A trust cannot be said to fail because one of the trustees had renounced or had not acted, where a will distinctly provides for the case of a trustee not acting, and gives a directing power to fill up the number of trustees when required.

Having regard to the principles above laid down, the Privy Council held that Jotendromohun Tagore was beneficially entitled to a life-interest under the will in the real property, and also in the personalty or the fund into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities; that upon the failure or determination of such life-interest, the beneficial interest in the said real and personal property was vested in the plaintiff, Ganendromohun Tagore, as heir-at-law; and that the marriage gift of a *primâ facie* adequate income to the plaintiff was a sufficient provision for maintenance ... 359

(31) Although a right to participate in the profits of trade is a strong test of partnership, and there may be cases, where, from such perception alone partnership may, as a presumption, not of law, but of fact, be inferred, yet whether that relation does or does not exist, must depend on the real intention and contract of the parties.

To constitute a partnership, the parties must have agreed to carry on business and to share profits in some way in common.

The relation of principal and agent ought not to be implied, any more than that of partnership, from the fact of a commission on profits and powers of control being given, when such relation is opposed to the real agreement and intention of the parties ... 384

(32) Plaintiffs, appellants, sued defendant, respondent (the Secretary of State) to recover a sum alleged to be due for principal and interest on certain bonds, called mortgage-bonds, executed by the late King of Delhi. The claim was made on the ground that the defendant, owing to the late mutiny, confiscated all the landed estate of the said King, but that by a circular of the Judicial Commissioner, under the order of the Supreme Government, all mortgages effected by the King on those estates which the defendant had confiscated were to be paid.

HELD that Municipal Courts have no jurisdiction to enforce engagements between sovereigns founded on treaties. The Government, when they deposed the King, and confiscated his property as between them and him, did not affect to do so under any legal right, and their acts can be judged of only by the law of nations.

The estates which had been given to the King had been assigned for the support of his royal dignity, and the due maintenance of himself and family in their high position. It was a tenure (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself.

The circular order does not amount to a law, and does not fall within the meaning of the 24 & 25 Vict. c. 67 389

(33) In an appeal brought by the co-respondent against a judgment of the Chief Court of the Punjab, confirming a judgment of the additional Commissioner at Umballa, whereby the petitioner had obtained a dissolution of his marriage with his wife, on the ground of her adultery with co-respondent, who had been ordered to pay the costs of the suit:

HELD that the provisions of the Statute of Limitations (XIV of 1859) did not apply to suits for divorce *a vinculo*:

HELD that it would have been desirable and proper for the Chief Court to have acceded to co-respondent's application for a commission to examine him, and that his general denial in his affidavit was not equivalent to what might have been a circumstantial denial

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PRIVY COUNCIL RULINGS.—(*Continued.*)

or explanation of the facts alleged against him:

HELD that the statements of the respondent were not evidence against the co-respondent:

HELD that there was no sufficient evidence on which the decree could be supported, and the Privy Council reversed so much of it as was appealed against 480

(34) Where witnesses who were not merely giving an opinion upon an isolated fact in the cause, but came into Court to prove the whole case made by the plaintiffs, and that a very special case, are shown to have come to prove a case false in its material features, much reliance cannot be placed on their evidence as to any particular questions in the cause.

Where, in the last stage of appeal, a case is made which is hardly consistent with the false case originally set up, and which was never made the real issue between the parties in any previous stage of the litigation, it cannot be relied on in any degree so far as it affects the case made by the other side 523

PROBABILITIES.

See Privy Council Rulings (7)

PROBATE OF WILL.

The High Court directs —— executed by a Hindoo in favour of his nephew to be granted to the nephew instead of a brother, where the property is of small value, and deceased's widow of immature age, and the nephew was brought up by deceased and was the object of his special affection 395

PROCEDURE.

(1) Disregard of correct —— in the number of postponements, irregular examination of witnesses, refusal of time to produce witnesses unavoidably absent, final hearing and the pronouncing of judgment by a different Judge from him who heard the evidence 101

(2) In any case in which judgment was passed *ex parte* or by default by the Revenue Courts, before the passing of Act III (B. C.) of 1850, the application for the rehearing of the case is governed by the ——— prescribed by s. 119 of Act VIII of 1859, and not s. 58 Act X of 1859. (Decision in 16 W. R., 255, explained) ... 207

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(3) What is the proper —— in a case where a talookdar brings a suit against the zemindar and the several purchasers to set aside the sales to them respectively of *putnee* talooks sold for arrears of rent due separately upon each, and the defendants at the earliest possible time put in a plea of misjoinder 288

(4) —— to be adopted by the Lower Appellate Court in a suit for rent 398

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PROHIBITORY ORDERS.

In execution against B, the Judge ordered petitioner to pay into Court a portion of the monthly allowance due from his estate to B in the first instance from August to November. Petitioner objected that the allowance had been paid in advance from October of the preceding year to November, but the Judge upheld his order and directed petitioner to pay into Court the allowance for August and September. HELD that the Judge was only competent to dismiss the application, but was not justified in ordering payment into Court 40

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A landlord cannot recover rent of lodgings knowingly let to a —— who carries on her vocation there; the principles of English law applying to this country ... 445

PURCHASER.

An auction ——, with notice of a payment in advance made by the tenant to the former proprietors of rent due for a period subsequent to the date of purchase, is bound by such payment. 328

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PURDAHNUSHEEN WOMEN.

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PUTNEE LEASE.

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Compensation-money for land taken up by a——should be divided by the parties entitled to it in the ratio of their respective interests in the land 91

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(1) *Quære.*—Whether a plaintiff can rely upon a document not registered as it ought to have been, and therefore not admissible in evidence under the —— Act ... 329

(2) Where defendant, after drawing up and signing a kobala, delivers it to plaintiff's servant to be registered, and afterwards gets it away, and it is never registered, plaintiff has a right to have the deed restored, and the sale declared good, and his suit is not barred by the —— Act ... 505

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(3) A mokururree lease, though registered, cannot prevail against a kobala executed previously, but detained by the executing party, so that it could not be registered; and even were the mokururreedar's suit to be separately tried, time would probably be allowed for the —— of the kobala in order to its being admitted as evidence 504

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REGULATION VII OF 1825.

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ABETMENT.

(1) The carrying off of certain buffaloes belonging to the complainant by order of the accused, and the retention of them in the custody of the latter's servant, were held to amount to an —— of theft as defined in the Penal Code ... 8

(2) The objection that the Sessions Judge was not justified in amending the charge after the case had been decided, but that he should have, if he thought a further charge necessary, directed a new trial, was overruled as coming clearly within the purview of s. 426, Code of Criminal Procedure, there being no contention that the accused had been in any way prejudiced, or that the punishment awarded for the theft by the Joint Magistrate was more than could have been awarded for —— of that offence 8

(3) The Lower Criminal Courts cannot punish, as abettors, persons who gave evidence in support of false charges or rather charges found by such Courts to be false ... 28

(4) Section 108 of the Penal Code does not contemplate any acts of subsequent ——, or provide for the punishment of such offenders except when they are such as are defined in ss. 212 to 218 ... 28

(5) It is not necessary to constitute the offence of —— that the act abetted should be committed ... 32

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ABSCONDING OFFENDER'S PROPERTY.

(1) The High Court cancelled a previous order made by it (under a error in law caused by a misapprehension of the facts) directing the restoration of the moveable property of a prisoner which was under attachment; the Court not having been informed at the time that the property in question had, under s. 184, Code of Criminal Procedure, been declared to be at the disposal of Government ... 33

(2) Property so declared to be at the disposal of Government can only be restored by Government ... 33

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ACQUITTAL.

(1) The order for the release of the accused as *nirdosh* (guiltless) was held to be an ——, and not a discharge, and therefore to have exempted them from a second trial for the same offence 10

(2) Certain persons having been charged under s. 352, Indian Penal Code, the hearing of the case was adjourned to a certain day on which complainant having reported that his witnesses were present, they were called but did not reply. The accused pleading "not guilty," the Deputy Magistrate acquitted him under s. 272, Code of Criminal Procedure. The Sessions Judge having referred to the High Court under s. 434, reported that the complainant had been present agreeably to order on 5th April, had continued to be present with his witnesses from 5th to 9th April, and that the trial had been adjourned to suit the convenience of the Deputy Magistrate, and that complainant's plea for the temporary absence of his witnesses on the day of hearing was that, after attending from 8 to 10

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o'clock, they had gone to the bazaar. The High Court under the circumstances quashed the proceedings of the Deputy Magistrate, and directed a re-hearing if complainant wished it 59

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(1) The proceedings of the Magistrate directing the issue of a summons to appear, and of a warrant of arrest against a person for the —— without a license under Act XXXI of 1860, were quashed as illegal... 1

(2) The mere possession of —— without a license in Gya was held to be no offence under the Arms' Act XXXI of 1860, the provisions of s. 32 of that Act not having been extended to that District ... 26

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BREACH OF CONTRACT.

The High Court declined to exercise their extraordinary powers of revision in a case in which the Joint Magistrate dismissed a complaint of —— under Act XIII of 1859 on the ground that that Act did not apply to this contract, which was a contract to work at a certain factory 53

BREACH OF THE PEACE.

(1) The kind of enquiry required to be held by a Magistrate in cases under s. 282 Code of Criminal Procedure, is a full judicial enquiry, evidence being taken in the presence of the parties charged, and opportunity given for the cross-examination of witnesses ... 2

(2) Where the manager of an indigo factory is obliged to enter into recognizances to keep the peace under s. 288 Code of Criminal Procedure, there is no reason, nor has the Magistrate any authority, to extend the order to the proprietor of the factory also 11

(3) The statements made by both the contending parties before the Magistrate must be regarded as evidence upon which the Magistrate may act under the said section, if he thinks it sufficient, without taking further evidence upon the subject 11

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BREACH OF THE PEACE.—(*Continued.*)

(4) There is no reason why the Magistrate, if he is satisfied that the circumstances require it, should not make an order under s. 318 as well as under s. 288... ... 11

(5) By actual possession is meant, not possession by putting up a tent upon the land, nor merely bodily possession, but the possession of a master by his servant, or the possession of a landlord by his immediate tenant, *i. e.*, the person who pays rent to him (not, as in this case, the possession of a superior landlord to whom the occupier of the land did not pay his rent), or the possession of the person who has the property in the land by the usufructuary 11

(6) There is nothing in the law which enjoins the serving of notice upon all the co-sharers in an estate which may in some shape or other form the subject of a litigation under s. 318 of the Code of Criminal Procedure. The only parties entitled to notice are those concerned in the dispute which is likely to induce a —— ... 54

(7) Although there is no provision in Chapter XXII of the Code of Criminal Procedure for the summoning of witnesses, it is the duty of a Court in cases of —— under s. 318, if the parties cannot produce their witnesses, to issue summonses for their attendance 64

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CHARGE.

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See Hurt (1)

CHEATING.

Where the accused were convicted of —— under s. 415 Penal Code, —the one of selling watered milk, and the other an inferior sort of sweetmeats: they were acquitted, —the former, because the purchaser knew and was told the milk

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CHEATING.—(*Continued.*)

was watered, and so there was no deception; and the latter, on the ground that the purchaser might have tasted the sweetmeats before buying, and the sweetmeats were not composed of any material injurious to health 61

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COMPENSATION.

An award of —— under s. 270 Code of Criminal Procedure, was set aside as illegal in a case of criminal force and theft or robbery, because the charge was in part one of theft or robbery, which did not come under Chapter XV, and because criminal force really was used to the complainant ... 6

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See Indigo Crops.
See Jurisdiction (3)

CONTEMPT OF LAWFUL AUTHORITY OF PUBLIC SERVANT.

Where, by direction of Government, the Magistrate promulgated an order under s. 62 Code of Criminal Precedure, directing all persons to abstain from hook-swinging or other self-torture in public, and from the abetment thereof, and no such order was upon the record, the High Court annulled the conviction of the prisoners by the Deputy Magistrate under ss. 188 and 114, Penal Code, for having knowingly disobeyed that order 30

CO-SHARERS.

See Breach of the Peace (6)

CRIMINAL FORCE.

See Compensation.

CRIMINAL PROCEDURE CODE.

See Act XXV of 1861.

CRIMINAL TRESPASS.

In the definition of ——, the entry and the *intention* with which a

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CRIMINAL TRESPASS.—(*Continued.*)

party enters are the essentials. Thus, where A and B all along asserted their prescriptive right to fish in a lake free of rent, and C had failed to establish the relationship of landlord and tenant in a suit brought by him under Act X of 1859 to get rent from them; HELD that no conviction for —— could be had against A and B, and that C's remedy was by suit in the Civil Court either to eject them if he treated them as trespassers, or to have them declared liable to pay him rent for the future ... 25

See Nuisance (1)
See Trespass.

CROP.

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CROSS-EXAMINATION.

See Breach of the Peace (1)
See Witnesses (2)

CULPABLE HOMICIDE (*not amounting to Murder*).

Where an old woman of 70, so beat a lad of 18 as to cause his death, and the Assistant Commissioner was of opinion that the beating was in the shape of chastisement such as a mother would inflict on a disobedient child, and convicted the accused under s. 304A of the Penal Code, HELD that the Assistant Commissioner had no jurisdiction in the case, and that he should have committed the accused for trial before the Sessions Court on a charge under s. 304 23

D

DACOITY.

Mere possession of stolen articles of trifling value does not warrant the presumption that the receiver knew them to have been the proceeds of a ——, or had acquired them from one whom he knew or believed to be a dacoit 25

DISCHARGE.

A Magistrate, after he has discharged the accused under s. 250 of the Code of Criminal Procedure, has power if circumstances appear to him to require it, to take up the case again and to re-try and convict the accused; and the circumstance that he was led to enter upon the second enquiry and second trial by an erroneous order made by the Sessions Judge

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DISCHARGE.—(*Continued.*)

is no ground for setting aside his proceedings and the conviction ... 39

See Acquittal (1)

DOUBT (*Benefit of*).

See Prisoners.

E.

ENQUIRY.

See Breach of the Peace (1)

ERROR.

See Evidence (3)

EVIDENCE.

(1) Where, although the Judge thought that the —— of two witnesses was inadmissible against the prisoner as being the —— of accomplices, yet he did not think the —— in the case legally sufficient to justify the conviction of the prisoner, the High Court declined to interfere under s. 404 Code of Criminal Procedure, considering that the question of admissibility was a quite different matter from that of credibility 3

(2) Section 434 Code of Criminal Procedure gives the High Court no power to interfere in a case where the difference of opinion between the Magistrate and the Judge is as to the credibility of certain witnesses. The Magistrate's order may be an improper one; but it was passed upon legally sufficient ——, and cannot be termed illegal ... 7

(3) The Deputy Magistrate (under the impression that the answer would be hearsay——) objected to the petitioner's vakeel asking a witness as to what was the first statement made by prosecutor to him immediately after the alleged occurrence. His decision with regard to petitioner was set aside, and the case sent back for a fresh decision 16

(4) The identification of an accused after the —— for the prosecution has been completed, will not be legally sufficient if there is nothing to show that the witnesses were on their oaths at the time they made the identification 33

See Breach of the Peace (1) (3)

See False Evidence.

See Grievous Hurt.

See Information (2)

See Prisoners.

See Weights and Measures (1)

EXECUTION.

See Fine (4)

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EXTORTION.

The making use of real or supposed influence to obtain money from a person against his will under threat, in case of refusal, of loss of appointment, is —— within the meaning of s. 384 of the Penal Code 17

See Hurt (1)

F.

FACTORY.

See Breach of Contract.

FALSE EVIDENCE.

(1) The Magistrate before whom the offence of intentionally giving —— in a judicial proceeding is committed, may himself try and commit the persons so offending 15

(2) The commitment of certain persons charged, under s. 193 Penal Code, with intentionally giving —— in a judicial proceeding, was held to be illegal, inasmuch as the sanction of neither the Court before or against which the offence was committed, nor of some other Court to which such Court is subordinate, was given 32

FINE.

(1) According to s. 3 Act XXIII of 1860, a —— of Rs. 180 cannot be commuted to imprisonment for a longer term than four months ... 9

(2) A sentence of rigorous imprisonment in default of payment of —— passed under Act II of 1867 (B. C.) was set aside, the notification of the Government extending the Act to Jungipore not having been published in three successive numbers of the Government Gazette ... 41

(3) Where the accused was convicted of having infringed a Bye Law of the Howrah Municipality, and was fined 1 rupee for the offence, and also to pay a daily —— of 2 rupees till he complied with the Bye Law, the High Court remitted the daily —— as illegal, but declined to exercise its extraordinary powers by setting aside the —— of 1 rupee which was inflicted for an offence actually committed 44

(4) To bring a case under s. 206 of the Penal Code, there must be a fraudulent removal, sale, or transfer of property, or of some interest therein, intending thereby to prevent that property from being taken as a forfeiture or in satisfaction of a —— 65

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FORGERY.

HELD, that where a person's object was to deceive his employer by falsifying account-books which were in his custody, such deception being likely to cause damage to his employer, he was rightly convicted under s. 468 of —— with intent to cheat, instead of under s. 465 of simple —— 46

FULL BENCH RULINGS.

(1) On receipt of a complaint, the Magistrate of a district is not bound, under s. 66 Code of Criminal Procedure, to examine the complainant before referring the complaint to a Subordinate Magistrate. The examination of the complainant by the Magistrate to whom the case is referred is sufficient for the regularity of the proceedings ... 18

(2) A Magistrate or other officer exercising the powers of a Magistrate is legally competent under s. 62 Act XXV of 1861, to issue an order prohibiting a land-holder from holding a haut on any particular spot on his estate on particular days, on the ground that such an order is likely to prevent a riot or an affray 47

G

GRIEVOUS HURT.

To establish a charge of ——, it is not necessary to prove that the accused struck the complainant so severely as to endanger the latter's life ... 22

GYA.

See Arms (2)

H

HAUT.

Where a new —— was established about half a mile from a long established market, and the Deputy Magistrate was of opinion that the holding of the two *hauts* on the same days of the week would induce a breach of the peace, HELD that the order passed by the Deputy Magistrate, under s. 62 of the Criminal Procedure, directing petitioner to abstain from holding his —— on certain days, was not beyond his power or out of his jurisdiction to pass, and therefore was one with which the High Court could not interfere under s. 404 22

See Full Bench Rulings (2)

HIGH COURT.

(1) There is nothing in s. 404 Code of Criminal Procedure which obliges the ——— to interfere; and in cases in which it is clear that substantial justice has been done, the Court is not bound and ought not to interfere even if, on some small point of law, the Judge below has made a mistake ... 23

(2) The taking by the Sessions Judge of a different view of the evidence from that taken by the Magistrate is not ground for a reference to the —— under s. 434 Criminal Procedure Code 39

(3) Where there is a failure of justice, or where the prisoner has been prejudiced by the defective summing up of the Judge, the ——— can interfere either by discharging the prisoner if the evidence on the record is not sufficient to convict him, supposing the trial to have taken place with the aid of assessors, or to direct a fresh trial ... 66

See Breach of Contract (1)
See Fine (3)
See Jurisdiction (2) (4)
See Jury (1) (2)

HOOK-SWINGING.

See Contempt of Lawful Authority of Public Servant.

HOUSE.

See Possession (2)

HURT.

(1) Where a person scourged another with nettles, in order to extract property from the sufferer, and the Magistrate tried the case as one of —— (under s. 323 Penal Code) and extortion (s. 384), although the accused ought to have been charged under s. 327, and tried by the Court of Sessions, the High Court declined to interfere under s. 404 Code of Criminal Procedure, and direct a new trial, believing that substantial justice had been done in the case 8

(2) Where, according to the prisoner's own confession (which was the only direct evidence against her), she, with a view to chastising the deceased, her daughter of 8 or 10 years of age, for impertinence, but without any intention of killing her, gave her a kick on the back and two slaps on the face the result of which was death—HELD that the conviction should be under s. 323 Penal Code of voluntarily causing ——, and the punishment one year's rigorous imprisonment 29

See Grievous Hurt.

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I

IMPRISONMENT.

See Fine (1)
See Registration (1)

INDIGO CROP.

In a case in which the servant of an Indigo Planter preferred a charge against certain parties for cutting and carrying away —— which was in his charge, the Joint Magistrate dismissed the charge on the ground that a more responsible servant ought to have laid the complaint: HELD that the Joint Magistrate ought to have tried the case... 55

INFORMATION.

(1) *Intentional* omission is the gist of the offence of a zemindar omitting to give —— regarding an offence 22

(2) *Per Kemp, J.*—Before a person can be convicted of an offence under s. 202 Penal Code there must be legal evidence (1) that he has knowledge or reason to believe that some offence has been committed; (2) an *intentional* omission to give *any* —— respecting that offence; and (3) that he is legally bound to give that ——. In this case, the Sessions Judge having found that there was *no* evidence at all, s. 422 Code of Criminal Procedure did not apply, as that section only authorizes an Appellate Court to direct *additional* evidence to be taken where there is *some primâ facie* evidence bearing upon the guilt or innocence of the accused, but not where there is *no* evidence at all.

Per Glover, J.—The Sessions Judge, having found that an offence was committed, and that the accused were bound by law to give —— respecting it, but that there was not on the record evidence of their *omission* to give that ——, was competent under s. 422 to order the deficiency to be supplied; the object of that section being the prevention of a guilty person's escape through some careless or ignorant proceedings of a Magistrate, or the vindication of a wrongfully accused person's innocence where the same carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth ... 31

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INTENTION.

See Criminal Trespass (1)
See Information (1)
See Weights and Measures (1)

J.

JOINT MAGISTRATE.

See Jurisdiction (3)

JURISDICTION.

(1) One Magistrate has no authority to set aside the order of another Magistrate 40

(2) When cause is shown by a party under s. 308 of the Code of Criminal Procedure, it is the duty of a Magistrate to, and he must, enquire whether there is a thoroughfare within the meaning of the section, and whether there is an obstruction. It cannot be said that in entering upon that enquiry he is not acting within his ——. If he decides any point of law erroneously, the case falls under s. 404 of the Code; but if he decides upon evidence before him, the case does not come within the section in question, even if his decision upon the evidence be an erroneous one; nor is an erroneous decision upon the evidence an excess of —— which would enable the High Court to interfere under its general power of superintendence 41

(3) A Joint Magistrate who has been vested with the full powers of a Magistrate of a district, and to whom a case is duly made over by the Magistrate, is competent under ss. 15, 23, and 68 of the Code of Criminal Procedure to initiate proceedings without any formal complaint against parties other than those mentioned in the original complaint 43

(4) Where a Magistrate appointed special constables under s. 17 Act V of 1861, on the ground that a murder had occurred and he was apprehensive that frequent murders would take place, it was held that his order was illegal, that section referring to cases of unlawful assembly, riot, or disturbance of the peace only; but that as the order was one of a purely executive nature, the High Court had no power to interfere with it. The Magistrate should rather have proceeded under s. 15 of the Act, and applied for sanction to an increase in the Police force 67

See Abetment (3)
See Criminal Trespass.

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JURISDICTION.—(*Continued.*)

See Culpable Homicide not amounting to Murder.
See False Evidence (1)
See Full Bench Rulings (2)

JURY.

(1) Where a —— convicted a prisoner contrary to the charge of the Sessions Judge, which charge was held by the High Court to have been a proper charge, the High Court refused to interfere although it concurred with the Sessions Judge in thinking that the verdict of the —— was not correct. The case was one in which an application could not be made to the Government; but as regards the Court, the petitions were rejected ... 45

(2) Where a trial was held with a —— instead of, as it ought to have been, with assessors, the High Court refused, with reference to the provisions of s. 426 Code of Criminal Procedure, to reverse the sentence as it could dispose of the appeal on the evidence instead of merely restricting itself to the point of law 59

L

LAND DISPUTE.

(1) A Magistrate is bound, before attaching the property in dispute, to take evidence to ascertain who was in actual possession of the subject of dispute, and to record his grounds for being satisfied that a breach of the peace was likely to occur 4

(2) The order of a Deputy Magistrate in a preliminary proceeding under s. 318 Code of Criminal Procedure, requiring both parties to produce "a written statement of their respective *claims to the share in dispute*," was held to mean that the parties were to file their statement in respect of their *claims to possession*; and the Deputy Magistrate having subsequently retained in possession the person whom he found in possession, his proceeding was considered sufficient, notwithstanding that the order passed by him was adverse to an absent co-sharer 24

(3) In a ——, the Magistrate having found one party to be in possession, had no power to give the opposite party, found not to be in possession, permission to cultivate the disputed land pending the decision of any possessory action he might bring under s. 15 Act XIV of 1859 27

(4) Section 318 Code of Criminal Procedure refers only to ——s, but not to a dispute as to the right to collect the rents of a joint undivided estate in a certain proportion. The latter must be dealt with under Circular Order No. 10 of 18th April 1863, and s. 26 Regulation V of 1812, as amended by Regulation V of 1827 36

See Breach of the Peace (4)

LANDHOLDERS.

See Information (1)

LICENSE.

See Arms (1) (2)

M

MAGISTRATE'S POWERS.

See Discharge.
See Jurisdiction (1)

MAHOMEDAN LAW.

See Marriage (2)

MARKET.

See Haut.

MARRIAGE.

(1) Where a woman was convicted of marrying a second time during her first husband's lifetime, the High Court, while thinking it not necessary to reduce the punishment passed by the Sessions Judge, observed that, taking the circumstances of the case into consideration, the extreme youth of the accused, and the influence she was no doubt subjected to, a nominal punishment would have sufficed ... 9

(2) The *nikah* form of —— is well known and established among Mahomedans. The issue of a *nikah* —— would be legitimate under the Mahomedan Law ... 28

MISCHIEF.

A conviction for —— was quashed in a case where it appeared that the complainant had formerly destroyed a crop belonging to the accused, and the latter, instead of complaining at once, merely bided his time and then took the complainant's crop 10

MOOKHTAR.

The mere writing of a petition for a party who afterwards presents that petition himself is not "acting" as a —— in a Criminal Court within the meaning of s. 11 Act XX of 1865 27

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NEW TRIAL.

See Abetment (2)
See High Court (3)
See Hurt (1)

NOTICE.

See Breach of the Peace (6)

NUISANCE.

The petitioners who filled up a portion of a ditch or drain which formed part of a public way, and which belonged to the public, instead of being convicted of a —— punishable under s. 290 Penal Code, was convicted of criminal trespass. But inasmuch as they had not been sentenced to a heavier punishment than might have been awarded if they had been convicted of a ——, the High Court, acting under s. 426 Code of Criminal Procedure, declined to interfere 38

O

OBSTRUCTION.

See Jurisdiction (2)

P

PENAL CODE.

See Act XLV of 1860.

POSSESSION.

(1) Meaning of *actual* —— in s. 318 Code of Criminal Procedure ... 11

(2) A certificate under Act XXVII of 1860 only authorizes the holder thereof to collect the debts due to the estate of a deceased person, but does not entitle him to recover or to take —— of any property belonging to the deceased from any person who may be in —— (whether wrongful or rightful) of that property. The Magistrate ought to maintain the person in ——, and leave the other party to bring a suit in the Civil Court to prove his title to the property independently of the certificate 34

See Dacoity.
See Land Dispute.

PRESUMPTION.

See Dacoity.

PRISONERS.

It is a mistaken view of the law to suppose that —— in appeal ought to have the benefit of any doubt with reference to any portion of the evidence. The doubt shown must be of the strongest kind before the Appellate Court should be justified in interfering 15

See Witnesses (1)

Page.

PROCEDURE.

Petitioner was charged with the theft of certain money found in his house and acquitted. Proclamation having been made for claimants to come in and claim the property, no one appeared, whereupon petitioner preferred his claim, and asked the Assistant Magistrate to summon certain witnesses, but the Assistant Magistrate refused to do so, and disallowed his claim, the Magistrate on appeal declining to interfere. On reference by the Judge, the High Court held that the Assistant Magistrate was bound to summon the witnesses named by the petitioner, set aside that officer's order, and directed him to dispose of the case after taking due steps for securing the attendance of the witnesses in question 5

See Full Bench Rulings (1)
See High Court (3)
See Jury (2)
See Land Dispute (1)
See Possession (2)

PROSECUTION (*Sanction for*)

(1) The words "such sanction may be given at any time" in s. 169 Code of Criminal Procedure must be construed reasonably, and "any time" means a time which does not unduly prejudice the party to be prosecuted, or put him in a worse position than he was before ... 62

(2) No appeal lies against a Judge's order sanctioning such prosecution 62

R

RECOGNIZANCE.

(1) It is illegal and contrary to s. 290 Code of Criminal Procedure to take a second —— before the period fixed in the first —— has expired 44

(2) Where a person has been bound down by —— not to commit a breach of the peace, the amount of the —— cannot be recovered from him if he is guilty of an offence, such as theft, which does not amount to a breach of the peace, or which is not likely to occasion a breach of the peace ... 63

See Security (1) (2)

REFERENCE.

See High Court (2)

REGISTRATION.

Under Act I of 1868 s. 2 cl. 18, the Sessions Judge should have specified in his warrant whether the imprisonment awarded to a person

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REGISTRATION.—(*Continued.*)

convicted under s. 80 Act VIII of 1871 should be simple or rigorous; but as he had omitted this at the proper time, simple imprisonment should now be set forth in the sentence and warrant 3

REGULATION V OF 1812.

Section 26. *See Land Dispute* (4)

REGULATION V OF 1827.

See Land Dispute (4)

RE-HEARING.

See Acquittal (2)

RIGHT OF PRIVATE DEFENCE.

The —— of person and property was not allowed to be pleaded in a case where there was no fear of an assault such as is described in the clauses of s. 100 of the Penal Code, and where the prisoners used deadly weapons (spears) and killed two unarmed persons whom they found ploughing land which the prisoners believed to be theirs ... 29

RIOT.

See Full Bench Rulings (2)

ROBBERY.

See Compensation.

ROWANNAH.

A was convicted under s. 16 Act VII (B. C.) of 1864, and B under s. 21 of the same Act; the former with having had in his possession salt not covered by a ——, and the latter with having sold to A the said salt:

HELD that the conviction of A under s. 16 was illegal, the salt in his possession having been a portion of salt for which B had taken out a ——; but that the conviction of B under s. 21 was proper, as he had failed to certify the salt sold by him to A on the back of the —— ... 64

S

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See Rowannah.

SANCTION.

See Prosecution (*Sanction for*).

SECOND TRIAL.

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SECURITY.

(1) Notwithstanding that a person has been bound down by bond to keep the peace for a stated period, a Magistrate has power, under s. 290 of the Code of Criminal Procedure, to increase the amount of the —— required before the expiry of that period 57

(2) A Magistrate is not justified in increasing the amount of —— and in demanding sureties on a summons to show cause which provided only for a recognizance of much smaller amount, and made no mention of sureties at all ... 61

SEIZED PROPERTY.

See Procedure.

SESSIONS JUDGE.

See Discharge.
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STOLEN PROPERTY.

(1) A conviction of an offence under s. 411 of the Penal Code was set aside in the absence of evidence on the record that the property was Government property, that it was ——, or that the accused knew or had reason to believe it was stolen 63
See Dacoity.

STRAY CATTLE.

The order of a Deputy Magistrate prohibiting the owners of cattle from allowing their animals to stray, and a conviction under s. 289 of the Penal Code against the accused for permitting his pony to stray, were quashed as illegal upon a reference under s. 434 of the Code of Criminal Procedure 21

SUMMONS.

See Breach of the Peace (7)
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SWEETMEATS.

See Cheating.

T

THEFT.

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TORTURE.

See Contempt of Lawful Authority of Public Servant.

TRANSFER OF PROPERTY.

See Fine (4)

TRESPASS.

A charge of —— involves an offence under the Penal Code which a Magistrate is bound to enquire into by taking evidence and deciding the case according to law 14

TRIAL.

See False Evidence (1)
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U

UNLAWFUL ASSEMBLY.

There is no ground for the distinction between an —— as a premeditated act and an affray as a sudden one; for, according to s. 141, Penal Code, an assembly which was not unlawful when it assembled may subsequently become an —— ... 2

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WATERED MILK.

See Cheating.

WEIGHTS AND MEASURES.

Intention is an essential part of the offence of fraudulently using false instruments for weighing; and in the absence of any evidence of such intention in this case, the Court quashed the conviction and directed the return of the fines ... 7

WIFE.

See Marriage (1)

WITNESSES.

(1) Where the omission of a Magistrate, in committing a prisoner, to enter on the record the names of certain persons who had been named as —— for the defence at the Sessions, was brought to the notice of the Judge, and an order was made by the Judge requiring the —— to be served, but the —— did not appear, and the Judge tried the prisoner in their absence and refused an adjournment in order to their production, the High Court held that the prisoner was entitled to have the benefit of the examination of the —— in question, and directed the Judge to examine them accordingly ... 20

(2) A witness ought to be allowed on cross-examination to qualify or correct any statement which he has made in his examination-in-chief 57

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The Weekly Reporter,

CIVIL RULINGS.

The 21st March 1872.

Present:

Sir James W. Colvile, Lord Justice James, Sir Montague E. Smith, and Sir Robert P. Collier.

Possession — Purchaser from Heir — Grantees from Widows—Mokurruree, Dur-Mokurruree, Putnee, and Dur-Putnee Rights.

*On Appeal from the High Court at Calcutta.**

Sheroocoomaree Debia

versus

Keshub Chunder Bosoo and others.

In a former suit appellant sought as purchaser from the *heir* to a former proprietor, to establish her *mokurruree* right to certain lands as against the grantees from the widows of such proprietor, upon the death of the last surviving widow. She obtained a decree establishing such right, and on proceeding to take out execution, was opposed by the respondents who claimed the lands as being a *putnee* tenure which had been sold by auction for arrears of rent due by B. S. the former *putneedar*, and which had been purchased by K. B. & H. B. who had granted a *dur-putnee* of the same to the respondents in 1849. In 1841 there was a proceeding before the Magistrate as between the grantees of the *dur-mokurruree* right under the widows and B. S. the *putneedar*, the result of which investigation was that the Magistrate quieted the former in possession as *dur-mokurruredars* under the widows, and ordered the *putneedar* to institute a suit in the Civil Court to enforce his claim, which suit was never brought.

The claim of the respondents was tried as a regular suit between the objectors (respondents) as plaintiffs, and the decree-holder (appellant) as defendant, and was decided in favor of the respondents in the lower Courts. On appeal to the Privy Council, THEIR LORDSHIPS held that the proceeding in 1841 was conclusive of the present case, as showing that the actual possession then was in the grantees of the widows; that it was in the highest degree improbable that they, having established their possessory right against B. S., would, without a struggle, have allowed themselves to be turned out of possession by their relatives as purchasers of the same B. S.'s right; that the possession of the grantees was obtained and continued under the widow's title and was referable solely to the title which was now vested in the appellant; and that the right of the appellant should in nowise be affected by the acquisition of the *putnee* title in 1849.

* From the judgment of Kemp and Markby JJ., dated 21st February 1867.

THIS is an appeal from the High Court of Judicature at Calcutta; and also, by special leave, from two judgments and decrees of the Zillah Judge of West Burdwan. As the suit was not heard on the merits by the High Court, and as the whole case is open on the decisions of the Zillah Judge, it is only necessary for their Lordships to deal with the latter.

The case is shortly this:—

The appellant instituted her original suit under these circumstances. She alleged that the property in question was hers by purchase from the person who became entitled to it as heir of a former proprietor, on the death of the last survivor of the four widows left by such proprietor. The widows, she alleged, had made a grant to Modhoosoodun Bosoo and Bhoyrub Chunder Bosoo, which grant would, of course, determine on the death of the last surviving widow. Upon such death she instituted her suit against the said Modhoosoodun and Bhoyrub Chunder and others in assertion of her right as purchaser from the heir, and obtained a decree establishing such right as against the defendants in that suit, and took possession in the usual form by planting bamboos in execution of the decree. The litigation in this suit was very hostile. The heirship of the appellant's vendor was disputed strenuously, and it was only after appeal to the High Court that her right was finally established. The lands in question were alleged by the appellant to have been held by *mokurruree* tenure under the Rajah of Burdwan, but were included in a part of the Rajah's zemindary, which he had granted in putnee,

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and the result of that state of things would, of course, be that the *mokurrureedars* were entitled to the possession of the lands, paying the rents reserved by their grant to the putneedar, as middleman between them and the zemindar.

When the appellant came to take out execution of her decree, other members of the Bosoo family who had not previously intervened in the suit, objected to such execution, on the ground that they were the persons really in possession under a better title, which was thus alleged :—

Keshub Chunder Bosoo said "that lot Beesoonundunpore, &c., seven mouzahs in Purgunnah Bistoopore (being the putnee tenure above mentioned), having been sold at auction for the arrears of rent due by Beer Sing Baboo, Khetternauth Bosoo, and Hungseswur Bosoo purchased the same on the 15th May 1849. In the year 1256, Khetternauth Bosoo granted the *durputnee* of his half share to me, and Hungseswur Bosoo granted the *durputnee* of his half share to Ram Chunder Bosoo, and since that time we have been in *khas* possession of the same."

On this claim being so made, it was put in course of trial as a regular suit between the objectors (the first three respondents) as plaintiffs, and the decree-holder as defendant, as provided by law in that behalf.

The alleged purchase in 1849 is not disputed, nor is the fact of the actual possession of the property by the Bosoo family, or some of them, denied ; the appellant's case being that what was so purchased was the interest of the putneedar, and that the alleged possession was, in truth, a possession under the *mokurruree* title derived from the widows, as above stated, and, therefore, a possession not adverse to, but supporting, her (the appellant's) title.

The Court of first instance was of that opinion, and gave judgment as follows :—

"I consider the *mokurruree* rights of the decree-holder to be true. If the plaintiffs have a putnee right, they can obtain the rent from the female defendant."

The suit of the objectors was, therefore, dismissed with costs.

On appeal to the Zillah Judge, he at first thought that the suit had not been instituted with sufficient and proper allegations, and decided against the plaintiffs on that technical ground; but the High Court having remanded it to be tried on the merits, the Zillah Judge proceeded to try it, and gave judgment against the appellant, on the ground stated in page 96 of the "Record," the substance of which is "the long and undisputed possession of the plaintiffs gives rise to a strong presumption of their title being good; the *onus* of proving a strict legal title lies on the party seeking to disturb such possession. The defendant cannot disturb the possession of plaintiff without proving possession within twelve years. Defendant has given no proof of possession within twelve years. On the contrary, her witnesses prove the plaintiff's possession. There is no proof, indeed, that defendant has ever collected the rents, or has ever paid rent to the putneedar. And she produces no title-deeds and no reliable proof that her vendor was ever in possession. It appears to me that the only ground on which the defendant stands is that the under-tenure subordinate to the putnee is called a *mokurruree* in various old papers, one if not more of which is a copy of a copy. This is quite insufficient to prove a title." And for these reasons the judgment of the Lower Court was reversed and the appeal decreed.

On special appeal, the High Court held that the case had not been really tried on the true merits, that is to say, under what title the *khas* or actual possession had been held, and remanded it for re-trial, and directed that such re-trial should be in the presence of the putneedars and the zemindars, so as to make a final decision.

Such re-trial was had. The Zillah Judge adhered to his former decision. His judgment is contained in a few lines as follows :—

"There is no proof whatever that the possession of the durputneedars is the same as the alleged possession of the 'durputneedars' (the grantees of the widows). Defendant's witness acknowledges that a former suit for rent was instituted some seven or eight years ago, by Ram Chunder Bosoo, styling himself dur-putneedar. The putnee title is proved, and the putneedars acknowledge the dur-putnee. But there is no proof whatever of the existence of the *mokurruree*, and, for the reasons given in my judgment of the 9th August 1865, I believe that no *mokurruree* has ever existed as separate from the putnee, though the latter tenure may have been occasionally styled a *mokurruree*. Therefore, clearly, the dur-putneedar is entitled to his claim."

It appears to their Lordships that the Judge must have overlooked the most material evidence in the case. The title alleged by the dur-putneedars was a title acquired in

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1849 to the putnee which had previously been Beer Sing's.

Now, in 1841, there was a proceeding before the Magistrate, in which the above named Modhoosoodun and Bhyrub Chunder Bosoo were plaintiffs, and the same Beer Sing and one Christoprosaud, his Mookhtear, were defendants, in which the whole title and the respective rights of the parties, as they then stood, were gone into and investigated.

Modhoosoodun and Bhyrub Chunder then expressly alleged their title as grantees of the "dur-mokurreree" right under the widows, and their possession under such title, and then insisted, as the appellant now insists, that the putneedar's right was only to the reserved rent.

As the result of that investigation the Magistrate found in favour of the then plaintiffs that they were and had been in possession as *dur-mokurrureedars* under the widows, and he accordingly, by his order, quieted them in such possession, and remitted the putneedar to institute a suit in the Civil Court to enforce his claim. No such suit was brought.

It appears to their Lordships that this proceeding, unless its effect can be altered by some other cogent evidence, is conclusive of the present case.

In the year 1841 the actual possession was clearly in the grantees of the widows; and any subsequent possession by other members of their families must be presumed and taken to be a possession by their permission and with their consent, unless the contrary is very clearly shown. If a widow or person claiming under a widow could destroy the title of the heir by allowing a friend or relative to have twelve years' possession of the estate, no heir would be safe.

In this case there is nothing to show that the possession was other than permissive, and on the other hand there is very strong evidence confirmatory of the presumption that it was permissive.

There is, moreover, considerable parol evidence that the possession was a joint family possession, and important documentary evidence to the same effect. Amongst these documents are a bond and a suit upon that bond showing that the purchase of the putnee, although made in two names only, *viz.*, Khetternauth Bosoo and Hungseswur Bosoo, was really made on behalf of themselves and of Modheosoodun, Ram Chunder, Bhyrub Chunder, and Keshub Chunder (Modhoosoodun and Bhyrub Chunder being the two *dur-mokurrureedars*). There are also on record a petition purporting to be a petition of Khetternauth's and filed as far back as 1858, claiming to be a co-sharer in the *dur-mokurruree* taken from the widows in the name of his brother Modhoosoodun; and a similar petition, of the same date, of one Eshan Chunder Bosoo, claiming in like manner to be a co-sharer in the *dur-mokurruree* taken in the name of his uncle, Bhyrub Chunder.

All the probabilities of the case lead to the same conclusion. It is in the highest degree improbable that Modhoosoodun and Bhyrub Chunder, having established their possessory right against Beer Sing, would, without a struggle, have allowed themselves to be turned out of possession by their relatives as purchasers of the same Beer Sing's right. And it is equally improbable that, if they were not in possession, but the possession was in their relatives (the putneedars), they would have litigated the original suit in the way in which it was litigated.

Their Lordships are clearly of opinion that the family or families of the Bosoos were in joint possession, that such possession was obtained and continued under the widows' title, and is to be referred solely to the title which is now vested in the appellant, and that the right of the appellant can in nowise be affected by the acquisition of the putnee title in 1849.

The Zillah Judge seems to have thought throughout that the mere production of the purchase of title acquired in 1849, and the possession by the purchaser subsequent to that year, were sufficient to establish his right. If he had rightly apprehended (as was clearly pointed out to him by the High Court) that such purchase and possession were perfectly consistent with the appellant's case, if that case were true—if he had considered the proceeding in 1841, and ascertained in whom the possession then was and under what title, and had enquired whether any change had been made in such possession between 1841 and 1849; or whether their had been any change in the possession consequent on the purchase in the latter year, and how that change, if any, had been effected—there would not have been what their Lordships cannot but consider a serious miscarriage of justice.

Their Lordships will humbly recommend to Her Majesty that, notwithstanding the decree of the High Court of Judicature at Fort William in Bengal of the 21st February 1867 on the special appeal, the

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judgments and decrees of the Zillah Judge of West Burdwan, dated respectively the 9th August 1855, and the 2nd August 1866, ought to be reversed, and that the decree of the Principal Sudder Ameen of West Burdwan of the 21st July 1864 ought to be affirmed with a declaration that the appellant is entitled to possession of the property claimed, and that the suit ought to be remanded to the High Court of Judicature, with directions to cause the decree of the Principal Sudder Ameen, of the 21st July 1864, to be executed in due course of law, and to take an account of the mesne rents and profits of the property claimed, to be repaid to the appellant by the respondents, Keshub Chunder Bosoo, Redaynatt Bosoo, and Ahladinee Dossee; and their Lordships will further report to her Majesty that the said respondents ought to pay to the appellant her costs of the proceedings before the Principal Sudder Ameeen and before the Judge of the Zillah Court of West Burdwan, and that the costs (if any) paid by the appellant in the Zillah Court be repaid to her by the respondents.

And the respondents are also to pay to the appellant the costs of this appeal.

The 26th March 1872.

Present:

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Presumption (from delay)—Long Possession—Alluvial Lands—Re-formations—Accretions.

*On Appeal from the late Sudder Dewany Adawlut at Calcutta.**

Sham Chand Bysack

versus

Kishen Prosaud Surma.

The presumption that usually arises against those who slumber on their rights is the stronger when applied to rights the subject-matter of which (as in the case of *churs*) is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time.

In this case plaintiff sought to oust from possession persons who had enjoyed the property in question from 1835 to the present time; and as he was responsible for nearly twenty years of that delay, the PRIVY COUNCIL required to be satisfied by clear proof the grounds which he alleged for disturbing a possession of such long continuance, and were of opinion that plaintiff had failed to prove his case, inasmuch as he had not proved the lands which had re-formed (if lands had re-formed in the bed of the river) to have been the same as those which belonged to his predecessors and had been diluviated, nor had he proved his title upon the ground of the *locus in quo* being an accretion to any lands of which he was possessed.

THIS was a dispute between two riparian proprietors, holding estates respectively on the opposite sides of an Indian river, concerning certain *churs* formed in the course of that river, each landed proprietor maintaining that he was entitled to those *churs*, as appertaining to his estate.

The case of the plaintiff was in substance this, that he was the owner of a talook called Meer Syud Mahomed, together with certain other persons of the surname of Chowdry; that his ancestors, by reason of their possession of this talook, were entitled to two *churs* in the channel formed by the junction of two rivers, the Booreegunga and the Dhuneesuree; that those *churs*, one named Goag, otherwise Kodalia, and the other Bhedur, were what is called diluviated, that is, covered by water, some fifty years or more ago. *Chur* Goag was said to be diluviated in a great measure, though not wholly (indeed it has never been quite diluviated), as long ago as the year 1814. The other *chur*, Bhedur, was diluviated somewhere about the year 1817 or 1818. The case of the plaintiff was that those *churs* had gradually re-appeared, chiefly owing to a change in the course of the river; in fact, that they have re-formed upon their original sites not many years after they were diluviated; and he gave evidence of measuring from time to time those *churs* as they re-appeared and exercising acts of ownership upon them. Among other acts of ownership, he gave evidence of a lease granted by the Chowdhrees, who were co-shareholders with him in the estate of Meer Syud Mahomed, to a person of the name of Dowcett in 1829 for a term of five years, and that Dowcett cultivated indigo upon a portion of the *locus in quo*. It is to be observed, however, that there is evidence on the other side of Dowcett having taken the precaution of also obtaining a lease from the proprietor on the opposite bank.

According to the plaintiff's evidence, he was in as complete possession as the subject-matter admitted of, at all events up to the year 1832, when this litigation with the riparian proprietor on the other side of the river, who owned a talook of the name of Bucktbully, commenced.

It is not necessary to refer to the proceedings which took place before the Magistrates

* From the judgment of Trevor, Loch, and Steer JJ., dated 31st January 1861.

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from 1832 to 1835, further than to state their result, which appears to have been this :— The plaintiff, or rather those under whom he now claims, were put into possession of *chur* Goag, or at all events, a portion of *chur* Goag, and they have remained in possession of that portion from that time to this. But in the year 1835 an order was made for putting the defendant's father, Gopal Pershad, in possession of *chur* Bhedur. Actual possession would appear to have been delivered in 1836, and Gopal Pershad and his son, the present defendant, have remained in possession of *chur* Bhedur from that day to this.

The plaintiff, having been dispossessed, as he alleges, in the year 1836, of this *chur* Bhedur, did not institute this suit for the purpose of recovering that possession until the year 1847. He does indeed make some attempt to explain this delay by stating that, in the interim, what is called a resumption suit was instituted in respect to these lands. As to the proceedings in that suit, it is not necessary for the present case to refer to more than this, that the proprietor of Mouzah Bucktbully, on the opposite side of the river, appears to have instituted a proceeding against the Government, with a view of obtaining possession of the lands in dispute, and some more upon payment of the Government revenue. As to a portion he succeeded, that he now occupies, and in respect of that there is no dispute. As to the lands now in question he failed, and undoubtedly the Collector did find that the plaintiff was entitled to those lands. That decision, however, was subsequently set aside, on the ground that the Collector had no jurisdiction to make it, his jurisdiction being confined to determining the questions which arose between the owner of Bucktbully and the Government, and not extending to deciding on the conflicting claims of landowners.

It appears also that, in the interim between 1836 and the institution of this suit, there was some family suit with respect to this property. Their Lordships, however, are of opinion that no sufficient explanation has been given for the very long delay on the part of the plaintiff in instituting this suit. If some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this discription, the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time. The hardship may be great of calling upon persons who have been long in undisturbed possession of such property for strict proof of their title after landmarks may have been washed away or witnesses may have died ; indeed in this case it would appear that Gopal Pershad, the then owner, died before the institution of this suit, and possibly Gopal Pershad's evidence might have been of an important character, which his son could not supply.

But the delay in the institution of this suit is not the only delay with which the defendant (plaintiff ?) is chargeable, for the judgment in this suit was given so long ago as 1861 ; the appeal was brought in 1862 ; and in 1863 the record was lodged. Some years afterwards, in the year 1868, the defendant (plaintiff ?) filed a supplemental record, but he did not lodge a case until the year 1871, so that there has been a delay of nearly eight or nine years wholly unexplained in the prosecution of this appeal.

The case then stands thus : the defendant (plaintiff ?) seeks to oust from possession persons who have enjoyed this property from the year 1835 to the present time, and for nearly twenty years of that delay he is responsible. Under these circumstances their Lordships certainly require to be satisfied by clear proof of the grounds which he alleges for disturbing a possession of such long continuance.

This suit began in the year 1848, and it lasted to the year 1861. It is not necessary to refer at length to its history. It may be enough to say that at an early stage, in the year 1848, a local investigation was held by an Ameen of the name of Monier, which appears to have resulted in favor of the plaintiff. Subsequently to that there was a hearing in 1850, before the Principal Sudder Ameen, who decided against the plaintiff, upon the ground of the Statute of Limitations. The case on appeal was sent back to be re-heard, in order that the grounds of that judgment might be more clearly stated. It was again heard in 1852, and again decided against the plaintiff on the plea of the Statute of Limitations, the Principal Sudder Ameen at the same time expressing a somewhat strong opinion against the plaintiff's case generally. Subsequently the case was again sent back to be re-heard upon the merits, and previous to its re-hearing upon the merits another local investigation was ordered before the Moonsiff of Naraingunge, which took place on the 30th January 1858, whereupon the report of the Moonsiff was against the plaintiff. The Principal Sudder Ameen, on the hearing of

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the cause, indeed set aside the Moonsiff's report, which he considered unsatisfactory, and decided substantially all the issues in favor of the plaintiff. The case then came on for appeal before the High (Sudder ?) Court, and it is against this judgment that the present appeal is lodged.

It has been contended that the High (Sudder ?) Court mistook the law as applicable to this case, and that their decision is in contravention of two cases—one, Mussumat Imam Banda *v.* Hurgobind Ghose, reported in the 4th Moore's Indian Appeals, p. 403,* and another in the 12th Moore's Indian Appeals†—in which their Lordships have laid down the principles applicable to cases of this description. If their Lordships could see clearly that the High (Sudder ?) Court had acted in contravention of the principles laid down in those cases, they would have thought it their duty to set aside the decision; but it appears to their Lordships impossible to suppose that the High (Sudder ?) Court could not have been acquainted with the first of those cases, reported so long ago, as before observed, as the 4th of Moore's Indian Appeals; and on looking at the judgment, although there are some expressions in it which may give some colour to the contention of the appellant, it does not appear to their Lordships that the High (Sudder ?) Court have, in the reasons of their decision, acted in contravention of either of the above decisions. It appears to their Lordships that the judgment must be taken to have proceeded mainly upon the ground that the plaintiff had not succeeded in proving that the spot which he claimed was identical with that of the *chur*, which he alleged to have been diluviated. Whether the second clause of the fourth Section of Regulation XI of 1825 applies, or whether the fifth paragraph of the same Section applies, which is in general terms and to this effect, "That in all cases "not previously provided for, and in all "cases of claims and disputes respecting land "gained by alluvion or by dereliction of a "river or sea, which are not specifically "provided for by the rules of this Regulation, the Courts of Justice, in deciding upon "such claims and disputes, shall be guided "by the best evidence they be may able to "obtain of established local usage, if there be "any applicable to such a case; if not, by "general principles of equity or justice;" in either case it is equally essential for the maintenance of the plaintiff's case that he should establish the identity of the land which he has lost.

Their Lordships think that on the face of the judgment it appears that this consideration must have been present to the High (Sudder ?) Court, and they read their finding, "that "there were not any marks by which the "lands can be identified as having at any time "formed part of the estate of the plaintiff;" not as intimating (as it has been contended) that proof was necessary of the existence of some specific landmarks, but as a general finding on the part of the Court that the lands had not been identified; and, if so, undoubtedly there was an end of the plaintiff's main case. But, further, it would appear from the judgment that the plaintiff, possibly feeling that, in the opinion of the Court, he had not established the identity of these lands as re-formed lands, contended that he was entitled to them as accretions to that land which was undoubtedly in his possession; for in the judgment of the Court it is said: "But he," the plaintiff, "urges that being in possession "of part of the *chur* as the Goag under a de-"cree of a competent Court which has be-"come final, the rest of the *chur* lands must "be considered an increment to that village." The Court disposed of that argument by stating their opinion that if the lands in question had formed to the south of the portion which was in possession of the plaintiff, then there might have been good grounds for this contention, but not so as they were alleged to have formed to the north. They thus disposed of the question of accretion, which certainly seems to have been raised, and, to a certain extent, dwelt upon, by the plaintiff.

Under these circumstances, their Lordships, whatever might have been their view if this matter had come before them as a Court of first instance, see no sufficient grounds for disturbing the finding of the High (Sudder ?) Court, which was to the effect that the plaintiff has failed to prove his case, that he has not proved the lands which have re-formed, if lands have re-formed in the bed of the river, to have been the same as those which belonged to his predecessors and had been diluviated; and that he has failed also to prove his title upon the ground of the *locus in quo* being an accretion to any lands of which he is possessed.

On these grounds their Lordships will humbly advise Her Majesty that this appeal be dismissed.

* 7 W. R., P. C., 67 and Suth. P. C., Cases, 208.

† 11 W. R., P. C. 2.

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The 24th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Sale of Attached Property—Limitation.

Case No. 47 of 1872.

Miscellaneous Appeal from an order passed by the Additional Judge of Hooghly, dated the 16th September 1871, affirming an order of the Moonsiff of that District, dated the 14th July 1871.

Modhoo Soodun Mookerjee (Decree-holder), *Appellant,*

versus

Kirtee Chunder Ghose and another (Judgment-debtors), *Respondents.*

Baboo Sham Lall Mitter for Apellant.

Baboo Chunder Nath Bose for Respondents.

Where a decree-holder did not deposit the travelling allowance of the officer deputed to hold a sale of the attached property, and the case was struck off, the attachment was held to subsist up to the date of the striking off, and an application made within three years from that date was held to be within time.

Kemp, J.—THE decree-holder is the special appellant. The decree is dated the 24th of March 1863. An application for the sale of the attached property was made and was granted on the 1st of Pous 1274, and the sale day was fixed by proclamation for the 7th January 1868; but it appears that, because the decree-holder did not deposit the travelling allowance of the officer deputed to hold the sale, the case was struck off on the 11th of January 1868, and up to that date the attachment subsisted. We think, therefore, that the present application was made within three years of the 7th of January 1868, the day fixed for the sale, as also from the 11th of January 1868, when the case was struck off; the attachment, as already observed, subsisting up to that date. We therefore think that the application was within time, and there is a decision of the Privy Council in Volume XIV, Weekly Reporter, page 22, which supports this view.

We reverse the decision of the Judge, and decree the appeal with costs.

The 24th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Execution—Decree of Appellate Court—Inactive Decree-holder.

No. 38 of 1872.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota Nagpore, dated the 4th October 1871, affirming an order of the Deputy Commissioner of that District, dated the 21st July 1871.

Bukronath Chuckerbutty and others (Decree-holders), *Appellants,*

versus

Rajah Nilmonee Singh Deo (Judgment-debtor), *Respondent.*

Baboo Anund Chunder Ghossal for Appellants.

Baboos Oopendro Chunder Bose and *Bhowanee Churn Roy* for Respondent.

A party who fails to take out execution of a decree and takes no steps to appear in the Appellate Court to prevent that decree from being set aside or modified, is not entitled to a fresh starting point from the date of the decree of the Appellate Court.

Kemp, J.—THE decree-holder is the appellant in this case. Both Courts have found that his application to execute his decree, dated the 6th of September 1866, is barred. It appears that the present application to execute the decree was made on the 1st of September 1870. The decree-holder accounted for the delay by stating that the judgment-debtor had appealed his case and that the appeals were disposed of respectively on the 29th of May 1867 and 16th of April 1869.

In special appeal, it is contended that the Full Bench Ruling cited by the Judicial Commissioner does not affect the present case, as that precedent simply ruled that the act of the decree-holder in appearing in the Appellate Court to oppose an appeal is sufficient to keep the decree alive, but did not rule that where no such appearance is made, the decree-holder fails to keep the decree alive; and that by a recent Full Bench Ruling to be found in Volume XVI, Weekly Reporter, page 1, it has been held that where a decree is affirmed in appeal, the decree appealed from is merged in the decree of the Appellate Court, which

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is to be considered as the decree in the case, and that therefore the petitioner was fully entitled to execute the final decree passed by the High Court within three years from the date thereof. Now, in this case it is admitted that the decree-holder did not appear in the Appellate Court. In a decision to be found, in Volume VII of the Weekly Reporter, page 521, the Full Bench laid down that a mere application for review or a petition of appeal by the person against whom the judgment was given would not be an act done by the person in whose favor the judgment was given for the purpose of keeping the same in force. It would be an act done by the opposite party to destroy it, and not done by the person in whose favor it was given to keep it in force. But if, upon the application for review or the petition of appeal, the person in whose favor the original decree was given appears in person or by vakeel (whether voluntarily or upon service of notice) to oppose the application and files a *vakalutnamah* or does anything for the purpose of preventing the Appellate Court or the Court of Review from setting the judgment aside, we think that within the fair interpretation of the words such act being an act of the person in whose favor the judgment has been given for the purpose of preventing it from being set aside, is an act done for the purpose of keeping the judgment in force.

Now, in the present case, the decree-holder did nothing by appearance in the Appellate Court to oppose the appeal, or for the purpose of preventing the decision which he had obtained from being set aside. It is therefore clear that he did nothing in the appeal stage for the purpose of keeping his judgment in force, and that the converse of the proposition laid down by the Full Bench in the decision reported in Volume VII applies to this case. The later case merely rules that the decree of a District Court affirmed in appeal is merged in the decree of the High Court, and that the three years' rule applies and not the twelve years' rule; but that decision does not lay down that, if a party fails to take out execution of his decree and takes no steps to appear in the Appellate Court to prevent that decree being set aside or modified, he is to have a fresh starting point from the date of the decree of the Appellate Court. There was nothing to prevent the decree-holder from taking out execution of his decree on the mere fact of an appeal having been lodged against it. Not having done so, and not having appeared in the Appellate Court, we think that the ruling in Volume VII does apply, and that the decisions of the Courts below are correct.

We dismiss the special appeal with costs, payable by the appellant.

The 24th April 1682.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Arrears of Rent — Jurisdiction — Limitation— Act XIV of 1859—*Act X of* 1859, *s.* 32—*Act VIII of* 1869 *(B.C.)*, *s.* 29.

Case No. 236 of 1871.

Regular Appeal from a decision passed by the second Subordinate Judge of Twenty-four Pergunnahs, dated the 5th July 1871.

Prosunno Coomar Pal Chowdhry and others (Defendants), *Appellants,*

versus

Ramdhun Chatterjee (Plaintiff), *Respondent.*

Baboos Nil Madhub Bose and *Jadub Chunder Seal* for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

It having been decided in a former case that the zemindar's claim against the defendants for the rent of 1271, being a suit for arrears of rent recoverable upon a liability arising out of matters not within the cognizance of a Revenue Court, was not governed by the special limitation prescribed by s. 32 Act X of 1859, but by the ordinary law of limitation, Act XIV of 1859—HELD that the zemimdar's present claim of a precisely similar nature against the same parties in respect of the year 1272 was not barred by the special limitation prescribed by s. 29 Act VIII of 1869 B. C. (corresponding to s. 32 Act X of 1859).

Markby, J.—IN this appeal the general facts are that a certain talook, formerly in the district of Nuddea, but now in the 24-Pergunnahs, was put up to sale on account of arrears of rent due to the zemindar, and purchased, nominally, by a person of the name of Gopal Chunder Mookerjee, but it has now been ascertained beyond all doubt that the purchase was really made on behalf of Prosunno Coomar Pal Chowdhry, and his wife, who are the two principal defendants in the present suit.

After the sale, the zemindar being aware that persons other than Gopal Chunder were interested in the purchase, brought a suit in

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the Revenue Court in respect of the rents of the year 1271, against Gopal Chunder and Prosunno Coomar Pal Chowdhry and his wife, and obtained a decree against them in the Court of the Deputy Collector on the 27th of June 1866.

Subsequently, objection was taken that the Deputy Collector had no jurisdiction to entertain that suit, as against Prosunno Coomar Pal Chowdhry and his wife, and this Court finally so held on the 23rd September 1867.*

In the meantime a suit had been commenced, also in the Court of the Deputy Collector, for the rents of 1272, and a decree was obtained on the 25th September 1866 against Gopal Chunder, and Prosunno Coomar Pal Chowdhry and his wife. That decree was obtained *ex parte*, none of the defendants having appeared.

Subsequently to the decision of this Court that the Revenue Court had no jurisdiction, the Deputy Collector, on the ground that the summons in the suit for the rents of 1272 had not been properly served on the defendants Prosunno Coomar Pal Chowdhry and his wife, set aside his *ex parte* decree as against them for the rents of that year, and then, on re-trial, adopting the ruling of the High Court with reference to the suit for the rents of the previous year, held that he had no jurisdiction to entertain the suit as against these parties, and accordingly he dismissed it as against them. This was done on the 19th of August 1867; the decree against Gopal remaining undisturbed.

In the meantime, a suit had been commenced in the Ordinary Civil Court by the zemindar against Prosunno Coomar Pal Chowdhry and his wife in respect of the claim which he had,—which after the decision of this Court might not perhaps, be strictly called a claim for rent, but such claim as he had against these defendants in respect of their use and occupation of the land for the year 1271.

That suit was brought up on appeal to this Court, and he obtained a decree here on the 25th April 1870,† that is to say, just twelve days after Act VIII of 1869, Bengal Council, came into operation. As soon as he had obtained a decree in this Court in respect of the claim for the year 1271, a suit was commenced in respect of the claim for the year 1272; but that suit (which is the present suit) is not brought by the zemindar, but by a person who claims that the zemindar has transferred to him all rights which he (the zemindar) possessed as against these defendants for occupation of the land in 1272.

The suit was heard by the second Subordinate Judge of the 24-Pergunnahs, and was decreed in favor of the plaintiff, and it now comes before us on regular appeal.

Three questions have been raised for our consideration.

First,—Whether the right to bring this suit was transferred by the zemindar to the plaintiff.

Secondly,—Whether the plaintiff is himself the real transferee, or is the *benamdar* for some other person; and

Thirdly,—Whether the claim of the plaintiff is barred by limitation.

As regards the first point, looking to the words of the instrument of transfer, which are quoted by the Subordinate Judge in his judgment, we think that there is no ground for the contention that only the decree against Gopal Chunder, obtained in the Deputy Collector's Court, was transferred to the plaintiff.

No doubt that decree was transferred, but the deed also transfers "all their (the zemin-"dars') powers which they possess under the "law for the enforcement and realization of "the said money."

I think, as was suggested by my brother Jackson in the course of the argument, that these words were put into the instrument with reference to the doubtful state of things which existed at the time when it was drawn up in order to cover all rights which might ultimately be found to belong to the zemindar by the result of the litigation then pending.

As to the second point, that is entirely disposed of by the plaintiff's evidence which is uncontradicted. The plaintiff has sworn, and the Subordinate Judge has believed, and we see no reason to disturb his finding, that the plaintiff was the real purchaser under that deed.

The remaining question is the one which has occupied most time in its discussion. It seems to me on that question that matters stand thus.

The claim of the zemindar against the defendants in respect of the year 1271 has been held by the Full Bench not to be a claim for arrears of rent within the meaning of Clause 4, Section 23, of Act X of 1859, and therefore the claim was one not cognizable by the Revenue Court but by the ordinary Civil Court; and accordingly when the

* 8. W. R., 428.

† 13 W. R., 390.

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claim was brought in the Civil Court and the case came up here in appeal,* it was held by my brother Jackson, sitting with Mr. Justice Glover, that that was a claim governed not by the special limitation of Section 32, Act X of 1859, but by the ordinary law of limitation, Act XIV of 1859, on the ground taken in the previous decision of a Full Bench that a claim of that nature was not a claim for recovery of arrears of rent.

Now, this present suit is brought in respect of the claim which has been transferred by the zemindar to the present plaintiff, and, for the purposes of this suit, must be treated exactly as if it were a claim of the zemindar himself for the year 1272 in respect of the same land, and against the same person.

At one time during the argument there was a contention, or rather I should say a suggestion, that the result of the litigation between the parties which ended in a declaration by this Court that the present defendants were liable to the zemindar, did in some way or other change their relation, so that if the jurisdiction of the Revenue Courts and of the ordinary Civil Courts had been kept distinct, this claim after that decision, although it would not have been so before, would have been a claim for arrears of rent within the meaning of Act X of 1859. If that contention had been insisted on, we should have had to consider the case reported in XI Weekly Reporter, Privy Council Rulings, page 5 (which is somewhat analogous to the present case); and whether on the authority of that case the plaintiff did not get a new starting point for limitation from the period when that charge took place. But I understand that contention not to have been insisted on in the appellant's reply: I don't say that it would have been successful if it had been pressed, but it was abandoned, and it is therefore unnecessary to say anything further upon it.

What the appellants did contend was that the relation of the parties remained the same after that decision as it was before. Assuming that to be the case, matters stand thus:—there has been a claim in respect of the year 1271 between these very same parties which has been held to be not a claim for arrears of rent under Section 32 of Act X of 1859. There is now the very same claim between the very same parties in respect of the same land, differing only in this that it is in respect of the following year,—and we are asked to say that this is a claim within the meaning of Section 29 of Act VIII of 1869, B. C. That is to say, we are asked to put a different construction on the words "suits for the recovery of *arrears of rent*" in Section 29 Act VIII of 1869, B. C. from that which has been put on these very same words in a case between these very same parties on the same words in Section 32 of Act X of 1859.

I wish to guard myself from putting any construction on Act VIII of 1869, B. C., namely, as to how far claims which are transferred to the Civil Court from the Revenue Court are to be treated differently from ordinary claims in the Civil Court; nor do I wish to express any opinion as to how far Act XIV of 1859 can apply to such claims.

I wish to confine my judgment entirely to this case; and inasmuch as it has been decided between these very same parties that the claim for the year 1271 was not a claim for the recovery of arrears of rent, and as this is admitted to be a claim of a precisely similar nature, but only in respect of a different year, I hold that we must apply the words of Act VIII of 1869 B. C. in the same sense as the same words in Act X of 1859 were applied, and on that narrow ground alone, without reference to any other question which has been raised on this appeal, I think that we ought to hold that the suit is not a suit for recovery of arrears of rent, and is not barred by the special clause of limitation.

The results will be that the decree of the Lower Court will be affirmed, the plaintiff's claim decreed, and this appeal dismissed with costs.

Jackson J.—I concur in the judgment which has just been delivered by my brother Markby in this case.

I wish it to be distinctly understood that I think there are other grounds, equally valid, on which the judgment of the Lower Court might be affirmed, and this appeal thrown out, and in the last resort I think it extremely probable that we should find it necessary to reject the plea of limitation on an equitable ground very much resembling that which influenced their Lordships of the Judicial Committee of the Privy Council in the case of Ranee Shurnoo Moyee.

I am glad to find it unnecessary to come to a decision as to the application of Section 14 Act XIV of 1859 to the present case, because if we had to consider that point, I

* 13 W. R., 390.

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think I should have been unable to acquiesce in the ruling of the Full Bench reported in Vol. II, Weekly Reporter, page 21, which has been referred to, in which it is laid down that Act X of 1859 (which it must be borne in mind, is the law still in operation in some districts subordinate to the jurisdiction of this Court) forms in itself a complete Code of law on the subject of rent suit and the other matters which fall within its provisions.

Although there are other grounds on which the plaintiff's case may be supported, I don't think it is necessary to go into them, as I am content to base our decision on those which have been stated at length by Mr. Justice Markby.

The appeal will be dismissed and the decision of the Lower Court affirmed with costs.

The 25th April 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Sale in Execution of Decree—Application to set aside—Discretion of Judge as to Time.

Case No. 26 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 21st December 1871.

J. H. Poulson (Judgment-debtor), *Appellant,*

versus

J. W. Dunn (Decree-holder), *Respondent.*

Mr. H. E. Mendes for Appellant.

No one for Respondent.

A Judge has the discretion to receive an application to set aside a sale in execution of a decree, when made to him after the lapse of thirty days, but before the confirmation of the sale.

Jackson, J.—Upon the authority of the case reported in III Wyman, page 180,* we think that the Judge was wrong in saying that he had absolutely no discretion to receive an application made to him after the lapse of

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*The 14th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Act VIII of 1859, *ss.* 256 *and* 257—*Sale in Execution—Time for Objection—Jurisdiction.*

Miscellaneous Petition.

Umirto Lall Bose and another, *Petitioners.*

Mr. Montriou and *Baboo Chunder Madhub Ghose* for Petitioners.

The period of thirty days mentioned in Section 256, Act VIII of 1859, is the measure of the right of the parties to come in and object to the sale. Under Section 257, however, the jurisdiction of the Judge is not limited to that period, but the Judge may receive such an application at any time before the confirmation of sale.

Norman, J.—Mr. Montriou, on behalf of Umirto Lall Bose and Gooroo Churn Roy, alleging themselves to be purchasers of a Sunderbund grant at a sale in execution of a decree against Raj Ranee Dabee and Byjonath Pundit, applied to this Court, alleging that Mr. Beaufort, the Judge of the 24-Pergunnahs, had improperly refused to confirm the sale.

The sale took place on the 2nd of October 1866, it was stated by the officer conducting the sale that the Government had declared the rights of the judgment-debtor to be forfeited, and had taken *khas* possession. On the 30th of November, the decree-holder, Jeo Bibee, presented a petition to the Judge, alleging that the order for resumption had long ago been cancelled; that some of the *amlah* of the Sunderbund Commissioner's office had fraudulently caused it to be stated that the estate had been resumed and was held *khas* by the Government; and that these people were the real purchasers.

The Judge, after making enquiries, was informed by the Sunderbund Commissioner that the order for resumption had not been cancelled; that the grant had been resumed; that the proceedings were still pending; but that he had recommended that the grant should be released, and the forfeitures waived. On the 15th December 1866 the Judge passed an order refusing to confirm the sale, and on an application for review of that order stated his reasons for so doing as follows:—

"The right and interest put up for sale was that of a Sunderbund grantee. Previous to the sale the Government pleader presented a petition in which he informed the Court, by order of the Sunderbund Commissioner, that the estate had been resumed, that is to say, that the Government had declared the rights of the judgment-debtor on the estate to be forfeited, and had taken *khas* possession. Nothwithstanding this, the decree-holder desired that the sale should proceed, and it did proceed, but the officer conducting the sale was directed to inform the bidders of the representation made by the Sunderbund Commissioner.

"Subsequent to the sale it transpired that the facts had been misrepresented by the Government pleader; that the forfeiture of the estate was under consideration; that the Government had not *khas* possession; and that the misrepresentation arose in a *purwannah* addressed to him by the Sunderbund Commissioner.

"It appeared also that the purchasers at the sale were the sheristadar and head mohurrir of the Sunderbund Commissioner's office. Looking at this fact, I found there was a strong suspicion of fraud, and on that ground refused to declare the sale absolute. I have heard all that has been urged on the merits of the case, and I am confirmed in the opinion that the order of the 15th of December was just and proper. Perhaps I ought not to have stated that a fraud was committed by certain persons employed in the office of the Sunderbund Commissioner, but I was right in finding what I certainly did find, though it was not specifically so stated but rather implied, that the sale had been conducted under a misrepresentation of the facts. It is immaterial whence the misrepresentation arose, if it had the sanction of the Court, as happened in this case by the order directing the publication at the time of sale. It is certainly the

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thirty days but before the confirmation of the sale.

There are certain circumstances in the present case which seem to make it desirable that the whole of the facts relating to the attachment and sale of the property should be enquired into, and we think that the case should go back to the District Court in order that the matters alleged by the judgment-debtor may be considered. Both he and the judgment-creditor will be at liberty to adduce such evidence as they may have to offer, and the purchaser is also entitled to be heard.

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duty of the Court to take care that every sale is properly conducted, fairly as regards both the debtor, the decree-holder, and the purchaser; and the discretion which is given to the Court of withholding confirmation is to be exercised in all cases in which the proceedings have been conducted unfairly as well as irregularly. It is urged that I had no power to cancel the sale; but the question is merely whether I had power to withhold confirmation under Section 256. Under the circumstances, I think, I was bound in justice to withhold it, and that I had jurisdiction to do so; a Court has always an inherent power to remedy a wrong about to be committed under its order, by the arrest of the proceedings."

Mr. Montriou contended that, under Section 256, the Judge had no power to receive an application for setting aside the sale, except within thirty days from the date of the sale; that that application to set aside the sale, on the ground of fraud, not being such an application as is provided for by Section 256, the Judge, under Section 257, had no alternative, but was bound to confirm the sale.

And he asked the Court to set aside his order, and to compel the Judge to confirm the sale referring to Section 15 of the 24 & 25 Vic. c. 104, as giving jurisdiction to this Court to interfere.

We think that the period of thirty days mentioned in Section 256, is the measure of the right of the parties to come in and object to the sale. But that the jurisdiction of the Judge to receive such an application is not limited to that period. The words "such application" in Section 257 refer to the application of the nature described in Section 256; Section 257 does not say if such application shall not be presented within the period mentioned in Section 256, the Court shall pass an order confirming the sale, though we might have expected that language of this sort would have been employed, had the object been to tie the hands of the Judge. We think, then, that there is nothing to lead to the inference that the Judge had not jurisdiction to receive such an application at any time before the sale was confirmed.

Secondly, the objection having been that the sale had taken place under a material mis-statement as to the condition of the property, and under circumstances which threw doubt on the *bonâ fide* of the purchasers, we cannot say that the Judge was not right in considering that there had been a material irregularity in publishing and conducting the sale. It is a question which it is clear he had jurisdiction to determine, and his order setting aside the sale on that ground is final under Section 257.

The application is rejected.

Seton-Karr, J.—I concur in rejecting this application.

The 25th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Co-sharers—Improvement of Puteet Land by one—Right of another to Possession of specific Share—Partition.

Case No. 794 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 21st April 1871, affirming a decision of the Moonsiff of Manickgunge, dated the 7th September 1870.

Gokool Kishen Sen (Defendant), *Appellant,*

versus

Issur Chunder Roy and others (Plaintiffs), *Respondents.*

Baboos Kalee Mohun Doss and *Nuleet Chunder Sen* for Appellant.

Baboo Gopeenath Mookerjee for Respondents.

Defendant having spent large sums of money in improving what was originally *puteet* land by locating ryots and building houses upon it and turning it into a village called after his name,—HELD that plaintiff, his co-sharer, was not entitled to claim possession of a specific share in that village, but only to demand a partition in which plaintiff would obtain compensation by receiving elsewhere lands equivalent to that brought into cultivation by the defendant at his own expense.

Kemp, J.—THE plaintiff sued, alleging that the lands in dispute appertained to Mouzah Ijlail, in Pergunnah Boykuntpore; that they were the *ijmalee* lands of the plaintiff and his co-sharers amongst whom was the defendant No. 1, special appellant before us; that the plaintiff's share was 4 annas 3 gundahs 3 cowries; and that the plaintiffs sued certain ryots for rent, whereupon the defendant intervened, and the suit was unsuccessful. Hence the present suit.

The defendant's case was that a portion of the lands were *ijmalee* lands, but that the rest of the land belonged to Pergunnah Mokimpore; that the lands in dispute were originally *puteet* lands; that the defendant has been in the occupation of these lands separately from his co-sharers for many years; that he has located ryots on the lands, and established there a village, which is called Gokoolnuggur after the name of the defendant, who, we may observe, is Baboo Gokool Kishen Sen.

Both Courts have found that the lands in dispute belonged to Pergunnah Boykuntpore,

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and have given the plaintiff a decree for possession.

With this finding of fact this Court cannot interfere in special appeal, the Lower Courts having found as a fact that the whole of the lands belong to Pergunnah Boykuntpore, and none of it to Pergunnah Mokimpore. But we think that the 10th ground of special appeal raised by the appellant is of great weight. It is in evidence in this case, even the witnesses of the plaintiff admitting that the lands in dispute were *puteet*, and that since the last, some say 10 or 15 years, and others 8 or 9 years, the defendant has located ryots on this land, built houses upon it, and turned the *puteet* lands into a village called after his name. The defendant, therefore, contends that the plaintiff is not entitled to possession of a specific share in this village, but that all the plaintiff is entitled to is to demand a partition, and that on a partition being made, the plaintiff will obtain compensation by receiving lands equivalent to the lands which have been brought into cultivation at the sole expense of the defendant, elsewere. The principle laid down, in a decision passed on the 20th of May 1869, by the late Chief Justice Sir Barnes Peacock and Mr. Justice Glover, appears to us to apply to the circumstances of this case. In that case the learned Judges observe that a man may insist upon his strict rights, but that a Court of Equity is not always bound to give him such strict rights. In that case, a joint owner erected a wall over some of the joint lands. The first Court had held that the defendant erecting a wall upon the joint lands, without the consent of his co-sharers, was unlawful, and that the wall must be demolished. The learned Judges held, as already observed, that the plaintiff was not entitled to insist upon his strict rights, and that a Court of Equity would not give them to that extent. The Judges said that his remedy was to apply for a partition, and that it was not equitable, after the defendant had gone to the expense of erecting this wall, to have it demolished at the suit of his joint co-sharers. Applying the principle of that decision to the present case, we find that it is admitted even by the plaintiff's witnesses that the defendant has spent large sums of money in improving this land and in turning the *puteet* land into a village, which is now called after his name.

The plaintiff, therefore, can seek his remedy, as already observed, by applying for a partition, in which partition a proper compensation will be made to him for any lands which the defendant may have improved from his own resources.

The decision of the Lower Court is reversed, and the appeal decreed with costs payable by the respondent.

The 25th April 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Production of Documents—Procedure—Act VIII of 1859, *ss.* 136 and 138.

Case No. 801 of 1871.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 25th March 1871, *affirming a decision of the Moonsiff of Nesragunge, dated the* 17*th November* 1870.

Louis Coraah (Plaintiff), *Appellant,*

versus

Gooroo Churn Ghose and another (Defendants), *Respondents.*

Baboo Jogendro Nath Bose for Appellant.

Baboos Grish Chunder Ghose and *Issur Chunder Doss* for Respondents.

A Court is not bound to send for documentary evidence which is with the record of another case and which a party alleges to be necessary to prove his case, on the ground that he was unable to procure the originals and that copies would be useless as he could not get them attested. A party requiring documents should proceed under Section 136 or 138 Act VIII of 1859.

Glover, J.—The only point taken in special appeal is that the Courts below did not send for and decide the case upon certain documentary evidence which the plaintiff alleged would be very material towards proving his allegations, and which evidence was with the record of another case.

The special appeal was admitted to argument on the strength of an affidavit put in by the plaintiff to the effect that these papers were important, that he was unable to procure them, and that the Court had refused to send for them. Now, in the first place, there is nothing on the record to show that the Court did refuse to send for them, but there are orders passed upon petitions of the plaintiff in which mention of those papers is made. The first of these petitions is dated the 5th of May 1870, and the order on that is that the plaintiff might take three weeks' time to put in those documents himself. In July of the same year, the plaintiff put in a second petition, the order on which was that he

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might have two weeks more to procure and file attested copies of those papers, but the result was that he filed neither originals nor copies. It is now contended that inasmuch as these documents were essential to prove the plaintiff's case, and inasmuch as he was not able to get the originals, and as the copies would be useless to him inasmuch as such copies could not be attested by the witnesses whose evidence he could adduce, the Court should have sent for these records of its own motion. It appears to us that no Court is bound to go out of its way to assist litigants in such a manner. The law gives every facility for persons requiring documents to get them. Section 136 lays down the rule which governs such cases, and before the plaintiff could come up to this Court with a plea *ad misericordiam* like the present, he ought to have shown that he applied to the Court in whose temporary custody these documents were, to have them returned to him, on deposit, if necessary, of properly attested copies with the *nuthee*, and that the Court had refused so to return them. If the Court had refused, the plaintiff could then have proceeded under Section 138 and asked the Court trying the case to send to the Court where the records were, desiring that Court to forward the papers required. But the plaintiff took neither of these steps although he had ample time given him for so doing. Under these circumstances, it is imposible to say that the Subordinate Judge was wrong in deciding the case on the evidence before him, and on that evidence he has found as a fact that the plaintiff has altogether failed to prove his contention.

The special appeal must be dismissed with costs.

The 25th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Opening a Door in one's Property (to Annoyance of another)—Evidence of Malice and Ill-will—Right of Privacy—Costs.

Case No. 393 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 11th January 1871, reversing a decision of the Sudder Moonsiff of that district, dated the 15th June 1870.

Kalee Pershad Shaha (Plaintiff), *Appellant,*

versus

Ram Pershad Shaha (Defendant), *Respondent.*

Baboo Sham Lall Mitter for Appellant.

Baboo Rash Beharee Ghose for Respondent.

In this case the defendant was held entitled to make a door in his own property, notwithstanding that it was proved to interfere with the privacy of the female members of the plaintiff's family, and to have been otherwise a source of annoyance to him; the right of privacy not being an inherent right of property, but requiring to be proved by local usage, permission, or grant.

Considering however the evidence of ill-will and malice which actuated the defendant in making the door, he was not allowed his costs.

Glover, J.—THIS was a suit by one brother against another to have a door which has been opened by the defendant in a wall, separating the premises of the two brothers, closed, on the ground that by it the privacy of the plaintiff's family is interfered with, as it opens into the private court-yard of the plaintiff's house, where the female members of his family cook, draw water from the well, and bathe. There is also a further prayer to the effect that the defendant may be restrained from passing through this door into the plaintiff's court-yard.

The defence set up was that the door was an old door which had been in existence for a period of more than 12 years, and that the plaintiff's suit was therefore barred by limitation. On the merits defendant alleged that no injury was caused by the opening of the door, and that the defendant had on several occasions passed through it into the court-yard of the plaintiff, with the plaintiff's consent.

The Moonsiff went to the spot, and, in accordance with an order of this Court, prepared a map of the place. He decided that the door was newly opened out by the defendant in the separating wall; that that door was useless for all purposes to the defendant; that in his opinion it was made simply for the purpose of annoying the plaintiff. He, therefore, ordered it to be closed, and the defendant to be enjoined not to commit trespass on the plaintiff's premises.

The Subordinate Judge took a different view of the case, except so far as the period of time when this door was made. He held that the defendant had failed to prove that it was an old door, and that the plaintiff's case was not barred by limitation. For the rest he considered that the defendant was merely exercising his rights of property in his own wall, and that there was nothing which

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prevented him from opening a door in that wall; but that if the opening of that door was the source of any annoyance to the plaintiff by interfering with the privacy of the female members of his family, the plaintiff had a remedy in his own hands by building a wall, or erecting a screen of mats in the face of the opening. With regard to the alleged trespass, the Subordinate Judge found that the witnesses who were called upon to prove that the defendant passed through the plaintiff's court-yard had not substantiated that fact.

It appears to us that substantially this decision is right. There is no doubt, after hearing the circumstances of this case, that the defendant was actuated by malicious motives in opening the door, and that he could not have had any possible object in doing so but to cause annoyance to his brother's family, for we find from the map that the new door is exactly in a line with the privy belonging to the defendant, and that the door of the privy and the door in this wall are exactly opposite one another, so that any one using the privy would be able to overlook nearly the whole of the plaintiff's court-yard. There is also a finding of fact against the defendant as to his having no right of way through the plaintiff's court-yard, and that the sweepings of his house are not carried through the plaintiff's compound. At the same time, we agree with the Subordinate Judge in thinking that the right of privacy is not an inherent right of property; and that if it exists at all, it must be shown to exist by some local usage, by special permission, or by grant, and in this case there is no such local usage, permission, or grant proved. There seems to be no reason therefore why the defendant should not make use of his property in any way he pleases; the wall is undoubtedly his, and he is merely making a door in his own property. The plaintiff, on the other hand, can very easily prevent, if he likes, all possible annoyance on account of this door, inasmuch as the whole of the land on the north side of it belongs to him, and he has only to build a screen or other erection to prevent any body in the defendant's house looking into his court-yard, or in any way disturbing the privacy of his family. The decision in the case of *Mahomed Abdoor Rohim* vs. *Birjoo Sahoo and others*, in Volume XIV, Weekly Reporter, page 103, lays down what we consider to be the right view of the law in deciding questions of this sort; and, following that decision, we must uphold the judgment of the Subordinate Judge.

If, notwithstanding the order which is now made, the defendant commits any trespass upon the plaintiff's property by passing through or over any new screen or erection which the plaintiff may build, of course the plaintiff will have his right of action for trespass. And with reference to the circumstances of this case, and taking into consideration the clear evidence of ill-will and malice which actuated the defendant in making this door, we think that the defendant should not get costs, but that each party should pay his own costs. The appeal is dismissed.

The 25th April 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Review of Judgment—Presumption—Preliminaries complied with—Evidence.

Case No. 1260 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 12th July 1871, reversing a decision of the Moonsiff of Aurungabad, dated the 31st March 1870.

Akkul Sahoo and others (Plaintiffs), *Appellants,*

versus

Abdool Guffoor (Defendant), *Respondent.*

Mr. C. Gregory for Appellants.

Moonshee Mahomed Yusoof for Respondent.

The Court declined to presume in this case that certain preliminaries had not been complied with by the Subordinate Judge in admitting a review of judgment, *viz.*, that he had not satisfied himself that the evidence tendered by the petitioner for review was evidence not previously attainable by him and not in his possession, especially when appellant was unable to show that he had taken any objection before the Subordinate Judge to the document on which the review was granted.

Jackson J.—This was a suit relating to the possession of a small piece of land originally decided by the Moonsiff of Aurungabad, and afterwards tried on appeal by the Subordinate Judge of Gya. The Subordinate Judge at first on the view which he took of the evidence affirmed the judgment of the Moonsiff. Sometime afterwards, an application was made to him, supported by certain documents, on which he granted a review and reversed the decision of the Moonsiff.

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We have been much pressed with several precedents of this Court, in which strong opinions have been expressed with regard to the course to be taken by Courts of Justice in receiving applications for review.

It is contended in this case that there is nothing on the record to show that the Subordinate Judge, in admitting the review, had satisfied himself that the evidence tendered by the petition for review was evidence not previously attainable by him, and not in his possession, and that consequently the review was one which ought not to have been admitted.

No doubt in several decisions, namely, in one reported in Marshall, page 553, and another in II Weekly Reporter, page 174, and X Weekly Reporter, page 432, and in XVI Weekly Reporter, page 7, observations have been made on the subject which tend to support the contentions of the appellant.

But we are not now called upon to state what are the proper preliminaries to be observed in admitting a review, nor on what principles a review should be admitted. If we were, we might have stated our views. But we are asked to set aside a judgment of the Lower Appellate Court on the ground that certain preliminaries had not been complied with when he granted the review.

In the several cases referred to, the Judges deal with them on their respective merits, and we are not bound to follow their ruling only that there might be uniformity in our decisions on such a point; nor are we bound to reverse the decision of the Lower Court, simply upon the ground that certain forms had not been followed.

On the other hand, we ought, I think, to presume in favor of the Lower Courts that all things have been done as the law requires. I do not therefore find in the circumstances of this case anything that induces me to think that the proceedings of the Court below are in any way contrary to law; and as there is no other valid objection taken to the decision of the Lower Appellate Court, we ought to dismiss the appeal with costs.

Markby, J.—I am of the same opinion. I entirely agree with my brother Jackson, that we have no question now before us as to what are the proper steps to be taken before the admission of a review. We have to decide now whether we ought not to presume that the steps and procedure prescribed by law were followed in the Lower Court; and as a general rule I think that we ought to presume that the proceedings of the Courts below have been conducted according to law, and ought not to presume that the requirements of the law have not been complied with. More especially, we ought not to presume so in this case when the appellant does not show us anything from which we can suppose that he took any objection in the Court below to the document on which the review was granted.

The appeal must be dismissed with costs.

The 25th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of Suit—Co-sharer—Discharge of Receiver—Act VIII of 1859, *s.* 73—*Discretion (Non-exercise of, by Lower Court)—Interference of Superior Court—Party summoned as Witness under s.* 170—*Lawful Excuse—Witness' Expenses (tender of).*

Regular Appeals from a decision passed by the Subordinate Judge of Beerbhoom, dated the 28th August 1871.

Case No 274 of 1871.

Ishen Chunder Sen (one of the Defendants), *Appellant,*

versus

Onath Nath Deb (one of the Plaintiffs), *Respondents.*

Baboos Gopal Lall Mitter and *Nil Madhub Sen* for Appellant.

Baboos Mohinee Mohun Roy and *Rajendro Nath Bose* for Respondents.

Case No. 276 of 1871.

Mr. Herbert Cowell (Plaintiff), *Appellant,*

versus

Ishen Chunder Sen (Defendant) and another (Plaintiff), *Respondents.*

Baboos Chunder Madhub Ghose and *Bhyrub Chunder Banerjee* for Appellant.

Baboos Gopal Lall Mitter and *Nil Madhub Bose* for Respondents.

A co-sharer who takes over into his own hands, from the Receiver, the management of his share of the estate, is entitled to sue, or to be made a party, under Section 73, Act VIII of 1859, to a suit already brought, for rents which had accrued before the date of the Receiver's discharge.

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Where the law allows a discretion to any Court, it presumes that such discretion will be soundly and properly exercised; and where it is shown that the discretion was not so exercised, the omission will be a ground for interference by the Superior Court.

Accordingly, the Subordinate Judge's order under Section 170 was set aside on the ground that he had not exercised his discretion at all, inasmuch as he had ignored the fact that plaintiff had given very substantial reasons for his inability to attend and give evidence when summoned to do so; and as the Subordinate Judge had held substantially that there was sufficient evidence to prove plaintiff's claim, plaintiff was entitled to a decree, his failure to give evidence notwithstanding.

Where there was no proof that a defaulting witness's expenses were not tendered to him by the party at whose instance he was summoned, the Court on appeal declined to order that witness's evidence to be taken or to take it themselves.

Glover, J.—ONE judgment will govern both these appeals.

The suit was for rent due on a share of a *putnee* tenure called Shakbahar, belonging to the estate of the late Promonath Deb of which the plaintiff, Mr. Cowell, was the Receiver.

The suit was instituted on the 18th March 1871, and whilst it was pending, Onath Nath Deb, one of the sons of Promonath, applied to be made co-plaintiff on the ground that he had discharged Mr. Cowell from the Receivership of his share of the estate. The application was allowed by the Court, and on the 7th July 1871, Onath Nath Deb was made a party to the suit under Section 73 of the Procedure Code.

The defendant Ishen Chunder Deb admits tenancy and does not dispute the rate of rent. His defence substantially is that he has, in various ways, which will be noticed hereafter, paid all that is due from him in the shape of rent with the exception of Rs. 453-2-9.

The Subordinate Judge decreed in favor of the plaintiff, Mr. Cowell, for one-half of the sum admitted by the defendant to be due and in favor of the co-plaintiff Onath Nath Deb for Rs. 1,724-11-4, the balance of rent on his share of the estate still proved to be due.

Against this decision, the plaintiff Mr. Cowell and the defendant Ishen Chunder Deb appeal.

It will be convenient to take the plaintiff's appeal first.

Mr. Cowell contends (1) that the provisions of Section 170 Act VIII of 1859 ought not to have been enforced against him, inasmuch as he had a lawful excuse for non-attendance at the Small Cause Court on the day fixed for taking his evidence.

(2) That as the Subordinate Judge accepted the evidence as proving the claim of Onath Nath Deb, he should not have refused Mr. Cowell the benefit of that evidence, even though he did not himself attend and give evidence.

And (3) that as the rents sued for accrued before the date of the Receiver's discharge in respect of Onath Nath's share, Onath Nath ought not to have been made a party to the suit under Section 73.

The last objection has not been pressed by the appellant's pleader. It would be clearly untenable, for as Onath Nath is admittedly the owner of a fourth share of the rents, and had admittedly discharged Mr. Cowell from the Receivership of that share within a few days after the institution of this suit, he, Onath Nath, was a party interested both in the subject-matter and in the result of the litigation, and the Lower Court cannot be said to have been wrong in making Onath Nath a co-plaintiff. From the day on which Onath Nath took the management of his share of the estate into his own hands, he was entitled to sue for its rents no matter for what year (within the period of limitation) they had accrued.

With reference to the 1st objection, it appears that the defendants desired that both Mr. Cowell, the plaintiff, and his general Mooktear Khogendro Nath Mullick, should be summoned, and two commissions were sent to the Small Cause Court in Calcutta for the purpose of examining these witnesses. Mr. Cowell represented to the Court that the day on which he was directed to attend was Saturday, a day on which he was necessarily on duty at the Bengal Legislative Council of which Council he was Officiating Secretary. There seems to be some doubt as to whether both summonses were served. The Subordinate Judge says that the second only was served, but the bailiff, we observe, in his evidence speaks of two, and the Subordinate Judge afterwards passed an order to the effect that, as the summons had been served twice without effect, it was a proper case for the application of Section 170. But whether served once or twice is immaterial. The Subordinate Judge has held that Mr. Cowell's omission to attend the Small Cause Court and give evidence is sufficient to prevent his obtaining any remedy in this suit except so far as the defendant chooses to admit liability.

Now, Section 170 restricts the penal consequences of refusing or neglecting to give evidence, to parties "without lawful excuse." The appellant contends that he had such excuse, being unable to attend on the day named in consequence of official duties which

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kept him elsewhere. The respondent Ishen Chunder argues that the sole judge of this was the Court before which the case was pending, and that there can be no interference with its discretionary power in this respect.

We are of opinion that, where the law allows a discretion to any Court, it presumes that such discretion will be soundly and properly exercised; and that where it is shown that the discretion was not so exercised, the omission would be a ground for interference by the Superior Court. In Data Hurukman Singh *vs.* Oodoy Chand Pyne, VI Weekly Reporter, 247, a Principal Sudder Ameen's order under Section 170 was set aside on the ground that he had not exercised his discretion properly.

Now, in this case the Subordinate Judge does not appear to have exercised any "discretion" at all. His order (vernacular) passed on the back of the plaintiff's petition is to the effect that "whereas the plaintiff (Cowell) has not appeared after being twice summoned, the case will be brought under the provisions of Section 170." He ignores the fact that Mr. Cowell had given very substantial reasons for not being able to attend the Small Cause Court on Saturdays, and had begged that some other day might be fixed. It is a matter of which this Court is bound to take judicial cognizance, that the Bengal Legislative Council's days of assembling are Saturdays, as notified in the *Government Gazette*, and that Mr. Cowell is the Gazetted Officiating Secretary to that Council. We have been informed that the Small Cause Court examines witnesses on commission on Saturdays only, but this would not affect the lawfulness of the plaintiff's excuse. We think that the Subordinate Judge was not justified under the circumstances in visiting the plaintiff with the extreme penal consequences of an omission which he could not prevent.

But in any case the plaintiff would not be precluded by an order under Section 170 from appealing against the Lower Court's decision on the merits, where there had been such decision, nor from getting a decree, if there were sufficient evidence on the record to warrant such decree, the plaintiff's failure to give evidence notwithstanding. In Bisho Nath Mojoomdar *vs.* Khettur Chunder Sen, Marshall's Reports, 467, it has been so held by this Court.

Now, in this case the Subordinate Judge has held substantially that there is sufficient evidence to prove the plaintiff's claim, but that he is not to take advantage of it because of his omission to attend and give evidence. The co-plaintiff Onath Nath Deb has got a decree for his share of the rents on that evidence, and if that evidence is sufficient (which is the point for consideration in Ishen Chunder's appeal), Mr. Cowell, the Receiver, would be entitled to a decree for the other half share irrespective of his former laches.

The question remains whether that evidence is sufficient.

The defendant, appellant, Ishen Chunder contends that it is not sufficient; that he did all he could by summoning Mr. Cowell and his Mooktear Khogendro to prove that he had paid various large sums to the proprietors of the estate, and had afterwards given their receipts to the plaintiff's Mooktear Khogendro for the purpose of having the payments credited in his accounts, and that until the plaintiff and his servant come forward and deny on oath the allegations that he, defendant, has vouched for by his own oath, the plaintiff's evidence is altogether insufficient to justify a decree being passed in his favor. The defendant further contends that it is in the highest degree improbable, and is opposed to all zemindaree custom, that rents should be paid for one year whilst a balance is still due on a preceding year, and that it cannot be believed that payments for the year 1276 would have been accepted (as the plaintiff says they were) whilst there was still a balance due for 1275.

The sums for which the defendant claims credit, were, he says, paid by him either to the various proprietors direct or paid to others on their behalf and for their advantage. The receipts, he says, he made over to the Receiver's Mooktear Khogendro Nath who promised to give him credit for them in account. The Subordinate Judge disbelieves this statement on the ground that Ishen Chunder has not called the Mooktears of these proprietors to prove the fact of payment, nor any one of his own servants in whose presence he says that the payments were made.

A good deal was made by the defendant's (appellant's) pleader of the neglect of the Mooktear Khogendro to attend and give evidence; and if we could be satisfied that the defendant really did all in his power to procure the attendance of this most important witness, we should undoubtedly refuse to decide this appeal without having his evidence recorded. But the contrary appears to be the case. Khogendro was no doubt summoned and the *subpœna* was duly served upon him, but there is no proof that the usual travelling

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expenses were furnished to him. The bailiff witness, who deposes to the service, admits that Khogendro expressed his willingness to attend if his expenses were tendered, but he knows nothing further, and there is nothing on the record to show that they were tendered; whilst, on the other hand, there is proof that Mr. Cowell's expenses were tendered and received. Now, if the defendant's plea of payment to the zemindars, and his subsequent handing over of the receipts to Khogendro, were true, we should have expected that he would have spared no pains to secure such a very important witness as Khogendro himself. Mr. Cowell could have had no special knowledge of anything connected with the suit, and his evidence could have proved little or nothing; but Khogendro's was the backbone of the defendant's case, and yet we find him altogether neglecting his interests and omitting to deposit the money which would have secured the presence of his principal witness. We do not therefore, at this late stage of the case, consider ourselves justified either in ordering Khogendro's evidence to be taken, or in taking it ourselves. The less so as there were other ways of proving the payments by the evidence of the parties to whom and in whose presence they were made. We may remark in this place that Ishen Chunder's own deposition as to the time and manner of his alleged making over of the receipts to Khogendro is extremely vague and unsatisfactory. He makes three distinct and opposite statements as to the year, and two as to the month. He admits, moreover, that he never mentioned the fact to the Receiver, Mr. Cowell, nor entered any memo. of the transaction in what he calls his *pucca* account books; and, as we have before stated, although he mentions the names of at least four persons who were present, he has not thought proper to call any one of them as a witness.

It remains then that the defendant, on whom was the *onus* of proving payment of what was admitted to be the correct rate of rent due on the estate, has altogether failed to prove such part of it as relates to the balances of the years 1275 and 1276. And we see no force in the defendant's objection as to the year in which some of the money was paid. That money was paid as rent *in* 1276, whilst there was still a balance of 1275 unpaid is likely enough, but there is nothing on the record to show that that money was paid as rent *for* 1276, or that rent for that year was paid whilst there was still a balance due for 1275.

As the *onus* of proving payment in full was on the defendant, and as he failed to support that *onus*, both the plaintiff and the co-plaintiff Onath Nath Deb are entitled to their full shares of the balance of the admitted rent. The decree of the Court below is modified accordingly, and Mr. Cowell, the Receiver, and Onath Nath Deb will each recover Rs. 1,724-11-4 with interest. The appeal of Ishen Chunder (No. 274 of 1871) is dismissed, and Ishen Chunder will pay the whole costs of this litigation.

The 26th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1859 *s.* 2—*Res-adjudicata—Right of Occupancy (under Act X of* 1859 *s.* 6)—*Holding as Koorfadar or Trespasser—Erection of Building—Acquiescence.*

Case No. 859 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 24*th April* 1871, *affirming a decision of the Moonsiff of Ghattal, dated the* 23*rd January* 1871.

Ishen Chunder Ghose and others (Plaintiffs), *Appellants,*

versus

Hurish Chunder Banerjee (Defendant), *Respondent.*

Baboo Taruch Nath Dutt for Appellants.

Baboo Bama Churn Dutt for Respondent.

Plaintiff having in a former suit obtained a declaration that certain lands was his mâl land, and not defendant's lakheraj, served defendant with a notice to quit, and on his non-compliance with that demand, brought the present suit for ejectment and *khas* possession. HELD that Section 2 Act VIII of 1859 did not apply to such a case, the causes of action in the two suits not being the same.

HELD, also, that defendant's holding either as a *koorfadar* (sub-lessee) or as a trespasser gave him no right of occupancy under Section 6 Act X of 1859; and that his erection of a mud house on the land and dwelling there for more than 12 years afforded no presumption of acquiescence on the part of plaintiff.

Kemp, J.—THE plaintiff is the special appellant in this case. He sued to recover

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khas possession of two cottahs of land by removal of a mud house erected by the defendant on that land. The plaintiff is admittedly the talookdar of the mouzah on which the land is situated. Previously, the plaintiff sued the ryot Muddun Ghose to enhance the rent of his tenure, and in that suit included these two cottahs. Muddun Ghose pleaded that these two cottahs did not form part of his holding, but that they belonged to the lakheraj holding of the present defendant. The present defendant also intervened in that rent suit and claimed these two cottahs as lakheraj, and the result of that was that the rent was assessed on the holding of Muddun Ghose, excluding the two cottahs which were claimed in that suit as lakheraj by the present defendant, and which claim was supported by the tenant Muddun Ghose. The talookdar, therefore, being foiled with reference to these two cottahs, brought a suit for a declaration that these two cottahs were mâl lands and for possession. It was found in that suit that the lands were not lakheraj, but that they were mâl lands, and a plaintiff's title to them as mâl land was declared. The plaintiff then served a notice on the defendant to quit the land; and the defendant not having complied with that demand, the present suit is brought.

Both Courts have dismissed the plaintiff's claim, mainly on the ground of equity—that, as the defendant had built a mud house on the land at some expense, and dwelt there for a long time, more than 12 years, it would not be equitable to eject him. The first point is whether Section 2 of Act VIII applies to this case or not. We are clearly of opinion that Section 2 does not apply. That Section refers to causes of action which have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties. Now, it is very clear that the present cause of action which is for ejectment of the defendant and *khas* possession is not the same cause of action tried in the former suit. Therefore Section 2 does not apply.

We then come to the question whether the defendant has acquired a right of occupancy in this land. We think that he has not. It is very clear that, if the defendant claims to have held this land as a *koorfa* tenant or sub-lessee of Muddun Ghose, such holding would not give him a right of occupancy. Then it may be said that he has held the land as lakherajdar; but it has been found in a suit between the parties, namely, the present plaintiff and the defendant, that the land was not lakheraj, but that it was the mâl land of the plaintiff. Therefore, if the defendant held as *koorfadar*, he acquired no right of occupancy; and if he held otherwise, he held as a trespasser, and his holding as a trespasser would not under Section 6 give him any right of occupancy. This has been ruled in the case of *Shaikh Peer Buksh*, reported in the Special Number of the Weekly Reporter, Full Bench Rulings, page 146, by the late Chief Justice Sir Barnes Peacock and Justices Bayley and Kemp.

Then we come to the question of Equity. We do not think that this is a case which is at all on all fours with the case reported in Volume XII of the Weekly Reporter, page 495. In this case, we do not think that the defendant is entitled to any sympathy from the Court. It appears that he frandulently set up this lakheraj holding in collusion with the tenant of the plaintiff, Muddun Ghose. A great deal has been said about the fact of the plaintiff standing by and allowing the defendant to erect this mud house at considerable expense. Now, until the point was settled in the suit brought by the plaintiff to have his mâl right declared, and which suit was brought after the plaintiff had been unsuccessful in the suit against the ryot Muddun Ghose for the rent of these two cottahs, we think it cannot be said that the plaintiff was under any other impression than that these lands were part and parcel of the holding of his tenant Muddun Ghose. That tenant having a right of occupancy, and the land being *bastoo* land, any erection by any third party holding from Muddun Ghose would not be a matter with which the zemindar could interfere; but the matter assumed a very different aspect when the zemindar, on bringing his suit for rent against Muddun Ghose, was met by the plea that a portion of the land was not in the tenancy of Muddun Ghose, but was the lakheraj of the defendant, a plea which eventually wholly failed in the subsequent suit. We therefore think that the ruling in Volume XII does not apply to this case. That was a case in which a party took lands from the zemindar, and transferred them to other parties who erected *pucca* buildings thereon. The zemindar wanted to demolish these *pucca* buildings, on the ground that the original tenant had no transferable rights. It was held in that case that there was evidence, although that evidence was meagre, of a custom to transfer, and it was considered that the conduct of the

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zemindar in allowing his ryot to transfer the lands, and the transferee to erect *pucca* buildings, without immediately attempting to stop him in so doing, amounted to an acquiescence in the transfer and to standing by while the tenant spent a considerable amount of money on the buildings.

We, therefore, think that the plaintiff is entitled to the relief he asked for, namely, to *khas* possession. We, therefore, decree his suit on the terms of the plaint, reversing the decisions of the Courts below, with costs to be paid by the defendant, respondent.

The 26th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Lakhiraj Title—Dispossession (under color of Sale in Execution).

Case No. 861 of 1871.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 26th April 1871, *reversing a decision of the Moonsiff of Jehanabad, dated the 30th December* 1870.

Dedar Buksh (Plaintiff), *Appellant,*

versus

Ake Cowree Singh and others (Defendants), *Respondents.*

Baboo Woopendro Chunder Bose for Appellant.

Mr. J. S. Rochfort and *Baboo Gopeenath Mookerjee* for Respondents.

The twelve years' and not the one year's limitation applies to a suit to establish plaintiffs title as *Lakhirajdar* and to establish that the lands in question are not the lands of the judgment-debtor in execution of a decree against whom defendants purchased the land and under color of that sale ousted plaintiff.

Kemp, J.—We think that the decision of the Judge is wrong in this case, and that the decision of the first Court is perfectly correct. This is not a suit to set aside an order under Section 246, but it is a suit by the plaintiff to establish his title as *lakhirajdar* and to establish that the lands are not the lands of the judgment-debtor Imdad Ali in execution of a decree against whom the defendant purchased the land. Moreover, the objection of the plaintiff under Section 246 which was rejected on the 8th of September 1868, was not followed by any process on the part of the decree-holder, the defendants in this case. The attachment was allowed to fall through and the case was struck off, and it was in execution of another decree that the attachment and sale took place, and it was under colour of that that the plaintiff was ousted. It appears to us that the one year's limitation does not apply to this case but that the twelve years' limitation applies. The case must, therefore, go back with reference to plots Nos. 1, 2, and 3 for the Judge to find on the twelve years' plea and on the merits if necessary.

With reference to lot No. 4, it is clear that the plaintiff's suit was dismissed in the first Court, and no appeal was preferred by the plaintiff. That decision is, therefore, final and must stand. With this modification the appeal is decreed with costs in proportion.

The 26th April 1872.

Present:

The Hon'ble W. Markby, *Judge.*

Appeal to Privy Council—Valuation—Act VII of 1870, *s.* 7—*Declaratory Decree—Consequential Relief—Irrigation—Power of High Court—Consolidation.*

In the matter of

Ajuas Kooer, *Petitioner,*

versus

Mussamut Luteefa, *Opposite party.*

Mr. R. T. Allan for petitioner.

Mr. C. Gregory for opposite party.

In ascertaining whether or not there ought to be an appeal to the Privy Council, the High Court has only to look at the value of the question at issue in the litigation.

In a case of conflicting claims with regard to the waters of a flowing stream, the matter at issue, so far as regarded the applicant, having been to have her lands irrigated in the way she claimed, the value of that matter, according to Section 7 of the Court Fees' Act VII of 1870, was held to be the extent to which her interests would be deteriorated if that right could not be established.

Quære.—Whether the Court had power to consolidate the two suits at this stage.

Markby, J.—This application is made with reference to two cases, one, in which Mussamut Luteefa sued Mussamut Ajuas Kooer and other persons to establish certain rights which she claimed in a stream flowing from the Mohabeer Hill, and the other a suit in which the defendants in the former suit were plaintiffs, and the plaintiff in the former suit was defendant, relating to rights which were also claimed in the same stream. The two suits were dealt with in the Mofussil Court together and one judgment was delivered. In this Court the appeals are said to have been heard separately; but here also only one judgment was delivered. The application now is to be at liberty to prefer one appeal to Her Majesty's Privy Council against the decision of this Court of the 21st December 1871, and that the two suits and

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two Regular Appeals to which that decision relates, may be consolidated. Now, so far as regards the question involved in these two suits is concerned, I have no doubt that substantially it is one and the same. These two parties, Mussamut Ajuas Kooer and her lessees on the one hand, and Mussamut Luteefa on the other, have conflicting claims with regard to the waters of this stream, and I have no doubt whatever that there is but that single substantial question between the parties, and in ascertaining whether or not there ought to be an appeal to the Privy Council at all, I think I have only to look at the value of this question which is the matter at issue in this litigation to the appellants.

Now, upon the petition of Mussamut Ajuas Kooer, as presented to this Court, I should have had very considerable doubt whether there were sufficient grounds for me to come to the conclusion that the value of the matter at issue ammounted to Rs. 10,000. I think the proper mode of estimating the value is this, to see whether comparing the result of the decision in the Court with what is claimed by Mussamut Ajuas herself and her lessees, this property will be deteriorated to the extent of 10,000 rupees if the decision of this Court remains unreversed: and I do not see that that fact is definitely stated in the application. That defect, however, I think, is supplied by the 4th paragraph of the affidavit of Mussamut Ajuas' agent, in which it is definitely sworn that in consequence of the decision of this Court "the lands of Bishenpore "will no longer benefit as heretofore by irri-"gation from the said stream, the consequence "of which will be both that the said Mussamut "Ajuas Kooer as well as her lessees will "sustain annually a very heavy loss and cer-"tainly not less than 10,000 rupees."

Now, that is met by an affidavit on the other side made by the husband of Mussamut Luteefa. He points out in the first place that there are other modes in which these mouzahs may be irrigated, that the holders of land in these mouzahs are not entirely deprived by the decision of this Court of all means of irrigation of their lands. And I am asked to infer from that that the decision cannot be so detrimental as stated. I think I have no proper materials for entering into any question of that sort. But it is further stated that the valuation of the claim in the plaint by either party was far below 10,000 rupees, or I ought to say that the stamp paid was for a claim far below 10,000 rupees. Valuation of a suit of this kind is regulated by Section 7 of the Court Fees' Act (Act VII of 1870): it says that in a suit "to obtain a declaratory decree, where consequential relief is prayed," the suit is to be valued "according to the amount at which the relief sought for is valued."

Now, I am not quite clear what the Legislature meant by the value of the relief sought for. But whatever that meaning may have been, I do not think that the value of the relief sought for is necessarily the same as the value of the matter at issue. I think the matter at issue in this suit was, as regards Mr. Allan's clients, their right to have their lands irrigated in the way they claimed, and the value of that matter, as I have stated, is the extent to which their interests would be deteriorated if that right cannot be established. But then Mr. Gregory's client goes still further and her husband puts in an affidavit in which he swears that the decision of this Court will in noway injure the interests of the other side, or in other words, he swears that the right which the other side has come forward to claim is a right having no value whatever. Of course, if that is true, that entirely answers the 4th paragraph of Mr. Allan's client's affidavit.

What I have to do is to determine which of these two affidavits I will give credence to: and I must say that, in a matter of this kind, I think I ought clearly to adopt the affidavit of Mr. Allan's client. It seem to me impossible, looking to the nature of this litigation as far as it has gone, to believe that these parties have gone to all this expense and carried on this litigation up to this point, simply for the purpose of establishing a right which is absolutely of no value. I think, therefore, I have no choice in this matter but to accept Mr. Allan's client's statement as really uncontradicted, and to hold the value of the matter at issue in this suit, calculated upon the principle above stated, is of the value of 10,000 rupees. Therefore, the substantial question, I think, ought to be decided in favor of the applicant.

I think, however, that there might be some difficulty were I to consolidate these two suits. That has not been done as yet, and there might be some question as to the power that I have now to do so.

I think the proper course will be, upon Mr. Allan's putting in the necessary security, to grant him leave to appeal in both suits, and for which he will have to put in proper applications within time. Upon those proper applications being put in and necessary security being given, I will grant leave to appeal in both cases.

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The 21st March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Partition—Hindoo Widow—Purchaser of her Estate at Sale in Execution—Exceptions—Khas Possession—Debutter Lands.

Case No. 221 of 1871.

Regular Appeal from a decision passed by the Judge of West Burdwan, dated the 16th August 1871.

Rughoonath Panjah (Plaintiff) *Appellant,*

versus

Luckhun Chunder Dullal Chowdhry and others (Defendants) *Respondents.*

Baboos Sreenath Doss and *Nil Madhub Sen* for Appellant.

Baboos Unnoda Pershad Benerjee and *Jugodanund Mookerjee* for Respondents.

A Hindoo widow being competent under the Hindoo law to put in a claim to enforce partition as against her co-sharers, there is nothing to prevent a purchaser of her estate at a sale in execution of a decree from enforcing a like claim.

The following items were held in this case not to form the subject of partition—property of which neither the defendants nor the plaintiff were entitled to *khas* possession but only to receive the rents from the tenants in occupation thereof, and *debutter* lands expressly reserved from partition by the decree under which the plaintiff derived his title.

Kemp, J.—THE plaintiff, appellant, sued for possession of an auction-purchased share consisting of 5 annas 6 gundahs 2 cowries 2 krants of the properties detailed in the schedule annexed to the plaint by distinct partition. The plaint sets forth that the property in dispute was divided into three shares, two of these shares being owned by the defendants and a third or 5 annas 6 gundahs 2 cowries 2 krants by Modhoo Mookhee Dossee; that on the 11th of Falgoon 1276, the plaintiff purchased the share of Modhoo Mookhee in satisfaction of a decree against her and obtained possession through the Court, and as inconvenience is felt by the plaintiff from the properties remaining joint, he called upon the defendants on the 9th of Falgoon 1277 to come to a partition of the properties, but that the defendants refused to accede to his wishes, and therefore his cause of action arose on the date on which they refused to come to a partition, namely, on the 9th of Falgoon 1277, and the present suit to enforce partition of the property is brought on the 12th of Assar 1278, or 27th of May 1871. In the plaint there is a long list of small parcels of land, including *thakoorbaree* and *rashbaree* lands, dwelling-house, tanks, and other small plots of land; the suit being valued at Rs. 2,691.

The defendants denied that the plaintiff had ever proposed to them to make a partition of the property, and with regard to plot No. 6 they said that the plaintiff had given incorrect boundaries, and that neither the defendants nor the plaintiff were entitled to *khas* possession of that plot but only to receive the rent from the tenants in occupation thereof. Then with reference to items 40 and 41 claimed by the plaintiff as *kooteebatee*, the defendants state that they constitute the *thakoorbaree* and that the plaintiff has no right to ask for a partition of those properties, and moreover, that the decree obtained by Modhoo Mookhee, the vendor of the plaintiff, expressly prohibited such partition. Then with reference to that portion of plots 37 and 38 on which the old house stands, that Modhoo Mookhee, although she obtained a decree for them, did not chose to take possession of these plots as the house is in a dilapidated state, and consequently no suit will lie for a partition thereof. Then with reference to the remaining portion of *daghs* 37 and 38, the defendants state that if the plaintiff, who is a stranger, be allowed to obtain a share in this property, which constitutes the family house, the privacy of the defendant's *zenana* will be interfered with.

There is also a contention respecting the tanks Nos. 7, 8, 15, 16, 17, 18, 19, 20, 21, and 22, inclusive of the embankments of these tanks and the trees growing thereon. The inconvenience of a partition is pointed out, and also the probability that the plaintiff may cut down the trees of his share and thereby cause damage and loss to the defendants who are the reversioners, and who, on the death of Modhoo Mookhee, will succeed to the whole of the property. With respect to the remaining properties, the defendants state in paragraph 7 of their written statement that they have no objection to the plaintiffobtaining distinct possession of the said properties.

The Judge in a very brief decision holds that the plaintiff has only purchased the life-interest of a Hindoo widow; that the wit-

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nesses for the plaintiff have given contradictory evidence and are not trustworthy in the matter of the plaintiff's allegation that he demanded a partition from the defendants and that they refused to accede to his demand. With reference to plot No. 10, which consists of one tree and the land upon which it stands, the Judge says that the plaintiff can have no interest in the partition of a tree and the estate would be injured thereby, and with reference to the partition of the homestead, that the plaintiff's application is made only with a view to harass the family.

With reference to the *thakoorbaree* and *rashbaree*, the Judge remarks that these properties cannot be divided as they are proved to be *debutter* lands and the decree of the 30th December 1865 in favour of Modhoo Mookhee distinctly provides for these lands being held joint. The suit of the plaintiff was therefore dismissed.

Baboo Unnoda Pershad Benerjee, who appears for the respondent in this case, admits that there is no authority on the point as to whether the purchaser of a Hindoo widow's estate can sue for a partition; he says that he does not go to the extent, and indeed he could not go to the extent, of saying that a Hindoo widow governed by the Bengal school of law cannot put in a claim to enforce a partition as against her co-sharers, but he falls back upon what he says are the circumstances of this particular case. The whole of his address amounted to this, that, looking to the circumstances of this individual case, the Court ought not to allow the plaintiff to enforce his right to a partition, because the other members of the family would be inconvenienced thereby. It is very clear that Modhoo Mookhee could have enforced a partition of the share which has been declared to be hers by a decree of Court; and with reference to the inconvenience which would probably attend a partition, the defendants have to think themselves for that. They chose to oppose Modhoo Mookhee in her just claim to a share of the family property. Modhoo Mookhee was forced to borrow money from the plaintiff to enable her to maintain her just claim against the other members of the family; in doing so she became involved, and the consequence has been that her share, not of the whole of the property, but of a considerable portion of the ancestral estate, has passed into the hands of a stranger. This happens every day; and as already observed, if the defendants had not opposed Modhoo Mookhee, they would not have been placed in the inconvenient position in which they find themselves. Modhoo Mookhee being competent under the Hindoo law to put in a claim to enforce partition, there is nothing to prevent her representative, the plaintiff, from enforcing a like claim.

We, therefore, think that the Judge was wrong in dismissing the plaintiff's suit; he is clearly entitled to a partition of the share purchased by him, namely, a one-third share of the property, or a 5 annas 6 gundahs 2 cowries 2 krants share.

There are certain items, however, which we think cannot form the subject of partition. With reference to plot No. 6 the defendants are not in *khas* possession of this property; they are only in receipt of their share of the rent of the same, and the plaintiff therefore cannot be entitled to a distinct division of his share; he will only be entitled to receive rent in proportion to his share, namely, one-third of the rent payable by the ryot.

Then, with reference to the *thakoorbaree*, *rashbaree*, and other lands and buildings which are appropriated to the service of the idols, the decree under which the plaintiff derives his title distinctly provides for these properties remaining joint, and distinctly reserves them from any partition. These properties, therefore, the plaintiff will hold jointly with his other co-sharers. There is also property No. 10, which has been claimed by a third and independent party who has shown the Court that he is the purchaser of that property and that the defendants and the plaintiff's predecessor Modhoo Mookhee had no right or title in that property. That property must also be excluded. The claim of the plaintiff with reference to the other properties will be decreed: he will obtain a partition of these properties and recover his costs from the defendants in proportion to the claim which has been affirmed by this Court.

We may also observe in conclusion that the Judge is wrong in stating that there is contradictory evidence as to the plaintiff's demand for a partition. We find that the evidence that the plaintiff did demand a partition is not contradictory, but be that as it may, there is, as already stated, no doubt that the plaintiff, whether he did or did not make a demand to that effect, has a right to enforce a partition, and therefore his appeal and suit must be decreed with the trifling modifications noted above, and the decision of the Judge must be reversed. The plaintiff will recover his costs of both Courts from the defendants, respondents.

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The 27th April 1872.

Present :

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Land (Described in Plaint by Quantity and Boundaries) — Decree — Excess—Possession (according to boundaries).

Case No. 49 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Chittagong, dated the 22nd June 1871, affirming an order of the Moonsiff of Futickchery, dated the 20th May 1871.

Zeenut Ali and others (Judgment-debtors) *Appellants,*

versus

Ram Doyal Podddar (Decree-holder) *Respondents.*

Baboo Bhowanee Churn Dutt for Appellants.

Mr. R. E. Twidale and *Baboo Aukhil Chunder Sen* for Respondent.

Where a plaintiff describes land which he claims as amounting to a certain quantity and as lying within certain boundaries, if he is found entitled to the land, and the decree which he has obtained gives those boundaries, the boundaries must prevail even if the land exceeds the quantity stated in the plaint.

Jackson, J.—THIS Court is always extremely reluctant to disturb an order made by the Judge below after a patient hearing of the parties, and after pains have been taken to come to a right decision. But it does happen that in this appeal both parties are agreed that possession has not been given according to the boundaries specified in the decree. This complaint is made in the petition of appeal, and it is also the subject of an objection by the respondent ; and the contention is further borne out by the words of the Judge in his judgment. He says : " the decree-holder asks certain land in " excess of the total quantity given him by " the decree ; as there is no mention of " *gunzaish* or excess, he can have but the " bare quantity given him by the decree."

The Judge appears to have acted on the view which he took of the matter, and that view, we think, was erroneous. If the land which the plaintiff claimed is described as amounting to a certain quantity, and also is described as lying within certain boundaries, and if the plaintiff is entitled to the land, and the decree which he has obtained gives those boundaries, the boundaries must prevail even if the land exceeds the quantity stated in the plaint.

The case must go back to the Judge in order that possession may be given according to the boundaries specified in the decree.

The 27th April 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction (of Small Cause Court)—Suit for recovery of Rent (paid to but misapplied by Ijaradar)—Act VIII of 1869 B. C. s. 11.

Reference to the High Court by the Judge of the Small Cause Courts at Hooghly and Serampore, dated the 19th February 1872.

Brojonath Dey, *Plaintiff,*

versus

Shumboo Chunder Chatterjee and another, *Defendants.*

A suit for the recovery of money alleged to have been paid by the plaintiff to an *ijaradar* on account of arrears of rent, when the same has not been applied to the purpose for which it was given, or when a receipt for it is withheld from the plaintiff, is not cognizable by a Small Cause Court, but by a Moonsiff under Section 11 Act VIII of 1869 B. C.

Case.—ON the application of the plaintiff in suit No. 977 of 1871, in which a question of law has arisen, I have the honor to draw up a statement of the case and to refer it under Section 22 of Act XI, 1865, with my own opinion, for the decision of the High Court.

The plaintiff sued the defendant for the recovery of Rs. 331 as principal and Rs. 78-10 interest thereon, in all Rs. 409-10, on the allegation that, notwithstanding the plaintiff has paid the following amounts to the defendant No. 1, who is an *ijaradar* of the ten annas share zemindars of the village of Mohesh, in part payment of rent due by him for 1275 B. S., *viz.* :—

On 25th Assar 1276 B. S.	... Rs.	26	0	0
„ 30th „ „ „ A Burrat on Gopal Chunder Mookerjee of Ackra.	... „	300	0	0
On 1st Bhadro 1277 B. S.	... „	5	0	0
	Total Rs.	331	0	0

the sum so paid by him has not been carried to his credit in account, and the rent has been exacted from him in excess of the aforesaid amount.

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The defendant No. 1 appeared by his pleader, denied the demand, and pleaded (1) that under the provisions of Section 11 Act VIII of 1869 (an Act to amend the procedure in suits between landlords and tenants) if the sum which is alleged by the plaintiff to have been paid by him on account of rent has not been credited to him as rent or a receipt for the same withheld from him, he could bring an action for its recovery in the Moonsiff's Court; (2) that the suit cannot be entertained in the Small Cause Court; (3) that the defendant has never received the sum in question from the plaintiff; (4) that the rent has in no case been paid by the plaintiff without issuing out execution of decree against him; (5) and that the money which is alleged to have been given as *burrat* on the deceased Gopal Chunder Mookerjee had been duly carried to the plaintiff's credit on a previous occasion for arrears of rent.

The points for determination which arise in this case therefore are—

1*st*.—Whether a suit of this nature is cognizable by the Small Cause Court?

2*ndly*.—If the case is maintained in this Court, whether the plaintiff's claim for money said to have been paid to the defendant as rent is just or not?

3*rdly*.—Whether the money said to have been given as *burrat* on Gopal Chunder Mookerjee has been duly credited on a former occasion to the plaintiff in account as arrears of rent or not?

In this case the claim is for the recovery of money alleged to have been paid by the plaintiff to the *ijaradar* defendant on account of arrears of rent; if the same has not been applied to the purpose for which it was given or a receipt withheld from the plaintiff, the only course left to the plaintiff is to seek redress in the Court of a Moonsiff under the provisions of the aforesaid Section 11 of Act VIII of 1869. I think a claim of this nature cannot be entertained by a Court of Small Causes as it does not appear to fall under any description of cases cognizable by the Small Cause Court as laid down under Section 6 Act XI of 1865.

I am, therefore, of opinion that the present suit is one over which I have no jurisdiction and would accordingly dismiss the plaint with half costs subject to the decision of the High Court.

The judgment of the High Court was delivered as follows by—

Kemp, J.—We think that the view taken by the Small Cause Court Judge is correct.

The 27th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeal (by one Defendant)—Reversal of Decree (as to other Defendants)—Act VIII of 1859 *s.* 337.

Application for Review of Judgment passed by the Hon'ble Justices E. Jackson and Onoocool Chunder Mookerjee, on the 15*th July* 1871, *in Special Appeal No.* 294 *of* 1871.*

Ram Chunder Paul and another (Plaintiffs) *Petitioners,*

versus

Omora Churn Deb and others (Defendants) *Opposite Party.*

Messrs. J. T. Woodroffe and *M. M. Ghose* and *Baboos Doorga Mohun Doss* and *Rajendronath Bose* for Petitioners.

Baboos Romesh Chunder Mitter, Romanath Bose, and *Grish Chunder Ghose* for Opposite Party.

Where one of several defendants appeal not against the whole decree but only against that portion of it which affects him, and his defence in the Lower Court is not a defence common to the other defendants, the decree of the Lower Court cannot be reversed in favor of those defendants who have not appealed.

Kemp, J.—THIS is an application to review the decision of this Court, dated the 15th of July last. Of the learned Judges who passed that decision one is dead and the other is absent, and is likely to be absent for a period of more than six months. We may, however, remark that the learned Judge who wrote the decision, Mr. Justice Elphinstone Jackson, sitting with Mr. Justice Kemp, was of opinion that the learned Counsel for the petitioners has made out a sufficient case to admit this review. The review was therefore admitted, and the case has now been thoroughly argued.

It appears that the plaintiffs, who are represented by Mr. Woodroffe, are the purchasers of a talook at an auction for arrears of Government revenue, the two plaintiffs having purchased a 7-anna share of which Ram Chunder Paul took 6 annas and Nubo Kishore Sen the remaining one-anna share. On proceeding to take possession of this

* 16 W. R. page 155.

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talook, they were opposed by the defendants, and the conduct of the defendants was such that the plaintiffs very wisely abstained from attempting to take possession by force and sought redress in the Civil Courts. The defendants are very numerous, some 134 in number. Many of them did not defend the suit at all, others put in appearance in the first Court, but their defence was not a common defence. Some of them pleaded that they had no *elaka* or connection with the talook in dispute, others that they had relinquished the lands held by them in that talook, and others again that they held *mirass* rights. In short, their defence was a varying one and not in any way a common one.

The Subordinate Judge, after going into the defences of the different groups of defendants, found that their allegations had not been proved, and that they all had wrongfully combined together to resist the plaintiffs obtaining possession of their auction-purchased talook. A decree was therefore passed against the defendants in favor of the plaintiffs. With this decision all the defendants were content with the exception of one, namely, Ooma Churn Dey, and he appealed to the Judge not against the whole of the decision but against that part of it only which affected him. His allegation was that no witnesses had identified him as having taken part in the common object of the defendants to resist the plaintiffs in their attempt to take possession of their purchased talook. The Judge without going into the question whether Ooma Churn was a *mirassdar* or not, which would have materially affected the case, inasmuch as, if he had been a *mirassdar*, it would have been a fact corroborating the evidence as to his having joined in the common object, found that there was not sufficient evidence to identify Ooma Churn Dey as having taken part in the combination. As stated by the learned Counsel, Mr. Woodroffe, it would have been well if his clients had let well alone and had not appealed against the decision in favor of Ooma Churn Dey. However, being dissatisfied with the decision of the Judge, they appealed to this Court, and unfortunately for them the result was that the decision of the first Court with which all the other defendants had rested content was reversed not only in favor of those defendants who appeared and defended the suit in the first Court, but also as regards those defendants who had not appeared at all, and the plaintiffs' suit was dismissed *in toto*. To add to their misfortunes, an order was also made that they were to pay separate sets of costs to all these numerous defendants.

We think that the decision of the Division Bench of which review is now sought was wrong in law. The appeal of Ooma Churn Dey, although he was one of the defendants, was not an appeal against the whole of the decision of the Court of first instance. Section 337 enacts that if there be two or more plaintiffs, or two or more defendants, in a suit and the decision of the Lower Court proceed on any ground common to all, any one of the plaintiffs or defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree in favor of all the plaintiffs or defendants. Ooma Churn Dey did not appeal against the whole decree; he only appealed against that portion of it which affected him, and his defence in the first Court was not a defence common to the other defendants. We, therefore, think that the learned Judges were wrong in law in reversing the decree of the first Court in favor of those defendants who had not appealed.

We, therefore, reverse the former decision of this Court and restore that of the first Court with costs payable by the defendants. With reference to Ooma Churn Dey, the learned Counsel admits that he has no case as against him, and that he did not wish to take out notice against that party. It appears, however, that he has been made a party to this application, and he is therefore entitled to his costs which he will obtain from the plaintiffs including one gold mohur as pleader's fees.

The 29th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Act VIII of 1859 *s.* 81—*Attached Property made away with—Criminal Prosecution.*

Reference of the High Court by the Judge of the Small Cause Court at Goalando, dated the 17*th February* 1872.

Choitunno Paramanick and another, *Plaintiffs,*

versus

Zumeerooddee Shaikh and others, *Defendants.*

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A suit will lie for the recovery or the value of property attached under s. 81 Act VIII of 1859 and afterwards made away with by the defendants in collusion with the attaching officer, without a criminal prosecution being previously instituted against them.

Case.—THE suit is for the recovery of Rs. 30, value of 10 maunds of sugar cane molasses taken away on the 9th Chyet 1277 B. S. before judgment, but never produced before the Court or deducted from the amount subsequently decreed.

The particulars of the case, as stated by plaintiffs in their plaint, are that defendant No. 1 instituted in this Court case No. 239 of 1871 against plaintiff No. 1 for recovery of money due on a *khut*, and caused, in collusion with other defendants, 10 maunds of molasses belonging to both the plaintiffs to be attached under Section 81 of Act VIII of 1859 alleging them as the 1st plaintiff's property.

On looking into the records of case No. 239 of 1871, I find, while my predecessor presided over the Court, the 1st plaintiff made an application on the 30th June 1871, stating "that he paid to 1st defendant three "jars of molasses, valuing Rs. 38, in liqui-"dation of a debt of Rs. 39, which 1st "plaintiff owed to 1st defendant under a *khut*, "and asked him to return it to him. The "1st defendant evaded his request under vari-"ous pretences and afterwards sued him for "the money due on the *khut* without deduct-"ing the amount paid him in kind. The "1st defendant who instituted this suit, at-"tached 10 maunds of molasess, five head of "cattle, and a brass lota belonging to plaintiffs "under Section 81 of Act VIII of 1859, and "obtained an *ex-parte* decree against him. The "property thus attached was made away by "the 1st defendant with other defendants. "The 1st defendant afterwards executed the "decree for the whole amount decreed and "attached two head of cattle and one brass "lota. All the circumstances took place "when 1st plaintiff was absent from home "from 22nd Falgoon 1277 to 16th Assar "1278. He learnt these facts on his return "home and ascertained from the Court "that the 2nd defendant, a peon attached to "the Court, was entrusted with the execution "of the process of attachment issued under "Section 81 of Act VIII of 1859. He at-"tached the property before judgment but "made a return that no property was attached. "The persons in whose charge the attached "property was kept, can testify to the fact of "attachment under Section 81. He, therefore, "prayed that the Court would enter satisfac-"tion of the decree which 1st defendant ob-"tained against him, to the extent of the "money paid by him before; that the payment "to 1st defendant of Rs. 39-12 which he "deposited in the Court for satisfying the "decree may be withheld; that the property "now under attachment be made over to him, "and that he may be released from further "liability."

My predecessor, Baboo Kalee Kinkur Roy, by an order, dated 12th July 1871, recorded on the back of the aforesaid application, summoned the persons in whose charge the property attached under Section 81 was kept and rejected the prayer for withholding payment to 1st defendant; and by another order, dated 12th August 1871, called for evidence regarding the charge brought against the peon. When I took charge of the Court in September last, I found the application pending and disposed it of by ordering the petitioner to prosecute the peon in the Criminal Court.

The case now instituted by plaintiffs is for recovery of value of the 10 maunds of molasses made away by defendants. The facts disclosed by the plaint and the 1st plaintiff's application filed on the 30th June 1871 are that the 2nd defendant as peon of the Court went to execute the process under Section 81 of Act VIII of 1859, attached certain property belonging to the plaintiffs during their absence from home and that the 1st defendant in collusion with him and other defendants made away with it. This taking away of the property without accounting for it, I hold, is nothing less than felony. Therefore, I am of opinion that a case for recovery of it or its value cannot be entertained in a Civil Court without the defendants being criminally prosecuted before—*vide* Coonamull *vs.* Sarno Raur, II Indian Jurist, New Series, page 187.

Under these circumstances, I beg respectfully to solicit the opinion of the Hon'ble Judges of the High Court of Judicature on the point as to whether the case as stated above can be entertained by this Court without any criminal prosecution being held against the defendants previously.

The Judgment of the High Court was delivered as follows by—

Kemp, J.—We are of opinion that the suit of the plaintiff can be entertained.

The Small Cause Court Judge will be informed accordingly.

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The 30th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Res-adjudicata—Act VIII of 1859 *s.* 2—*Onus Probandi.*

Case No. 831 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 13*th June* 1871, *reversing a decision of the Moonsiff of Manickgunge, dated the* 31*st December* 1870.

Kalee Coomar Dutt Roy (Defendant) *Appellant,*

versus

Pran Kishoree Chowdhrain (Plaintiff) *Respondent.*

Baboos Bama Churn Banerjee and *Kishen Dyal Roy* for Appellant.

Baboos Sreenath Doss and *Doorga Mohun Doss* for Respondent.

Section 2 Act VIII of 1859 was held not to apply to a case where the present plaintiff's name was ordered by the High Court to be expunged from the list of defendants in a former suit, but, notwithstanding that order, her name by some mistake still appeared some two years afterwards in the decretal order, the *onus* being on the present defendant to show how that happened, and that the former suit was decided in her presence.

Glover, J.—THE plaintiff in this case sues to recover possession of a 10-gundah share of a zemindaree which belonged originally to one Hur Narain Roy. Hur Narain Roy had a son Prosunno Coomar, who died and was succeeded by his maternal uncle Dino Bundhoo Roy. The plaintiff purchased from Dino Bundhoo Roy. There was a suit brought by Kalee Coomar Dutt, the defendant in this case, against Jugodessuree, the widow of Hur Narain, for possession of the property after foreclosure of a mortgage. In that suit, the plaintiff in this case intervened and was made a party to the proceedings by the Lower Court. The case came up eventually to the High Court on appeal, and the High Court remanded it directing that the name of the present plaintiff should be removed from the category of defendants, the case not being one which ought to be decided in her presence, but on the contrary that the case was very much complicated from the fact of her having been allowed to put in a defence. This order was dated the 18th of July 1866. We are not shown what proceedings were taken by the Court below with reference to this order of the High Court; but when the case was again decided after the remand in September 1867, in favor of the present defendant, and which decision was afterwards confirmed in special appeal on the 14th of August 1868, we find that the plaintiff's name was then entered in the decree as one of the defendants notwithstanding the order of this Court of July 1866. After that decision, the plaintiff in that suit, the present defendant, applied to take possession of the property decreed to him, when the present plaintiff put in a petition of intervention under Section 230 of Act VIII of 1859. This petition was rejected by the Courts below and eventually, in special appeal, by this Court in January 1870, on the ground that the plaintiff was a party to the suit and therefore had no right to intervene under Section 230. On this the plaintiff brought the present suit.

The defendant contends that the hearing of the suit is barred by Section 2 of Act VIII of 1859, the point having already been heard and determined in a previous suit between the same parties, and it is also contended that the suit is barred by Section 231 of the same Act.

The first Court dismissed the plaintiff's suit on both these grounds, but the Subordinate Judge reversed that decision and sent the case back to the Moonsiff for trial on the merits.

The only question argued before us in special appeal is whether the plaintiff's suit was or was not barred by Section 2 of Act VIII of 1859. There can be no doubt whatever that her name was ordered to be expunged from the list of defendants by the order of this Court of the 18th of July 1866. The order was couched, we may remark, in particularly strong language and very many weighty reasons why it was that she should not be allowed to remain a defendant were given. No doubt, her name, notwithstanding this prohibition, does appear some two years afterwards in 1868 in the decretal order which was passed in that case after remand, and some stress was apparently laid upon the neglect of the plaintiff to take steps when that case was heard, to have the decree altered and to have her name expunged from the list of defendants according to the High Court's order; but it was explained to us, and we think reasonably enough, that after

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the order of this Court directing her name to be struck off, she had no further interest in the case and could not know whether her name had or had not been entered in the decree, and no doubt, before the defendant can take advantage of the fact of her name appearing in the decretal order, he must be prepared to show us in what way the plaintiff came again on the record as a defendant notwithstanding the absolute prohibition by this Court. Of course it may be, as suggested, that the Principal Sudder Ameen had taken new evidence to the effect that notwithstanding the original statement of facts she was in possession, and on the strength of that new evidence had made her a party to the suit, but it would be necessary to show this distinctly. The petition praying that she be made a party and the order passed upon that petition should have been filed. As it is, we have on the one side the most distinct order of this Court directing her name to be struck off from the record, and on the other side we have nothing but the bare fact of her name appearing some two years afterwards in the decretal order of this Court. There was, moreover, it appears in 1869, some action taken by the plaintiff with regard to her name being still on the record. She applied to the Subordinate Judge of Dacca, setting forth the circumstances and declaring that she had had nothing to do with the case and had not interfered with it since the order of the High Court directing her name to be expunged. Upon this, the Subordinate Judge having called for a report from his office passed an order to the effect that the fact of her name still remaining on the record should not be allowed to prejudice her, inasmuch as it appeared that her name had been allowed to remain there by some error on the part of the transcribers of the decree; and although the learned Judges of this Court, who passed the order dated January 1870, remarked that this order of the Subordinate Judge was passed without authority, and no doubt it was so, still it shows that the plaintiff was not, as it has been endeavoured to be made out, sleeping over her possible rights, but that the moment she knew that notwithstanding the order of this Court directing her name to be expunged, she still appeared in the decretal order, she at once took measures to have the mistake remedied. We think that in the face of the order of this Court, directing the plaintiff's name to be removed from the list of defendants, the *onus* of showing that, notwithstanding that order, she was for some cause or other put back upon that list and that the suit was decided in her presence, lay upon the defendant, special appellant, and he has certainly given no evidence to prove that fact. No doubt, we have been shown that her name appears in the decree of 1867, but, under the circumstances, we think that is not sufficient.

We see no reason, therefore, for interfering with the order of the Subordinate Judge which directs this case to be tried upon the merits. The special appeal is dismissed with costs.

The 30th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Estoppel—Decree (on the strength of a Kabooleut still in contest).

Case No. 1298 of 1871.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 5th August 1871, modifying a decision of the Moonsiff of that district, dated the 10th April 1871.

Ram Dhun Ghose (Defendant) *Appellant,*

versus

Ishan Chunder Ghose and others (Plaintiffs) *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Taruck Nath Dutt for Respondents.

The Lower Appellate Court was held to have been wrong in ruling that a decision of the Collector in a distraint case was conclusive and binding against the defendant as to the genuineness of a *kabooleut* when the *kabooleut* was not put in issue in that case, nor its validity or genuineness determined so as to conclude the parties; and in giving the plaintiff a decree on the strength of a *kabooleut* the genuineness of which was still in contest in a regular suit pending determination in the Civil Courts.

Kemp, J.—THE defendant, the ryot, is the special appellant. The suit was for rent of 15 beegahs 13 cottahs of land on the basis of a *kabooleut*, dated the 6th of Jeyt 1263. The arrears claimed were for the years 1275 to 1277. The defendant, the ryot, special appellant, denied the execution of the *kabooleut* and alleged that he held a much larger plot of land than that covered by the *kabooleut*, under a *mokururee* pottah of the year 1161, confirmed by a subsequent *amulnamah* of the year 1216.

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The first Court, the Moonsiff of Ghattal, gave the plaintiff an amended decree, the decretal order being that, out of the sum claimed, Rs. 22-3 annas be decreed in favor of the plaintiff on the admission of the defendant with costs in proportion; excess costs payable by the plaintiff. The plaintiff, the *talookdar*, then appealed to the Judge. The Judge, Mr. Bright, observed that the question to be determined in the case was the validity of the *kabooleut* upon which the plaintiff sues. The Judge then refers to the previous distraint case in which the plaintiff, the *talookdar*, distrained the defendant's crops for the arrears of 1276. The ryot defendant sought to set aside the distraint as illegal. The *kabooleut* in question was filed in that case, and the Judge found, and erroneously found, that the question of the genuineness of that *kabooleut* was adjudicated upon in the distraint suit, and that the Collector finding that the arrears were due to the *talookdar* dismissed the suit of the plaintiff, present defendant. The Judge then says that the present defendant instituted proceedings in the Civil Court to establish the genuineness of his pottah.

This is not a perfectly correct statement of the facts, for we find that the suit in the Civil Court which, we may observe, was instituted in June 1870, or prior to the present suit which was instituted in September 1870, was not only to establish the genuineness of the pottah, but also and most distinctly to set aside the *kabooleut* dated the 6th Jeyt 1263 which had been filed in the distraint case. The Judge then proceeds to state that the former case before the Collector was a decision upon the genuineness of the deed, and as the defendant, the ryot, had never sued to have it declared that the *kabooleut* was a false document, he, the ryot, would be bound by the Collector's decision. The Judge then proceeds to say that in the present case the plaintiff has satisfactorily proved that the *kabooleut* in question was executed by the defendant. The Judge seems to think that the oral evidence for the plaintiff was trustworthy, and that it has not been refuted by the oral evidence for the defendant; that there was no improbability in the defendant having given such a *kabooleut*; and taking the evidence in the present case into consideration with the fact that the Collector had upheld the *kabooleut*, the Judge was of opinion that the plaintiff was entitled to have it declared that the *kabooleut* was executed by the defendant. With reference to the plea of payment, the Judge held that the defendant was unable to prove that he had paid the arrears. The decision of the first Court was therefore modified, and the plaintiff was declared entitled to recover the whole of the arrears claimed with all costs of both Courts.

In special appeal, it is contended that the Lower Appellate Court was wrong in law in holding that the decision of the Collector in the distraint case was conclusive and binding against the defendant as to the genuineness of the *kabooleut*, inasmuch as the *kabooleut* was not put in issue in that case, nor was its validity or genuineness determined so as to conclude the parties; that the Lower Court was wrong in holding that the ryot, special appellant, had not sued to have it declared that the *kabooleut* was a forgery, whereas his suit No. 617 was expressly instituted to set aside this *kabooleut* upon which the present case is based; and that as that suit No. 617 is still pending on remand by this Court, it was improper for the Appellate Court to give the plaintiff a decree on the strength of a *kabooleut* which is still in contest in a regular suit; and there is also another ground that as the Court of first instance before whom the plaintiff's witnesses were examined, distinctly found, for reasons stated at length in its judgment, that they were untrustworthy and rejected the *kabooleut* on various grounds, the Lower Appellate Court was wrong in reversing that judgment and holding the *kabooleut* to be proved without in any way considering or meeting the various reasons set forth by the first Court.

We have referred to the proceedings in the distraint suit, and we are of opinion that the Judge has taken an entirely erroneous view of the decision in that case. We do not find that the genuineness of this *kabooleut* was put in issue, or that there was any trial whatever of that question. It appears that in the first instance the ryot's suit contesting the distraint was successful, and on appeal to the Collector all that the Collector found was that the ryot had not been able to prove satisfactorily his plea of payment, and the distraint was upheld. The Judge was, therefore, clearly wrong in using the decision of the Collector as conclusive and binding upon the defendant on the question of the genuineness of this *kabooleut*. There is, as contended by the pleader for the special respondent, a finding by the Judge that there is oral evidence in this case which appears to the Judge to be trustworthy and which evidence proves the *kabooleut*. How far the

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Judge may have been influenced in this opinion by his erroneous finding upon the question of the fact of the *kabooleut* having been decided to be genuine in the former suit by the Collector, we are unable to say; but we do not base our decision upon this alone. We find that in the suit brought, as already observed, in the Civil Court previous to the present suit for rent, the ryot defendant, special appellant, sued not only to establish his *mokururee* pottah but also to have it declared that the *kabooleut* which was filed by the *talookdar* in the distraint proceedings was a spurious *kabooleut*. It is admitted that that case is still pending on remand from this Court, and that the question of the genuineness of this *kabooleut* has not yet been determined by a competent Court. Now it appears to us clear that, if the defendant succeeds in that case, all that the plaintiff will be entitled to will be to retain the decree which has been passed by the first Court giving him the rent admitted by the defendant. If it should so happen that the ryot's case fails, even then we do not think that the plaintiff's remedy is in any way barred, for in the event of the ryot's suit failing, the position of the ryot defendant as holding under the *kabooleut* will be restored and the plaintiff will be entitled to claim the rent under that *kabooleut*, and any plea as to the suit being barred will be met, and we think successfully met, by the fact that the question as to whether the *kabooleut* was genuine or not was a question which was pending in the Civil Courts.

We, therefore, think that the plaintiff is not entitled to the decree which he has obtained from the Judge and that the decision of the first Court must be restored. The decision of the Judge is reversed with costs payable by the special respondent.

The 1st May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law of Succession—Joint Family—Sons of Surviving brothers—Per Capita—Presumption—Partition Deed—Bill of Sale.

Case No. 1268 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 1st July 1871, *affirming a decision of the Moonsiff of Manickgunge, dated the 14th January* 1871.

Ruttun Kristo Bosoo (one of the Defendants) *Appellant,*

versus

Bhugoban Chunder Bosoo (Plaintiff) *Respondent.*

Baboo Nulit Chunder Sen for Appellant.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Respondent.

By the rules of Hindoo succession, on the death of brothers of a joint family without issue, the sons of surviving brothers take *per capita* and not *per stirpes.*

Because in a partition deed of 1260, in the column showing the shares of the different members of the family, the name of N's son is inserted instead of N's own, it does not follow that N was dead in 1260 or that a sale alleged to have taken place in 1262 by N must necessarily be false.

Kemp, J.—THE plaintiff in this case sued to recover possession of a one-anna share in six talooks, claiming that one-anna share as his ancestral right; also of a 10-gundah share of the same talooks as the heir of Ashanund and Krishnanund, and of a further share of 6 gundahs 2 cowries 2 krants by purchase from Nityanund Bose, under a deed of sale dated the 20th of Srabun 1262. Total claim, 1 anna 16 gundahs 2 cowries 2 krants. The plaintiff alleges that he applied to the Collector under the Butwarah Law for a division of the estate, but that his co-sharers objecting, the Collector refused to make a partition and referred the plaintiff to a Civil Court to establish his right. Hence the present suit.

The defence is that neither the plaintiff nor his father Ramessur had any title as heir-at-law to any portion of the estate of Krishnanund and Ashanund, inasmuch as Ramessur, the father of the plaintiff, was not adopted by Surbessur during the life-time of Ashanund and Krishnanund.

With reference to the purchase from Nityanund, the allegation of the defendants was that a plea of purchase was a false plea, and that the defendants were in possession under a Meeras right. With reference to the 1st share claimed by the plaintiff as his ancestral right, no objection was made by the defendants.

Both Courts have given the plaintiff a decree.

Before entering into the questions raised in special appeal, we think it right to mention that from the genealogical tree filed in the case and which is not disputed, it appears that Gunga Pershad, the head of the family, had six sons, Kebul Kristo Bosoo, Raj Kristo

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Bosoo, Ramanund Bosoo, Ashanund Bosoo, Krishnanund Bosoo, and Surbessur Bosoo. Kebul Kristo Bosoo had two sons, Joy Kristo Bosoo, and Kristo Mungul Bosoo; and Kristo Mungul left a son Ruttun Kristo Bosoo, the defendant, special appellant.

Raj Kristo Bosoo had two sons, and Ramanund had also two sons, one of whom was Nityanund Bosoo, the plaintiff's alleged vendor of a 6 gundahs 2 cowries 2 krants share. Krishnanund and Ashanund died without issue. Surbessur, the sixth son, it is alleged, adopted Ramessur Bosoo, who again adopted Bhugoban Chunder Bosoo, the plaintiff.

The first ground taken in special appeal is, that the Lower Court was wrong in law in not trying the real question in the case, namely, whether Krishnanund and Ashanund predeceased Surbessur and whether the adoption of plaintiff's father took place during their life-time.

It has been urged for the respondent that this is a new point not raised in the Court of first instance or in the Appellate Court. It appears that it was raised in the written statement of the defendant, and there is a clear finding by the first Court, that the adoption of Ramessur, the father of the plaintiff, took place in the life-time of Krishnanund and Ashanund. That this point was not seriously contended before the Judge appears very clear from the second ground of appeal to him by the defendant, for in that ground it is admitted that the four brothers, that is to say, Kebul Kristo, Raj Kristo, Ramanund, and Surbessur Bosoo left seven sons. The first Court having found on the evidence that the adoption of Ramessur, the plaintiff's father, took place before the death of Krishnanund and Ashanund, and the decision of the first Court having been confirmed by the Appellate Court, and the matter not having been pressed before the Judge, we overrule the first ground of special appeal.

The next ground is, that the shares of Krishnanund and Ashanund having been divided among his brothers' sons into six shares, each succeeding *per capita* and not *per stirpes*, the plaintiff's claim to the half-anna share from Ashanund and Krishnanund cannot therefore stand.

We think there is some weight in this objection. It is very clear that Krishnanund and Ashanund would inherit each one anna out of the six annas of their father Gunga Pershad, or in the aggregate two annas of the property. Therefore, on their death without issue, the sons of the surviving brothers would take *per capita* and not *per stirpes*, and the two annas which belonged to them would be divided amongst the seven sons of the surviving four brothers who left issue. In that case, the plaintiff would not be entitled to 10 gundahs of the property or one-fourth of the estate left by Krishnanund and Ashanund, but that estate would be divided into seven shares of which the plaintiff would be entitled to one share, that is to say, to one-seventh, and not to one-fourth of the two annas as found by the Court below. But it is contended that in 1863, in a suit between Ramessur, the father of the plaintiff, and the present defendant, special appellant, it was decided that Ramessur had been in possession of this share for more than twelve years in 1863. In special appeal it is contended that the lower Court was wrong in treating that decree as evidence against the defendant in the present case, and we think that that contention is correct. That decree does not refer to the six talooks now in dispute. At the most it only refers to a very small quantity of land in some mouzahs in these six talooks. There was no dispute as to the share of Ramessur, and no decision upon that point. Therefore, by the rules of Hindoo succession, the plaintiff is clearly entitled to a share of one-seventh only in the estate of Ashanund and Krishnanund, and so much of the decision of the lower Court, therefore, must be reversed.

We now come to the last point taken in special appeal, namely, the ground which opens out the question of the purchase from Nityanund Bosoo of a 6 gundahs 2 cowries 2 krants share. Nityanund, as already observed, was the son of Ramanund. The plaintiff has put in the *kobalah*, dated the 20th Srabun 1262, which has been found by both Courts to be proved on the evidence. In special appeal it is contended that because in the partition deed, dated the 12th Kartick 1260, filed by the plaintiff in this case, in the column showing the shares of the different members of the family, the name of Manick Chunder Bosoo, the son of Nityanund, is inserted in lieu of that of his father, it is therefore clear that Nityanund was dead in 1260, and the sale which is alleged to have taken place in 1262 must necessarily be false. We do not think that this follows as a natural consequence of the name of Manick Chunder being inserted in that deed instead of the name of his father Nityanund Bosoo. The *kobalah* has been put in and

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duly proved, and on the finding of fact as to the genuineness of the *kobalah*, we think we should be wrong in special appeal, simply because the name of Manick Chunder in a joint family like this appears instead of that of his father Nityanund, to set aside the concurrent finding of the two Courts below on a question of fact. We, therefore, dismiss the special appeal of the defendant with reference to the findings as to the adoption of Ramessur, and as to the purchase from Nityanund, and decree his appeal with reference to the share which the plaintiff takes as heir of Krishnanund and Ashanund, and modify the decision of the Court below to this extent by declaring that the plaintiff is only entitled to one-seventh of the estate of Krishnanund and Ashanund and not to one-fourth.

The costs of this appeal will be paid by the special appellant as he has failed in the main point in the case.

The 1st May 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Interest—Costs.

Case No. 85 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Additional Subordinate Judge of Dacca, dated the 23rd December 1871.

Bharut Chunder Sircar and others (Judgment-debtors) *Appellants,*

versus

Gouree Pershad Roy (Decree-holder) *Respondent.*

Baboo Kashee Kant Sen for Appellants.

Baboo Nullit Chunder Sen for Respondent.

Costs in the suit carry interest unless the contrary is distinctly stated in the decree.

Kemp, J.—THE question raised in this appeal is whether the costs in the suit are to bear interest or not. We may observe that this point was not raised below and has been raised for the first time in this Court. The decree is silent as to awarding interest on costs, but it has been the practice of this Court to award interest on costs on the ground that costs generally carry interest without any distinct order to that effect being required. There are two decisions to that effect to be found in Volume I, Weekly Reporter, Miscellaneous Rulings, page 1, and in Volume II, Miscellaneous Rulings, page 21. There is no ruling that we can find, nor has any such ruling been brought to our notice which rules otherwise, and the ruling of the Full Bench which has been quoted by the pleader for the appellant is, we think, inapplicable to the facts of this case. The question there decided was whether interest could be awarded on the principal sum decreed or on the subject-matter of the suit when the decree is silent on that point, and the Full Bench decided that it could not, but there was no ruling as to interest on costs. Moreover, interest on costs is not of the same character as interest on the subject-matter of the suit. Costs, as observed by Mr. Justice Glover in the course of the argument, are advanced by parties from time to time during the progress of the suit ; and when a party succeeds in a case, he is, we think, entitled to interest upon any sums duly and fairly spent by him in litigation. We hold, therefore, that, as a general rule, unless it is distinctly stated in the decree that no interest is to be given on the costs, we ought to award them. The appeal is dismissed with costs.

The 2nd May 1872.

Present :

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Plea of Limitation—Defendant's Possession (in his own right and as farmer of Plaintiff)—Decree (for lands unascertained).

Cases Nos. 1287 and 1288 of 1871.

Special Appeals from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 21st August 1871, *affirming a decision of the Sudder Moonsiff of that district, dated the 29th July* 1870.

Nuthoo Sigh and others (Defendants) *Appellants,*

versus

Ram Buksh Singh (Plaintiff) *Respondent.*

Baboo Kalee Kishen Sen and *Chunder Madhub Ghose* for Appellants.

M. C. Gregory and *Baboo Boodh Sen Singh* for Respondent.

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The plea of limitation was held to fail in a case where it was impossible to distinguish the defendant's possession in his own right from his possession as farmer of the plaintiff.

But the Court refused to allow a decree to stand which gave to the plaintiffs something (*i. e.* lands whose boundaries were) unascertained and which might after all not be ascertainable.

Jackson, J.—THESE two appeals have been argued almost simultaneously, and both cases have been disposed of in a single judgment by the Moonsiff as well as by the Lower Appellate Court. The plaintiffs are mainly, it seems, the same parties, though there are some one or more concerned in one case who are not concerned in the other. In suit No. 1288 the defendants are Lalljee Singh and others, and in suit No. 1287 the defendants are Nuthoo Singh and others. In both cases the plaintiff sued to recover certain specified parcels of land, being portions of putnees, described and set out with particularity in the *khusrah* of the Collectorate.

The defendants set up the plea of limitation, and they moreover denied the plaintiff's title. It will be more convenient to deal with the case in which Lalljee and others are defendants, namely appeal No. 1288, first. The plaintiffs have had decrees in their favor in both suits. As to the defendant Lalljee Singh, the plea of limitation must fail, because the defendants who, it appears, hold other lands in the vicinity, also held in farm some share of the plaintiffs, and therefore it does not lie in their mouths to say that they have been holding adversely to the plaintiffs. If the lands now in dispute be found to belong to the plaintiff they must be given up, because it would be impossible to distinguish the defendant's possession in his own right from his possession as farmer of the plaintiff. But there is another and a very serious objection to the judgment of the first Court which has been confirmed by the Subordinate Judge.

The decree as we read it, taken by itself, has the appearance of a final decree, for it purports to give the plaintiff the parcel of land claimed according to the boundaries and the description given in the *khusrah*. But it is manifest, on looking to the judgment, that the Court was unable to ascertain before the decision of the suit what were the precise position and boundaries of the land claimed. In fact, by the terms of the judgment, the Court expressly reserves the ascertainment of these particulars by directing that an Ameen shall be sent after the rainy season to measure and ascertain the boundaries of the land. Therefore the decree, although it appears final, is not so, and Mr. C. Gregory, who appears for the respondent, is unable to give any explanation of how the decree and the judgment do not conform.

There must have been some error on the part of the officer who drew up the decree, because it is not in accordance with the judgment. We cannot allow a decree to stand which gives to the plaintiff something unascertained, and which might after all not be ascertainable. This is not like a case where an account is ordered to be taken, or where wassilat has to be calculated; but it is a suit for a certain specified parcel of land, and the decree must define the boundaries.

This case (No. 1288) in which Lalljee Sing is concerned must therefore go back to the first Court, the decree of the Lower Courts being set aside, with direction that the necessary enquiries may be completed and a final decree drawn up.

In the other case No. 1287, in which Nuthoo Singh is defendant, the ground on which the plea of limitation ought not to prevail in the other case does not exist. Nuthoo Singh and the others deny that they ever held a share in the plaintiff's land, and therefore the decision in Lalljee's case cannot apply to this case. The case must go back to the Lower Appellate Court in order that it may determine the plea of limitation on its merits. If the determination be in favor of the defendants, then there is an end of the suit; but if it be determined in favor of the plaintiff, then the case will go to the first Court with the like directions as in the other case.

Markby, J.—I concur in the order of remand.

The 2nd May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction (Plea of want of)—Conflicting Claims to Land—Appeal to Judge—Special Appeal—Benamee and Equitable liability.

Cases Nos. 1310 and 1313 of 1871 under Act X of 1859.

Special Appeals from a decision passed by the Judge of Beerbhoom, dated the 22nd June 1871, *reversing a decision of the Deputy Collector of that district, dated the 28th September* 1870.

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Hurish Chunder Roy (Defendant) *Appellant,*

versus

Poorna Soonduree Debee (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Sreenath Doss and *Rash Beharee Ghose* for Respondent.

Where a Deputy Collector determined a question relating to an interest in land as between parties having conflicting claims, although in a former part of his decision he was of opinion that a Revenue Court was not competent to entertain and decide the question, the appeal was held to lie to the Judge; but as this objection was not taken in the Lower Appellate Court, the High Court declined to entertain it in special appeal.

The Revenue Courts were held not competent to try a question of *benamee* and equitable liability arising out of a suit for rent where the relation of landlord and tenant was clearly and distinctly denied.

Kemp, J.—THESE two appeals No. 1310 and No. 1313 have been heard together and one decision will govern the two cases. We have had the advantage of a very able argument by the pleaders on both sides. The suit was brought against the defendant No. 2, special appellant, for arrears of rent. The allegation was that there is a *mowrosee jote* in *mouzah* Dourka originally held in the name of one Shama Churn Mookerjee. The plaintiff Poorno Soonduree Debee is the purchaser of this *jote*, or rather her husband purchased it *benamee* in her name. The allegation of the plaintiff is that in this *jote* in which the defendant is also a co-sharer, 1 beegah 16 cottahs of land was taken in lease by the defendant No. 1 Gour Soondur Mookerjee and another at a jumma of Rs. 4-4 annas on a *kabooleut* executed by them Gour Soondur and another, but that the real beneficial owner was the defendant No. 2, Hurish Chunder Roy. The suit is for the rent of the two holdings.

The defendant Hurish Chunder Roy denied the relationship of landlord and tenant; he also denied the execution of the *kabooleut* and alleged that the *mowrosee jote* was the joint property of the defendant and of the plaintiff's husband Protab Chunder.

The first Court, the Deputy Collector, was of opinion that the question could not be decided by the Revenue authorities; but he went further, and although he held that he had no jurisdiction to try the case, went into the merits and found that there was nothing to prove that Hurish Chunder Roy executed the *kabooleut.* He accordingly dismissed both suits.

On appeal, the Judge, Mr. Craster, on the question whether the Revenue Courts had power to entertain this suit, after commenting upon the case of Prosunno Coomar Roy Chowdhry, decided by the Full Bench, to be found in Volume VIII. Weekly Reporter, page 428, was of opinion that that ruling did not apply to the circumstances of the present case. The Judge was of opinion that this case was one which the Revenue Courts were fully competent to try, and he refers, in support of his opinion, to the case of Bipin Beharee Chowdhry *vs.* Ram Chunder Roy, reported at page 12, Volume XIV, Weekly Reporter, and also to a case to be found in Volume IX, page 71. The Judge then says that it is true there is a decision in Volume XI, Weekly Reporter, in the case of Kishen Buttee Misrain *vs.* Hickey, at page 406, which conflicts with the decision cited above, but that he prefers to be guided by the decision first cited by him. He, therefore, held that the Revenue Court was competent to entertain the question. On the merits he found that Hurish Chunder was in possession and that there was sufficient evidence to warrant the Court in concluding that he was the tenant actually in possession of the land and liable for the rent claimed. The decision of the Deputy Collector was therefore reversed in both cases and the appeal decreed.

The defendant is the special appellant, and the first ground raised by him in special appeal is that the Judge had no jurisdiction to try the appeal, inasmuch as the decision of the Deputy Collector did not determine any question relating to a title in land or to some interest in land, and therefore that, under Section 153 of Act X of 1859, there was no appeal to the Judge; that the appeal, if any, from the decision of the Deputy Collector, which was a decision on a question of whether rent was due or not, would lie to the Collector, and therefore that, on the point of jurisdiction, the Court ought to set aside the decision of the Judge.

The second point is that the Judge was wrong in holding that the question of *benamee* and equitable liability arising therefrom, as raised in the present case, could be determined by a Revenue Court under Act X of 1859; and lastly, on the merits, that the mere fact of the defendant having had possession of the land which he claimed to hold directly under the proprietors and not as tenant under the plaintiff, it was not a possession which entitled the Court below to assume that the special appellant was liable to pay the rent claimed by the plaintiff.

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On the first question raised, namely, the question of jurisdiction, we may observe that this objection was not taken in the Lower Appellate Court. Moreover, we are of opinion that a question relating to an interest in land as between parties having conflicting claims, was determined by the judgment of the Deputy Collector, for, although the Deputy Collector in the first part of his decision was of opinion that a Revenue Court was not competent to entertain and decide the question, he did really enter into and determine it.

The question at issue in the first Court, and which was determined by that Court, was whether Hurish Chunder Roy was a co-sharer of the plaintiff, or whether he was a tenant subordinate to the plaintiff. Therefore, we think an appeal did lie to the Judge, but we are further of opinion that this objection not having been taken in the Lower Appellate Court, we ought not to entertain it at this stage of the case, and we are supported in this opinion by a decision reported in Volume I, Weekly Reporter, page 279, and by a late decision in Volume II, Bengal Law Reports, page 42, Appendix,* in which the judgment was delivered by Mr. Justice Markby. We therefore over-rule the plea of want of jurisdiction to hear this appeal by the Judge.

Then comes the question whether the Revenue Courts were competent to entertain this question. The Judge appears to rely upon the decision in the case of Bipin Beharee Chowdhry and on a case to be found in Volume IX, Weekly Reporter, page 72. We will take the case of Bipin Beharee Chowdhry, first. There can be no doubt that, if the decision of the Full Bench, which is to be found in Volume VIII, applied to the circumstances and facts of the case of Bipin Beharee Chowdhry, the majority of the Judges who decided the case of Bipin Beharee would have felt themselves bound by the decision of the Full Bench, but those learned Judges in their judgment show, and we think very clearly show, a clear distinction between that case and the case decided by the Full Bench. In the case of Bipin Beharee Chowdhry there was no denial of the relationship of landlord and tenant, while in the present case there is a distinct denial of such relationship on the part of Hurish Chunder. In the present case, there is a repudiation of liability by the defendant, and in the case of Bipin Beharee, on the contrary, liability was, as observed by Sir Barnes Peacock, eagerly claimed by all the defendants. We think, therefore, that, as laid down in the decision in Bipin Beharee's case, there is a clear distinction between that case and the case decided by the Full Bench.

We now come to the decision in Volume IX on which the Judge has also relied. The facts and circumstances of that case appear to us to be entirely different from the case before us. That case was decided by one of the Judges who sat on the Full Bench when the decision to be found in Volume VIII was passed. We allude to Mr. Justice Macpherson. That learned Judge observes that his decision in Volume IX agrees generally with the principles laid down in the Full Bench decision in Volume VIII. He observes also that credit was not given to the real lessee, but to the person in whose name the lease was granted; the Judge had accepted the finding of the Deputy Collector that the respondents were the real lessees in possession, and if so, observed Mr. Justice

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* The 5th March 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Plea of Jurisdiction—Waiver of.

Case No. 581 of 1868.

Special Appeal from a decision of the Officiating Judge of Midnapore, dated the 18th December 1867, affirming a decision of the Principal Sudder Ameen of that district, dated the 18th June 1867.

Mahomed Hossein (Defendant) *Appellant,*

versus

Rajah Akhoya Narain Paul (Plaintiff) *Respondent.*

Mr. E. Twidale for Appellant.

Baboo Mohendro Lall Shome for Respondent.

Where defendant objected to the jurisdiction in the first Court, but took no objection to the jurisdiction in the Lower Appellate Court, the High Court considered the objection as waived.

Markby, J.—In this case the plaintiff, having borrowed money from the defendant, gave his zemindaree in farm to the defendant, who was to re-imburse himself from the proceeds, paying to the plaintiff Rs. 300 a year as *malikana.* This suit is brought to recover some arrears of that allowance. The two Lower Courts, in this case, have given a decision in favor of the plaintiff, and the only ground on which we are asked to set that decision aside, is that the Civil Court has no jurisdiction to try the case. The defendant objected to the jurisdiction in the first Court, but took no objection to the jurisdiction in the Lower Court of appeal. Without determining the question whether the Civil Court or the Revenue Court is the proper tribunal in this case, I think that, under such circumstances, we ought not to set aside a decision which we must presume to be correct on the merits. I think that for the purpose of this appeal, we ought to consider the objection to the jurisdiction as waived. Whether or not the defendant can take this objection in any other form, it is not necessary to say. I think the appeal ought to be dismissed with costs.

Jackson, J.—I concur in this judgment.

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Macpherson, the relation of landlord and tenant existed between the plaintiff and them, and they were liable for the rents, unless there was a special contract to the contrary, that is to say, unless there was a special contract, that the person whose name was used should alone be liable. Obviously that is a case that has no application whatever to the facts and circumstances of the present case.

We now come to the Full Bench decision to be found in Volume VIII in the case of Prosunno Coomar Paul Chowdhry *vs.* Koylash Chunder Paul Chowdhry. The learned Chief Justice in that case observed that it was never the intention of the Legislature to empower the Collector to try questions relating to rent depending upon equitable rights and liabilities arising from circumstances other than those of the relationship of landlord and tenant. The relationship of landlord and tenant is clearly and distinctly denied here; and the question which has been gone into is a question which, under the Full Bench ruling in Volume VIII, the Revenue Courts are not competent to entertain.

In a case which is to be found in Volume XI, Weekly Reporter, page 406, and which was passed subsequent to the Full Bench ruling in Volume VIII, the very question which is now raised before us was clearly raised. The learned Judges who decided that case, Justices Glover and Mitter, observe that, assuming that the *kabooleut* upon which the action was based in that case was executed by the defendant No. 1, a further question still remained, namely, whether the defendant No. 2 was the party beneficially interested in the lease, and they held that that was a question which was not intended by the Legislature to be tried by the Revenue Courts, and that the point had already been set at rest by the Full Bench decision in Volume VIII. These are precisely the facts and circumstances of the present case: if we assume that the *kabooleut* executed by the other defendant is genuine, there still remains the question whether the defendant before us, the special appellant, was the party beneficially interested in the lease or not, and that is a question which the Judges held was not intended by the Legislature to be tried by the Revenue Courts as settled by the Full Bench decision in Volume VIII.

We think that this case clearly falls within the purview of the Full Bench decision, and without going into the merits of the case, for it is unnecessary to do so under the circumstances, we reverse the decision of the Judge and dismiss the plaintiff's suit with costs of all the Courts with interest.

The 4th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Possession—Compromise—Dispossession—Cause of Action—Limitation.

Case No. 1351 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 2nd September 1871, *reversing a decision of the Subordinate Judge of that district, dated the 24th August* 1869.

Nobin Chunder Roy Chowdhry (Plaintiff) *Appellant,*

versus

Radha Pearee Debia Chowdhrain (Defendant) *Respondent.*

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellant.

Baboos Unnoda Pershad Banerjee and *Hem Chunder Banerjee* for Respondent.

Where possession of the lands in dispute had been transferred by defendant to plaintiff under a deed of compromise,—HELD that every subsequent interference on he part of the defendant with the plaintiff's possession of the lands in question must be considered as constituting a fresh cause of action, with a limitation of 12 years from the date when that cause of action arose.

Mitter, J.—IT is quite clear that the judgment of the Lower Appellate Court in this case cannot be sustained.

The plaintiff is the proprietor of a village called Tumbulpore.

The defendant is the proprietor of a neighbouring village called Chaola.

It appears that in the year 1861 the present plaintiff sued the present defendant for possession of certain lands which he alleged appertained to his estate (Tumbulpore), and for the correction of a survey map.

An Ameen was deputed to hold a local investigation in the case, and on certain lands being demarcated by him, both parties appeared before him through their duly constituted agents, and entered into a compromise, most full and precise in its terms, by which possession of certain lands amounting to 13 bissees and odd drones was transferred by

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the defendant to the plaintiff. The deeds of compromise were regularly filed in Court, and in those deeds it was distinctly stated that one party had received possession, and the other relinquished it. Upon this a decree was passed in favor of the plaintiff in terms of the compromise. Sometime afterwards, a dispute again arose between the parties which led to the institution of certain proceedings under Section 318 of the Criminal Procedure Code, and the Magistrate being of opinion that the defendant was in *de facto* possession of the property, ordered her to be maintained in possession.

The plaintiff has therefore brought the present suit to recover possession of the lands which formed the subject-matter of the compromise in the previous suit, and the only ground on which the Lower Appellate Court has thrown out his case is that the suit is barred by the law of limitation.

We are of opinion that this decision is erroneous in law. It is beyond all question that possession of the lands now in dispute had been transferred by the defendant to the plaintiff under the deed of compromise above referred to; and it therefore follows that every subsequent interference on the part of the defendant with the plaintiff's possession of the disputed lands must be considered as constituting a fresh cause of action, and if the suit is brought within 12 years from the date when that cause of action arose, no question of limitation would arise in the case. The suit is admittedly brought within 12 years from the date of the above compromise; and in the absence of any evidence to the contrary, we must take it for granted, upon the statements of the parties themselves, that possession was actually relinquished by the defendant in favor of the plaintiff in the manner and on the date mentioned in the deed of compromise. That being so, the plea of limitation cannot be sustained; and as no other question remains to be decided with reference to the validity of the plaintiff's claim, we think it unnecessary to remand the case for further investigation.

We accordingly reverse the judgment of the Lower Appellate Court, and restore that of the first Court, the defendant being liable to pay to the plaintiff all the costs of this litigation.

The 6th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Sale in Execution—Rights of Purchaser—Appeal—Reversal of Decree against a Party not an Appellant.

Case No. 921 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 1st May 1871, reversing a decision of the Subordinate Judge of that district, dated the 24th June 1870.

Lalla Ram Surun Lall (Plaintiff) *Appellant*,

versus

Mussamut Lokebas Kooer and others (Defendants) *Respondents*.

Baboo Mohesh Chunder Chowdhry for Appellants.

Mr. C. Gregory, *Moonshee Mahomed Yusoof*, and *Baboo Boodh Sen Singh* for Respondents.

There is no authority for the proposition that the purchaser, at a sale in execution of a decree, of the right, title, and interest of the judgment-debtor, acquires by that purchase not merely the right, title, and interest of the judgment-debtor, but any right which the judgment-creditor might have to set aside or question the validity of any deed which had been previously made, even it might be by the judgment-debtor himself.

An Appellate Court has no power to reverse the decision of the Lower Court as regards a party who has not appealed.

Couch, C. J.—WHAT is really contended for on behalf of the special appellant in this case is, that the plaintiff, who was the purchaser at a sale in execution of a decree of the right, title, and interest of the judgment-debtor, is to be considered as having acquired by that purchase, not merely the right, title, and interest of the judgment-debtor, but any right or title which the judgment-creditor might have to set aside or question the validity of any deeds which had been previously made, even it might be by the judgment-debtor himself.

We think that is a proposition which cannot be supported, and we are not aware of any decision which can be quoted for it.

In the present case, the Lower Courts have gone very carefully in tothe question, whether those *mokururee* instruments were actually executed, and it is found that they were. It is also found that there was a consideration for them, although it is said that possibly the consideration might not have been an adequate one. It may well be, if a creditor had been suing, that the defendants would

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have been bound to produce evidence of the consideration, and to show that the transaction was one which would be good against creditors. But that is not the case here; the Lower Courts have found quite sufficient to show that it was a real transaction, and that there was a consideration for it, although it is not clear what the consideration was, whether it was so ample as to have been sufficient against the creditors. We think that is a question for the Lower Courts to determine, and they have properly determined it. And supposing that the Judge of the Appellate Court was wrong in giving effect to the decree of the High Court, it is clear, upon his judgment, that he thought there was quite sufficient to justify his decision, if that had been put aside altogether, and that he would have come to the same conclusion if there had been no such decree.

We think there is no ground shewn in special appeal for interfering with the decision appealed against. In fact, unless the proposition which we mentioned can be made out, that the plaintiff was put in the position of the creditors, and bought the rights of the creditors, there is no ground whatever for this appeal. That not being shown, and not being in our opinion the law, the appeal, so far as the two *mokurureedars* are concerned, must be dismissed with costs in proportion to their interest.

But with respect to Gokool, the *ticcadar*, there seems to have been a mistake. He not having appealed, the Judge had no power to reverse the decree of the Lower Court as regards him. The result, therefore, is that the decree appealed against must be altered by omitting that part of it which relates to Gokool, and to the share which belonged to him, and he must pay the appellant's costs to the extent of his share.

The 6th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Prohibitory Order—Execution—Payment of money into Court—Jurisdiction.

In the matter of

Maharaj Coomar Kishen Pertaub Sahee, *Petitioner*,

versus

Chowtarinee Sree Bhowya Debya and others, *Opposite Party*.

Mr. R. T. Allan for Petitioner.

Baboo Rash Beharee Ghose for Opposite party.

In execution of a decree against B, the Judge made an order requiring petitioner to pay into Court 700 rupees out of the monthly allowance of 1,000 rupees due from the estate of the petitioner to B, in the first instance from August to November 1871, and then month by month; petitioner objected that the allowance due from his estate to B had been paid up in advance from October 1870 to November 1871, but the Judge upheld his former order and directed petitioner to pay into Court the allowance for August and September, and thereafter monthly. HELD that the Judge was only competent to dismiss the application or decline to set aside the prohibitory order; but that he was not justified by any provision in the Code of Civil Procedure in making an order that petitioner should pay the money into Court; and his order was accordingly set aside as illegal.

EARLY in 1871, the Judge of Sarun made an order upon the petitioner (the Maharajah of Hutwa) which was in the nature of an order of attachment, in a case of execution of decree against one Beerpertab Sahee, requiring him to pay into Court the sum of 700 rupees out of the monthly allowance of 1,000 rupees due from the estate of the Maharajah to Beerpertab Sahee,—in the first instance for the months of August to November 1871, and then month by month.

The Maharajah objected by a petition that the allowance due from his estate to Beerpertab Sahee had been paid up in advance from October 1870 to November 1871, both months inclusive. The Judge thereupon (on the 25th September 1871) upheld his former order, and directed the Maharjah to pay into Court, on the 30th September 1871, the sum of 1,400 rupees, the allowance for August and September, and thereafter 700 rupees month by month. From this last order the Maharajah filed a petition of Miscellaneous Regular Appeal. But inasmuch as the applicant was not a party to the suit in which the decree was passed, it was held that he could not come up to the High Court in appeal from the order passed by the Lower Court; and his application was rejected, on the 2nd February 1872, by Mr. Justice Loch.

The applicant now came up by way of petition, alleging that, forasmuch as previous to the issue of any *purwannah* or prohibitory order from any Court of Justice, petitioner had actually paid and advanced to Beerpertab Sahee, the judgment-debtor, the full amount of allowance to which he was entitled from October 1870 to 30th November 1871, the order of the Judge of Sarun directing petitioner to pay into Court, on 30th September 1871, the monthly allowance for August and September 1871, was opposed to law and

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justice, and ought to be reversed; that, at the date of such *purwannah* being issued, there was nothing due or owing to the said Beerpertab Sahee, and consequently the decrees of the several decree-holders could not operate on the monthly allowance of the judgment-debtor, the same having been already paid by petitioner; that petitioner presented a petition of objection to the Judge in respect of execution of the decrees of the decree-holders, but that the Judge, without having regard to such petition of objection, in which he stated that he had paid the full amount of allowance up to 30th November 1871, and had filed in the suit of Monessur Doss, decree-holder, in *decreejaree* case No. 10 of 1871, a receipt of the judgment-debtor for such payment, passed an order requiring petitioner to pay over again the allowance for August and September. Petitioner, therefore, prayed for a rule to be issued directed to the said decree-holders to show cause why the order of the Lower Court, bearing date the 25th day of September last, should not be set aside on the ground of the same being illegal and irregular and in excess of its jurisdiction, and that in the meantime all further proceedings in respect of the said order of the 25th September last be stayed; and, further, that precept be issued directed to the Judge requiring him to cause notice of this order to be served on the said several decree-holders whose names are specified in his said order, as entitled to participate in the money directed to be paid into Court, but which petitioner had already paid.

Couch, C. J.—In this case, a prohibitory order was issued in April 1871, and served on the 26th of April. It might be that if the Rajah had, as he alleged, paid the year's allowance, and, consequently, at the time of the service of the prohibitory order, there was no debt in existence, he might have taken no notice of that order; but, considering what is the practice of the Courts in the Mofussil, it would not have been altogether wise to have done that. It might have been said that he was admitting by his conduct that there was in fact a debt existing at that time to which the order would apply. He, therefore, appears, in May, to have made an application to the Judge to set aside the prohibitory order on the ground that there was no debt.

The Judge seems to have entered into the question whether there was a debt or not. He does not appear to us to find that the money had not been paid as the Rajah alleged, but he seems to have considered that because there had been a declaration by the High Court that this allowance was subject to attachment, the Rajah had no business to pay it at all, and that it must be considered as an evasion or a device to defeat the creditor.

Now, strictly speaking, until the decree-holder in this case had served the prohibitory order, the Rajah was not bound to pay any attention to his claim. The Judge, when he came to his conclusion, whether on good grounds or not, is immaterial, should have said, "I dismiss the application; I decline to set aside the prohibitory order;" but instead of doing that, he proceeded to make an order that the Rajah should pay the money into Court. That is an order which was not justified by any of the provisions in the Civil Procedure Code—an order which was illegal, and cannot be allowed to stand.

The rule must, therefore, be made absolute, and the order of the 25th of September 1871 must be set aside; and, as there has been an appearance here by the opposite party and an attempt to support this illegal order, the petitioner must have his costs of this application, which we fix at 32 rupees.

The 8th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Relinquishment—Non-cultivation—Ancestral Jote—Minority of Holders.

Case No. 1324 of 1871.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 26th July 1871, reversing a decision of the Moonsiff of Amdubora, dated the 18th November 1870.

Radha Madhub Pal and another (Plaintiffs) *Appellants,*

versus

Kalee Churn Pal (one of the Defendants) *Respondent.*

Baboo Nil Madhub Sen for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

The non-cultivation of a small portion of an ancestral jote by the admitted holders for one year owing to their minority, does not amount to relinquishment as laid down in 6 W. R., p. 67.

Kemp, J.—This was a suit for possession of 5 beegahs 6 cottahs of land out of a jote

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of 13 beegahs odd cottahs. The plaintiffs allege that the land in dispute with the remaining portion of the jote was obtained by their great-great-great-grandfather by a pottah in the year 1208 ; that, on the death of the plaintiff's father, which took place in 1265 Pous, the plaintiffs remained in possession for two years and were then forcibly turned out by the defendants in collusion with the zemindar.

The defendants admitted that the lands are the ancestral jote lands of the plaintiffs' ancestors, but set up a relinquishment by the plaintiffs and pleaded that the zemindar, after that relinquishment, had settled these lands with them, and that they are in possession under that settlement.

The first Court found that the plaintiffs were in possession after the death of their father for two or three years ; that during their minority and owing to their inability to cultivate the lands in dispute for one year, the defendant, in collusion with the zemindar, dispossessed them. The first Court, therefore, gave the plaintiffs a decree.

On appeal, the Judge has found that there is proof to the effect that, for a period of at least one year prior to the case of the defendant, the plaintiffs did not cultivate the lands in dispute. The Judge, therefore, without going further into the case, has applied the principle laid down in the case of Muneerooddeen, reported at page 67 of Volume VI, Weekly Reporter, and found that the plaintiffs had relinquished the lands in dispute, and that therefore the zemindar was justified in letting them to the defendant. The suit was therefore dismissed. We may observe in the first place that the first Court found to the effect that the plaintiffs neglected to cultivate a portion of the jote for one year owing to their minority, and on this finding there is no appeal made to the Judge. In the case quoted in Volume VI in which Muneerooddeen was the plaintiff, appellant, it was found that for some years before the occupation of the land by the plaintiff the defendant in that case had run away, or in fact had ceased to occupy the land, and the Judges therefore found that, when a cultivating ryot goes away and neither cultivates nor pays rent, he must be held to have wholly relinquished the land. Now in this case the plaintiffs are the admitted holders of an ancestral jote consisting of some 13 beegahs odd cottahs ;—the lands in dispute only form a portion of that jote ; the plaintiffs are still residing on the land and are cultivating the remaining portion of the jote. We do not think, therefore, that the circumstances of the case of Muneerooddeen apply to the present case at all, for in Muneerooddeen's case the tenant left of his own accord and did not pay rent, and he neglected to cultivate for several years. There is also, as already observed, the finding of the first Court on the evidence that the lands were left uncultivated owing to the inability of the plaintiffs to cultivate them for one year during their minority, against which finding no appeal was preferred. We, therefore, think that the Judge was wrong to apply the principle laid down in the case of Muneerooddeen to this case, the circumstances of which are, as shown above, altogether different.

We restore the decision of the first Court and reverse the decision of the Judge with costs payable by the special respondent.

The 8th May 1872.

Present :

The Hon'ble F B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1869 *B. C. s.* 102—*Suit for Rent below* 100 *Rupees—Special Appeal.*

Cases Nos. 1289 and 1290 of 1871.

Special Appeals from a decision passed by the Judge of Dacca, dated the 25*th July* 1871, *reversing a decision of the Moonsiff of Lessragunge, dated the* 30*th May* 1871.

Hurry Mohun Mozoomdar (Plaintiff) *Appellant,*

versus

Dwarkanath Sein and another (Defendant) *Respondent.*

Baboos Hem Chunder Banerjee and *Lullit Chunder Sein* for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Where, in a suit for rent below 100 rupees, the Judge decided the case solely on the want of proof of relationship of landlord and tenant between the parties and especially avoided coming to any decision as to right and title to the land or as to any interest in land, HELD that the case fell under s. 102 of Act VIII of 1869 B. C., and that no special appeal lay to the High Court.

Glover, J.—A PRELIMINARY objection is taken by the vakeel for the special respondent to the effect that there is no appeal to this Court from the decision of the Judge

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under the provisions of Section 102 of Act VIII of 1869, Bengal Council. There is no doubt that the amount sued for was under 100 rupees, and the question is as to whether the Court below having decided the question of rent as between the landlord and tenant, decided at the same time any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, for, if they have done any of these things, an appeal would lie. An objection was made by the vakeel for the special appellant to the effect that this Section would take away from the Judge the power to entertain an appeal from the decision of the Court of first instance, and that the judgment of the Moonsiff ought therefore to stand. This we think is a wrong view of the question. The words of the Act are—"Nothing in this Act contained "shall be deemed to confer any power of "appeal in any suit tried and decided by a "District Judge originally or in appeal." The words "or in appeal" seem to make it quite clear that, whatever may be the judgment of the Court of first instance, if the Judge in appeal shall decide a claim to rent as between two parties, and in that case shall not decide parenthetically any question relating to title to land or to any interest in land, that judgment would not be open to special appeal in the High Court.

On the substantial question before us, we find that the Judge did not try any such question relating to a title to land or to any interest in land; on the contrary, his judgment shows very clearly that although, to use his own words, there was a mass of documents filed with the case as if it were a regular civil suit and as if he had to decide on the merits between the two contending parties, the contending parties being the plaintiff and the intervenor, who each had a *baenamah* as purchaser in execution of a decree, he decided only this point namely that there was no proof of any agreement between the plaintiff and defendant, nor any proof of payment of rent by the defendant to the plaintiff at any former time, nor any such plain relationship of landlord and tenant as would justify the Court in dispensing with positive proof. It seems to us that the Judge specially avoided coming to any decision as to right and title to the land or as to any interest in land. He decided the case solely on the want of proof of relationship of landlord and tenant between the parties.

It appears to us, therefore, that the provisions of Section 102 apply to this case, and that no special appeal lies to this Court. The preliminary objection must therefore be allowed and the special appeal dismissed with costs.

The 8th May 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution of Decree—Possession of undefined Share of Ijmalee Property.

Case No. 175 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 7th July 1871, *modifying a decision of the Moonsiff of Naraingunge, dated the* 19*th December* 1870.

Prosunno Coomar Dutt and others (Defendants) *Appellants,*

versus

Sreemutty Addessuree and another (Plaintiffs) *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Doorga Mohun Doss and *Grija Sunkur Mojoomdar* for Respondents.

A decree for exclusive possession of a plot of land of which the judgment-debtors are not the sole owners, is incapable of execution, when the shares of the several shareholders has not been exactly defined, and no partition has taken place.

Glover, J.—THIS case is closely connected with Special Appeal No. 1309 of 1871 just decided. In this suit the plaintiffs claim the exclusive possession of plot No. 1 for building purposes, the ground of their claim being that the principal defendant's father had taken possession of a portion of the *ijmalee* property with the plaintiffs and other shareholders' consent; and in return for that consent had given them, the plaintiffs, exclusive possession of this plot No. 1 for the purpose of building their house thereupon; and their cause of action they state to be the interference with the building of that house by the defendants.

The first Court gave a decree against all the defendants in plaintiff's favor, but the Subordinate Judge before whom appeals were preferred, both by the plaintiffs and defendants, while confirming the decision of the first Court as against the defendants

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1 to 4, who were the sons of Mirtoonjoy, the principal member of this community, and its most influential shareholder, dismissed the plaintiff's case as against the defendant Nund Coomar. The point which we have had argued in special appeal is that such a decree is incapable of execution; that there being no exact definition of the shares of these shareholders, and no partition having taken place, the plaintiff's decree for possession of an unknown portion of this plot No. 1 cannot be carried into execution. It appears to us that, however hard it may be on the plaintiff, this objection must prevail. Nund Coomar, who has got a decree on his appeal before the Subordinate Judge, had a right to a certain share in every foot of land in this *howlah*, and he can, if he chooses, make this decree void and of no effect by laying claim to a portion of every piece of the ground on which the plaintiffs might attempt to build their house. It is all very well to say that Nund Coomar might perhaps not to do so, and that this objection comes with a very bad grace from the other defendants against whom the decree has been passed; but still the fact remains that the decree, as it at present stands, cannot be executed, inasmuch as under it the plaintiffs are to be allowed to have exclusive possession of a plot of land of which the defendants Nos. 1, 2, 3, and 4 are not the sole owners.

On this ground we think that the judgment of the Court below must be reversed, but under the circumstances we shall give no costs.

The 8th May 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale in execution—Right of Purchaser—Distribution of Rent.

Case No. 7 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Cuttack, dated the 5th October 1871.

Maharanee Adheeranee Narain Coomaree (Plaintiff) *Appellant,*

versus

Rajah Murdraj Biddyadhur Singh Nurendro Bahadoor (Defendant) *Respondent.*

Baboos Jugodanund Mookerjee and *Chunder Madhub Ghose* for Appellant.

Baboos Unnoda Pershad Banerjee and *Mohendro Lall Mitter* for Respondent.

Plaintiff having purchased at a sale in execution the rights and interests of the former proprietor after the whole of the Government Revenue had been paid by the Surburakar out of the collections made by him, was considered entitled to a share of those rents in proportion to the actual term of her proprietorship in the estate; and as defendant had not received more than he was entitled to upon the above principle of division, plaintiff's suit was held to have been properly dismissed.

Glover, J.—THE plaintiff (appellant) was the purchaser in execution of a Civil Court decree of the defendant's right, title, and interest in a killah paying a Government revenue of Rs. 7,503-9-3 yearly.

The revenue was payable in three instalments—

Rs. 2,535-11-11 in April.
„ 2,535-11-11 in June.
„ 2,432-1-9 in July.

The collections of the estate are stated to be (and the fact is not denied) Rs. 26,830-5-4 yearly.

The estate appears to have been for some years in charge of the Collector, and the Surburakar had, before the date of the sale to plaintiff, which took place in May 8th, 1868, paid up the whole revenue for the Amlee year, from 1st Assin 1275 to 1st Assin 1276, that is,

Up to the date of sale, *Suburakar* had collected Rs. 15,507-2-5, and the plaintiff claims the two-thirds of this sum after deducting the June and July kists of Government revenue on the ground that, as those two kists fell due after the date of his purchase, he took the responsibility of payment, and was in the same way entitled to a proportionate share of the rents already collected.

The defendant denied the plaintiff's right to anything more than a share of the collections proportionate to the time he had been owner of the estate.

The Subordinate Judge took this view of the case. He held that the plaintiff could not claim a two-third share of the collections merely because two kists happened for the convenience of the old proprietor to have been fixed for June and July. He held plaintiff entitled to his share of the collections calculated on the number of days he had been in possession, and finding that he had already appropriated a larger sum, dismissed his suit with costs.

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It is contended in appeal that this calculation is made on a wrong principle.

If the plaintiff had been at the time of her purchase liable for the two Government kists of June and July, there would have been perhaps some show of reason in her contention, but the fact is that she was not so liable. When the plaintiff bought the estate on the 18th of May, there was no revenue due. It had been already paid in advance for the entire year by the *Surburakar*, and the plaintiff entered into possession free of all demands for that year. But putting aside this for the moment, the plaintiff as auction-purchaser at a sale in execution of decree bought the rights and interests of the judgment-debtor, defendant, as they stood on the 18th of May 1868. What were those rights? It seems to me that they consisted of the right to hold the estate revenue free for the remainder of the year, and to collect from the ryots the balance of the Rs. 26,830-5-4 still outstanding. It is alleged, and not denied, that the plaintiff has since entering on possession collected these moneys, amounting to Rs. 11,323-2-11.

It appears to me, therefore, that the plaintiff has, by the decree of the Subordinate Judge, got more than she had any right to ask, and that, for this reason alone, her appeal should be dismissed with costs. I think it right to add that, if there were any necessity to go into the question of assets as the Subordinate Judge has done, I should have held that his decision apportioning the receipts and payments according to the number of days each party was in possession of the estate, was a very fine and proper one, and indeed the only one that could have been come to under the circumstances.

Kemp, J.—I also think that this appeal must be dismissed. I am of opinion that the principle upon which the Lower Court has distributed the rent collected by the *Surburakar* is proper and certainly fair to the parties. The whole of the Government revenue which is payable in three kists of nearly equal amounts was paid by the *Surburakar* out of the collections before the plaintiff purchased the rights and interests of the former proprietor. The plaintiff is, therefore, entitled not to two-thirds of the collections made by the *Surburakar*, but to a share of those rents in proportion to the actual term of her proprietorship in the estate; and as it is clear that the defendant has not received more than what he is entitled to upon the above principle of division, the plaintiff's suit has been properly dismissed.

The 27th March 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Witness—Refusal of Defendant to give Evidence—Benamee.

Case No. 46 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 30th November 1870.

Kalee Chunder Chowdhry (one of the Defendants), *Appellant,*

versus

Ranee Surut Soonduree Debia (Plaintiff), *Respondent.*

Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter, and *Hem Chunder Banerjee* for Appellant.

Baboos Sreenath Doss and *Gopal Lall Mitter* for Respondent.

In a suit to recover possession brought by the zemindar against one who claimed to be the *dur-putneedar*, the defendant, though allowed an opportunity to give his evidence and displace the finding of the Lower Court that his *dur-putnee* lease was not a real but a nominal transaction, refused to do so, and notwithstanding that the *putneedar* and his alleged vendee who were called as witnesses for another purpose, had in some respects given evidence in support of the defendant's case, the Court nevertheless confirmed the finding of the Lower Court.

Markby, J.—In this case it appears that the plaintiff, Ranee Surut Soonduree, was the zemindar of 10 annas of Pergunnah Pookhoria, and that some time prior to the 30th November 1849, a putnee talook was granted to Anund Chunder Roy and others, which was nominally sold to one Brojonath Chuckerbutty on that date, *viz.*, the 30th November 1849.

On the 26th December 1855, a *dur-putnee* tenure of the same 10 annas share was said to have been created by the Roy *putneedars* in favor of one Nitaye Soondur. On the 16th September 1862, Nitaye Soondur executed a bond for Rs. 3,000 in favor of the defendant Kalee Chunder Chowdhry, who is also a zemindar of a 4-anna share of the zemindaree, by which bond the *dur-putnee* tenure was made security for the re-payment of the loan.

On the 22nd September 1863, Kalee Chunder obtained a decree on his bond, but it was a money decree only.

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On the 24th June 1864, the plaintiff obtained a decree for certain *putnee* rents against Anund Chunder, and on the 22nd September 1864 there was a sale by the plaintiff in execution of her decree of the rights and interests of the Roy *putneedars*, at which sale she herself became the purchaser.

On the 6th March 1865, there was a sale at the instance of the defendant Kalee Chunder, and in execution of his decree of the rights and interests of Nitaye Soondur, at which sale he himself became the purchaser, and under this purchase he eventually got into possession of the land now in dispute; and the question to be determined in this suit is whether the plaintiff can recover possession as against the defendant Kalee Chunder, who holds under the above title.

One of the pleas raised by the defendant Kalee Chunder, in the first Court was that, at the time when the suit was brought against the Roy *putneedars*, and a decree for rent recovered against them, the property had long ago passed out of that family into the hands of Brojo Nath, and that therefore any title which the plaintiff based on the proceedings in that suit, and the sale in execution of the decree in that suit was worthless. But the Lower Court has found upon the evidence that the transfer to Brojo Nath was merely a *benamee* one, and that no interest really passed under it; the real owners of the *putnee* still continuing to be Anund Chunder Roy and his brothers.

On the other hand, the plaintiff made a somewhat similar allegation as regards the *dur-putnee* tenure and the proceedings by which that *dur-putnee* tenure was transferred to the defendant. It was alleged that the *dur-putnee* tenure in favor of Nitaye Soondur was a collusive transaction, or, at any rate, not a real transaction, that nothing passed under it, and that the decree obtained by Kalee Chunder was only a collusive and sham decree.

On this point, the Court below has found that the *dur-putnee* tenure at any rate was not a real transaction, and it also seems to intimate, although not quite so clearly, that the proceedings on the part of Kalee Chunder were sham proceedings. But the Court below has further expressed as its own opinion that even if the *dur-putnee* tenure were a real transaction, and it had been really transferred to the defendant Kalee Chunder Chowdhry by the proceedings in the suit on the bond, the sale to the plaintiff in execution of a decree for arrears of rent in respect of the *putnee* talook, although it was under Act X of 1859, would not necessarily get rid of the incumbrances created by the *putneedar*, and therefore not of the *dur-putnee* tenure.

The defendant Kalee Chunder Chowdhry alone has appealed to this Court; and in this appeal he contends that the sale to Brojo Nath by the Roy defendants was a real transaction, and that the creation of the *dur-putnee* in favor of Nitaye Soondar was also a real transaction. He supports the finding of the Court below that the sale for arrears of rent would not necessarily get rid of the incumbrances created upon it by the *putneedar*; and, lastly, contends that even if the sale to Brojo Nath and the *dur-putnee* to Nitaye Soondar are not real transactions, still there is some equity as between the plaintiff and the defendant which would prevent the former from denying the validity of the *dur-putnee* tenure.

As regards the first point, *viz.*, whether or no the transfer to Brojo Nath was a real transaction, or, what is commonly called, only a *benamee* transfer for the benefit of the Roy defendants, as also as regards certain other points, we thought it desirable that persons should be examined who are more likely to know the real facts between the parties than the witnesses who have been examined in the Court below; especially we thought that Brojo Nath and Anund Chunder were persons whose evidence ought to be taken. They were accordingly called before us and examined. Anund Chunder, however, does not appear to have had so intimate a knowledge of the affairs of his family as we were led to suppose. So far as he is acquainted with them, he distinctly denies that Brojo Nath took any interest whatever under the nominal sale to him, and his evidence is certainly of weight, because, as the case stands, he is, apparently at any rate, in noway interested in this suit, he having accepted as final the decree against himself.

Brojo Nath, who must have known the truth, has also distinctly denied that he took any interest whatever under the sale. On this point, therefore, there can be hardly any doubt that we must affirm the decision of the Court below.

Another important question of fact is as to the *dur-putnee*. The Court below has, as I have already said, found that the *dur-putnee* created in favor of Nitaye Soondar like the sale to Brojo Nath was not a real but a *benamee* transaction. It is not upon this point alone, but more particularly upon this point, that we thought we ought to have the

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evidence of the defendant, Kalee Chunder Chowdhry. He is not, as it was suggested, in the situation of a mere auction-purchaser as a stranger to the property. He held a 4-anna share in the zemindaree, and he advanced Rs. 3,000 on the security of the *dur-putnee* tenure. It might there be presumed that he had some general acquaintance with the affairs of the zemindaree, and may be presumed to have made some enquiry when he advanced the money; if he did so at all into the validity of the title of Nitaye Soondar, who offered the *dur-putnee* as security, and probably also, as suggested by Mr. Justice Bayley, into the title of his ostensible grantor Brojo Nath. For these reasons, we thought that the defendant himself who made the written statement ought to be examined, and we directed a summons to issue in his name to come here and give evidence.

Now, there is no doubt that of the witnesses who did appear, two, *viz.*, Anund Chunder and Brojo Nath, have given very material evidence in support of the *dur-putnee* tenure; and had their evidence been supported by that of the defendant himself, it would have been a question requiring very careful consideration as to whether the finding of the Lower Court could be supported. I must not be understood as expressing any opinion that this would have been so. I merely point out what possibly might be the effect of Kalee Chunder's evidence. But it is obvious that neither Anund Chunder who himself admits that he was for a considerable period absent from home, and was not the person who managed the affairs of the family, nor Brojo Nath who was merely a name, and who, although very intimate with the family, was not necessarily acquainted with all their affairs—it is obvious, I say, that neither of these persons, however conscientiously they may have believed their statements to be true, must necessarily be supposed to know the whole history of the transaction; and under the circumstances it seems to me impossible to attribute the absence of the defendant to any other cause than to a conviction in his mind that his evidence when given will go against the case which he wishes to establish. It must be remembered that this case has been already submitted to one Court, and that Court has come to a conclusion unfavorable to the defendant, Kalee Chunder; and I think the best that the defendant could do when he asks us to reverse the finding of the Lower Court, and to substitute for it a conclusion of fact favorable to himself, was, when an opportunity was given him which was really an act of grace on the part of the Court shown towards himself, to come here and support his case by his own evidence, he being the appellant in the cause.

It was suggested to us, and no doubt the suggestion was perfectly candid, that, being a Hindoo of rank, he would be unwilling to give evidence in a Court of Justice, but it must have been well-considered by the Legislative when they framed Section 170 of the Code of Civil Procedure, what was the value of such an objection. Besides, this objection altogether falls to the ground when it is seen, as has been pointed out to us by the respondent, that, in a recent case which was taken up to the Privy Council, and the printed book of which has been produced before us, this very defendant Kalee Chunder did appear and did give his evidence in a Court of Justice. It does not, therefore, appear that there is any reason whatever that in this particular case the same defendant should decline to appear and give evidence in support of his own case, or to obey the order of the Court in which Court he seeks redress against an order passed by the Lower Court against him. We do not, however, in this case go so far as Section 170 empowers us. We prefer to adopt the course taken in the case of Rajah Nursingh Deb, Marshall's Reports, page 176, which in many respects is very similar to this. We have heard all that the appellant has to say, and we only treat the refusal of the defendant as one of the incidents in the case when we consider whether we ought to reverse the finding of the Court below. The case to which I am referring was heard by Sir Barnes Peacock, C.J., and Bayley and Kemp, JJ. There Rajah Nursingh Deb was summoned into Court but he declined to come in person, making certain suggestions of prejudices as in this case. The Chief Justice, thereupon, says:—"It was the Rajah's "own case, and therefore we did not think it "necessary to order his attendance, nor is it "necessary to compel it. We simply gave "him the opportunity of giving his own "evidence if he wished to do so, and the "defendants were allowed to give their evi-"dence if they should find it necessary. We "are told that persons of the Rajah's station "in life in this country have a prejudice "against appearing and deposing in a Court "of Justice. If prejudice is the cause "of the Rajah's non-attendance, the Court "can only regret it for his own sake and "for the cause of justice, if his case is a "true one. But he must not expect the Court

"to find that his charge against the defendants "of forgery and conspiracy is a true one "upon the evidence of menials, when he "refuses to give his own evidence upon a "matter within his own knowledge. It is not "the wish of the Court to disregard honest "prejudices, however erroneous. But they "cannot allow such prejudices to interfere "with the due administration of justice. If "parties will not come forward and give "their own evidence in cases in which such "evidence is most important, and the best "that can be obtained, they must not com-"plain if their written statement, verified by "their mookhtear, and not by themselves, and "supported by the evidence of menials and a "class of witnesses of whom any number "can be obtained to prove any fact that is "wanted, are not believed. The Court will "require the best evidence to be given, and "will not be satisfied with the evidence of "inferior witnesses put forward by the "parties themselves, while they remain in the "back ground, and plead their prejudices as "an excuse for their absence. As this rule "comes to be more generally acted upon, "fewer false causes will be put forward, and "the occupation of hired witnesses be "gone."

Looking to the great experience and knowledge of the country possessed by the Judges who delivered judgment in that case, all that I need say for my own part is that I entirely agree in that view. I think that applying the principles of that decision to this case, looking to the fact that the Court below which originally heard the case has found that the *dur-putnee* lease was not a real transaction, looking to the fact that we gave the defendant an opportunity to give his own evidence, and displace that finding if he could, and that he has refused to do so, I think that, notwithstanding the two witnesses called here have in some respects, as I have said before, given evidence in support of the defendant's case, we ought nevertheless to confirm the finding of the Court below that this *dur-putnee* tenure was merely a nominal and not real transaction. That being so, and affirming the finding of the Court below upon the two questions of fact, *viz.*, that the sale to Brojo Nath was a *benamee*, and no real transaction, and the *dur-putnee* tenure in favor of Nitaye Soondur was also a *benamee*, and unreal transaction, it is unnecessary to consider the next question raised, *viz.*, whether the sale in execution of decree of the *putnee* tenure had the effect of getting rid of the incumbrances created upon it before the sale.

The only other question is whether there is any equity which prevents the plaintiff from asserting the non-validity of the *dur-putnee* tenure. I had some little difficulty in ascertaining on what ground that equity is put; but whatever it may be, this question is determined by a passage in the judgment of the Lower Court, and we see no reason to differ from it. The Lower Court says:— "There is no proof that the plaintiff was "aware of the above transfers before the "sale for arrears of rent. The *putneedar* "Anund Chunder Roy and others did not "try to protect their rights by paying their "arrears, and hence the plaintiff purchased "the *putnee* rights at a sale held in execu-"tion of a decree for arrears of rent, in "perfect good faith, by paying down an "adequate consideration, and without being "aware of any fraud or other objectionable "circumstances." This finding, which we see no reason to disturb, entirely disposes of this last question, and the result is that this appeal should be dismissed, and the decision of the Lower Court affirmed with this modification that the plaintiff will recover mesne profits from the 1st Assin 1273, which is a date subsequent to the 31st August 1866, on which date the defendant admittedly took possession of the property.

The appellant must pay the costs of this appeal.

Bayley, J.—I quite concur in this judgment.

The 15th April 1872.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Hindoo Law—Mitakshara Family—Alienation of undivided Share—Right of Action.

Case No. 11 of 1871.

Application for Review of Judgment passed by the Hon'ble Justices Kemp and Markby on the 18th November 1870 in Regular Appeals Nos. 170, 234, 240, 245, 238, 235, 239, 243, 244, 224 *and* 237 *of* 1866.*

Musst. Phoolbas Kooer and another (Plaintiffs), *Petitioners,*

versus

Lalla Juggessur Sahoy and others (Defendants), *opposite party.*

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* 14 W. R., 339.

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Mr. J. T. Woodroffe and *Baboos Mohesh Chunder Chowdhry* and *Abinash Chunder Banerjee* for Petitioners.

Messrs. G. C. Paul, C. Gregory and *Deverine* for opposite party.

Construction to be put on the Full Bench decision in 12 W. R., F. B., p. 1, and on the judgment of the Division Bench *Ib.* Civil Rul. 478, as to the power of a member of a Mitakshara family either to alienate or to sue for and recover his undivided share.

Markby, J.—I do not think that this review ought to be admitted.

The ground on which I based my former decision in these appeals was this :—It was held by the Full Bench* that the titles which the defendants set up through Bhugwan Lall had failed inasmuch as they took nothing under the alienations made by him. This was founded on the opinion, as I understand the judgment, that a member of a Mitakshara family was not, as in Bengal, the owner of his share ; that he only became the owner of his share upon partition, and that consequently to allow him to alienate his share would be to allow him to effect a partition by his own will without the assent of his co-sharers.

Applying that decision of the Full Bench to this case, I have all along thought, and still think, it impossible that the plaintiff can have the decree which he asks for, that is to say, if the family is still joint—a matter which I will consider presently. If the family is still joint, then, on the principle laid down in the Full Bench decision, the plaintiff, so far as this family property is concerned, is the owner of nothing; and as he is the owner of nothing, he can, of course, recover nothing in this suit.

I do not, of course, say that this is necessarily involved in the decision itself of the Full Bench, apart from the reasoning by which it is arrived at. It would be quite possible, though contrary to the general principles of Hindoo as well as other law (see the opinion of Nareda quoted in Colebrooke's Digest, Book II, Chapter 4, Section 1, para. 6), that a man should be owner of his share and yet not be able to alienate it. But the reasoning of the Full Bench and the construction which the Full Bench put on Appoovier's case seem to me to proceed on the ground that the member of a joint Mitakshara family is not able to alienate, *because* he is not the owner of his share. Moreover, Mr. Justice Kemp who was a party to the Full Bench judgment has concurred in this construction of it, and a Division Bench of this Court in a later case, reported in XII Weekly Reporter, page 478, after referring expressly to the Full Bench decision, and apparently as a consequence of it, arrived at the same conclusion.

I have given the most careful attention to Mr. Woodroffe's very able argument in support of the present application in which he contests this view, but I cannot say that he has shaken my opinion. It is contended that it is one thing to say that a member of a joint family cannot alienate his share, and another to say that he cannot sue for and recover it, and so, in one sense, it may be. There may, as I have already said, be ownership with a restriction on alienation ; but if the member of the family is not owner of the share, he cannot either alienate or recover it. It is also contended that this case differs from the one in XII Weekly Reporter, page 478, because here all the family are parties, whereas in that case it was assumed (though as it afterwards appeared, erroneously) that this was not so. But supposing the assertion of fact in reference to this case to be correct, that does not, I think, distinguish the two cases. I do not see how an addition of all the members of the family as parties will enable a single member to recover a share, if he is not the owner of it ; and the objection pointed out in the case in XII Weekly Reporter, page 478, is not merely that there is a defect of parties, but that the right of action has been misconceived. "The suit," it is said, "should have been brought by all "the joint owners to set aside the deed as to "the charge created by Oodid (one of the "members) as well as to the charge created "by Jeetum (another of the members) and "the suit should have been brought by all "the members of the joint family and not "by two of them alone who, before partition, "have no definite share. If the deed were "to be set aside, it would be impossible by "the decree to define the share which the "plaintiffs are entitled to recover, so long "as the property is joint." And when the mistake as to the defect of parties had been discovered and brought to the notice of the Court, this view is not altered. In dismissing the application for a review, Sir Barnes Peacock, after re-stating the facts, says :—"It appears to me, for the reasons given in the judgment (*i. e.* the judgment then under review), that the plaintiffs are not entitled to recover possession of the 8 annas share, and that they are not entitled to set aside the deed as to the 8 annas share." But this is

* 12 W. R., Full Bench Rul., 1.

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exactly what the plaintiff in this suit seeks to do. He claims "to recover possession" and to be entered in the public records as "proprietor" of certain mouzahs "as per shares below represented by fraction of annas," and in the Schedule to which he here refers, he divides each item of the property into two parts assigning half to his brother, and claiming the other half himself. Mr. Woodroffe points out the passage in the judgment in XII Weekly Reporter, page 478, where it is said that if any of the members refused to join as plaintiffs, they would have to be joined as defendants; but I gather that the Court considered that the claim would still be the same, namely, to set aside the deeds *in toto* and to recover the whole property, not any particular share or shares.

So, in an earlier passage of the same judgment it is said, "the plaintiffs, as two only of "the members of a joint family which has "not been separated, and as two only of the "owners of joint property which has not been "partitioned, are not entitled to any certain "definite share for which they can sue "alone." Mr. Woodroffe argues that the force of this observation lies in the last six words, and that if the other members of the family are joined, then a share may be sued for and recovered by one member alone. But I cannot come to this conclusion, except on the hypothesis that the suit in which the single member sued for his share was a suit for partition as well as a suit for possession. I shall state presently my reasons for thinking that this view would not be applicable to the present case; but, apart from this, I do not think that this was what was meant. I think it was meant that the whole family should be made parties, and that the suit should be brought not to recover a share of the family property, but to recover the whole. Whether, therefore, the Full Bench decision be right or wrong, it appears to me that the Division Court has drawn from it the same consequence which I would draw from it, and, as it appears to me, the only consequence which can be drawn from it, namely, that a single member of a joint family, not being the owner of his share, cannot recover it.

Another argument relied on by Mr. Woodroffe was that the question of the plaintiff's right to recover in this suit was referred to and affirmed by the Full Bench. It is true that each of the questions put to the Full Bench is in terms whether, the plaintiff had a right to recover, but the Full Bench did not consider that question separately. They had not before it the state of the family, and could not know whether, since the death of Bhugwan Lall it had been separated or not. Mr. Justice Kemp would certainly know if this point had been decided by the Full Bench, and he agrees with me that it has not.

This brings me to the next point urged by Mr. Woodroffe and very strongly insisted on, *viz.*, that this objection was not taken by the respondent, and that it ought not, therefore, to be insisted on by the Court. In point of fact, Mr. Woodroffe is correct. The difficulty was pointed out, either by Mr. Justice Kemp or by myself when the case came back to us from the Full Bench; and Baboo Unnoda Pershad, who at that time appeared for the plaintiff, met the suggestion by arguments similar to those which Mr. Woodroffe has used on the present occasion. But I do not see how the Court can help taking this objection. We cannot apply the law laid down by the Full Bench inconsistently in the very same case. We cannot say that an alienation by a member of a Mitakshara family is void because he is not the owner of a share in the family property, and in the same suit say that the plaintiff, a member of such a family, can recover such a share. The case of Eshan Chunder Singh in the Privy Council was relied on; but whatever may be the true interpretation of that decision, on which I have expressed elsewhere my own opinion, I think that the present suit stands clear of all that class of cases. The present is in fact a very peculiar case.

It will be observed that, up to this point, I have assumed that the plaintiff is a member of a joint Hindoo family to the members of which joint family the property in question belongs. But I have now to consider a contention of a totally different character very strongly pressed in the argument of this review, namely, that there has been, since the death of Bhugwan Lall, a partition of the family property, and that plaintiff is the separate owner of that which he claims. It is not said, nor need it be said, that there has been a partition by metes and bounds, but it is said that the surviving members of the family have become, at any rate as to the property involved in this suit, separate in estate. Of course, if this be so, all difficulty in the way of the plaintiff obtaining the decree which he asks for is removed, and there is, no doubt, apparent force in the argument so strongly pressed in support of this contention, that Sudabirt Pershad has already in the suit of 1862 recovered the other half share of the family property, and has been

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put in the possession thereof, which, according to the cases above referred to, could not have been done unless there had been a partition. But I think that it is necessary to consider the nature of this contention with reference to the history of the family and the general state of things in the Mitakshara districts. I think it is impossible to understand either the decree in Sudabirt's suit or a great number of other cases which have come before this Court, unless we also bear in mind how parties in these Mitakshara districts have hitherto been in the habit of dealing with their property. I have myself seen a considerable number of suits in which members of Mitakshara families still joint have sued separately to recover their undivided shares, and I have excellent authority for saying that such suits have been constantly brought in the Mitakshara districts without objection. All these suits have been, no doubt, brought under the conception (however erroneous it may be) that each member is owner of his undivided share, and that he can sue for and recover it alone; and though according to English notions such a suit would be informal, and though it may have been unwise to allow such an inconvenient practice to grow up, even if it had been founded on a right conception of the law, there is nothing which conflicts with any legal principle, or presents any insuperable difficulty of procedure, in one of several co-owners suing alone to recover the undivided share of which he is the owner. Moreover, without any partition, these Mitakshara families do frequently hold, and this very family has held, the family property, ostensibly as separate owers; sometimes each member taking a separate portion of the property, and holding that portion exclusively for his own benefit; sometimes the members holding the property in common, but taking the profits separately, and never bringing them into a common stock. In this very family it has been contended, and this Court (it is not for me now to say whether rightly or wrongly) has held, that such separate enjoyment does not constitute a partition. And the question is, whether Sudabirt's suit was framed under the erroneous but commonly accepted notion that a single member could sue alone for his undivided share, and whether Sudabirt's subsequent enjoyment has been under a family arrangement similar to that which has always existed in this family—or whether, as Mr. Woodroffe contends, the suit of Sudabirt was a suit for a partition as well as a suit for recovery of property, the effect of the decree being to constitute a partition so that the subsequent possession of Sudadirt was a possession as separate owner. I cannot come to any other conclusion than that it was the former and not the latter. I think both that suit and the present suit were brought under the impression that a member of a joint Mitakshara family is before partition the owner of his undivided share, and that, as such, he may sue alone to recover it. With the most sincere deference for the opinion of the late Chief Justice of this Court and the other Judges of far greater experience than myself who appear to have thought otherwise, I think that the cases in XII Weekly Reporter are the first in which it has been laid down that the member of a joint Mitakshara family is not the owner of his undivided share: and that prior to those decisions the notion that each member was owner of his share was almost, if not quite, universal. Nor do I understand the Privy Council in Appoovier's case to lay down anything to the contrary. It is quite true that Lord Westbury there says, almost in the same words as are used by Sir Barnes Peacock, "no individual member of the family whilst "it remains undivided can predicate of the "joint and undivided property that he, that "particular member, has a certain definite "share;" but if we read what follows, it is clear to me that what Lord Westbury had under consideration was not so much the separate ownership of a share in the *corpus*, as separate enjoyment of the profits of it. In order to ascertain the meaning of this passage, I think we must look to the illustration which follows, and the illustration given by Lord Westbury is that whereas *before* any partition, and whilst the family is joint in estate, all the profits go into the common fund, *after* partition of ownership, but before partition by metes and bounds, each member takes his share of the profits, or the profits of his share (which is the same thing) for his own separate use. But this leaves the question quite open, whether before partition of the ownership the members of the family are owners of their respective shares, or whether the "family" is the owner. In a later passage, Lord Westbury compares by way of illustration the change which takes place upon partition of ownership without partition of the subject of ownership, to the change from joint tenancy to tenancy in common. That clearly assumes that, prior to the partition, the family are somewhat in the position of joint tenants:

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whereas the construction which the Full Bench put upon this judgment would place the family somewhat, if not exactly, in the position of a corporation. If I might venture to put my own construction on Appoovier's case, I should say that the main features of the change which takes place in a Mitakshara family upon partition of ownership without partition by metes and bounds were these :—that, both before and after such a partition, each member of the family is the owner of a share to be ascertained at any given moment by the same rules as those which govern partition ; that both before and after a partition of ownership without a partition by metes and bounds, the rights of possession of the members of the family over the *corpus* are the same ; that after such a partition the right of enjoyment is modified in this that each member can, after such a partition, claim to have a separate share in the profits set apart to his own use, and can claim nothing out of the other profits, and that after such a partition the right of succession on the death of the shareholders is regulated by the rules of succession relating to self-acquired property, and not by the rules relating to ancestral property ; and this, as far as I can discover, accords with the ideas prevalent on the subject until the recent decisions. Those decisions have undoubtedly given authority to a different view of the law, but I think we ought not to let this view of the law determine our inference on this question of fact. I think it would be most dangerous to many existing interests to hold that a member of a Mitakshara family, by the mere recovery of his share in a suit to which other members of the family were parties, had effected a partition. And with regard to the separate enjoyment which each member of this family is said to have had in fact, I have already said that it is not necessary for me to express my own opinion on what ought to be the effect in evidence of such an enjoyment. It has been declared by this Court in the suit of 1862, and by the Principal Sudder Ameen in this suit, to be the practice in this family, for the members of it, by arrangement amongst themselves, to hold and enjoy their shares separately without giving up the idea that the property was joint, and it is on that footing alone that the present plaintiff can recover what he is now seeking for. He bases his claim on the finding in Sudabirt's suit that up to a certain date, notwithstanding this separate enjoyment, the family was joint, and substantially the decision in that suit is the ground on which the judgment of the Principal Sudder Ameen proceeds in this suit (see the judgment of 27th March 1866, decision on the 2nd and 4th issues). And it would, I think, take this family entirely by surprise were we to hold that the assertion of such separate enjoyment was in effect an assertion that a partition had taken place, and that Sudabirt and Huree Pershad became in 1862 separate owners of the ancestral property in equal shares. We know very little of the estate of this family. We know that in 1862, besides Sudabirt Pershad and Hureenath Pershad, there were in existence Mussamut Ram Kalee Kooer, the widow of Ajoodhya Moheshee Kooer, and Mussamut Parbutty Kooer, the widow of Bhugwan, and Phoolbas Kooer, the widow of Kashee Nath and the mother of the present plaintiff, Huree Nath. Whether or no in 1862 Sudabirt and Huree Nath, or either of them, were married, we do not know, but Huree Nath was married and had had a son on the 10th March 1866, and Sudabirt has died since 1862 leaving a son who is still a minor. If we were to hold that the effect of the suit in 1862 was to constitute Sudabirt and Huree Nath, separate owners in equal shares, we might seriously compromise the rights of other members of the family. The widows of Bhugwan at any rate, if no other persons, would seem to be clearly entitled to shares upon partition (see Mitak : Inher : Chapter 1, Section 7, para : 1, and Macn. H. C. Volume II Chapter 1, Section 1, case 3). Now what Phoolbas Kooer claims in this suit is *maintenance*,—a claim quite inconsistent with any notion on her part that there has been a partition. I have not been able to find the authorities to which she refers in her written statement, but she appears to consider that each nephew is bound to contribute the half of her maintenance. Whether such a notion is well founded in law it is not necessary to consider ; her written statement is only another instance of the inveterate habit of this family, while still claiming to be joint, nevertheless to treat, *inter se*, each member not only as the owner of his share, but as separately entitled to the profits of it. But if it was right not to treat that separate enjoyment *de facto* as proving a separation *de jure* when the state of this family was under enquiry in 1862, it would, I think, be not only inconsistent but highly unjust to treat it so now.

I need not say with how much diffidence I have arrived at a conclusion in this case.

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My former judgment was written under great pressure and with far less opportunity of consideration than the importance of the case deserved. I was very glad, therefore, to find that, during my absence from India, a course had been taken which would give me an opportunity of re-considering it. I have carefully done so; and though upon further consideration the difficulties of the case by no means diminish, I am unable to alter the conclusion at which I had formerly arrived. And though it is by no means impossible that I may have failed rightly to apply principles in which I do not concur and which I may, therefore, the more easily have failed to appreciate, it does at least seem to me that any other construction than that which I have put on the Full Bench decision and the decision which immediately followed it, would lead to a conclusion which is altogether inadmissible. Suppose that I have failed rightly to interpret the Bull Bench decision and that a member of a Mitakshara family was considered by the Judges who pronounced that decision to be the owner of his undivided share; suppose that I have failed also rightly to interpret the decision of the Division Bench and that in the opinion of those Judges a member of a Mitakshara family may sue alone for and recover his undivided share; it would follow that, in the districts governed by the Mitakshara Law, a man may be the owner of a thing, that he may sue for it and recover it as his own in a Court of law, that he may hold it and enjoy it as his own, and yet that it is not liable to his express engagements with respect to it. The law of the Mitakshara, though not perhaps in some respects suitable to the exigencies of modern Hindoos, is, like the rest of Hindoo Law, founded on broad principles of justice, and on none more clearly than this that property is liable to the burdens which the owner has imposed upon it.

Apart, therefore, from the reasoning contained in the case itself, to say that the Full Bench acknowledged Bhugwan Lall's ownership in this property, but that they have allowed his sons to repudiate his express engagements in respect to it, would appear to me to assume that the Full Bench have ignored one of the first principles of Hindoo Law. I can only reconcile the Full Bench decision with this principle by assuming that to which the language of the decision also tends, namely, that Bhugwan Lall was considered by the Full Bench not to be the owner or even part owner of the property with which he assumed to deal.

The petition for a review should in my opinion be dismissed. There having been notices issued to the parties to appear, Mr. Casserat, whose counsel has appeared and argued the case, should get costs on the usual scale allowed in reviews; the other parties who appeared should get as costs two gold mohurs in each case.

Kemp, J.—I also think that this application should be rejected. In my opinion, our former decision, which is now in review, put a right construction on the judgment of the Full Bench, and by which we must be guided.

The 5th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Payment of subsequent Bill—Error—Special Appeal.

Case No. 1308 of 1871.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 11th August 1871, reversing a decision of the Moonsiff of Salkea, dated the 30th May 1871.

Darimbo Debee (Plaintiff), *Appellant,*

versus

Hurreehur Mookerjee (Defendant), *Respondent.*

Baboos Hem Chunder Banerjee and *Mohendro Nath Mitter* for Appellant.

Baboos Romesh Chunder Mitter and *Gopal Lall Mitter* for Respondent.

The improbability of plaintiff having received payment for one bill whilst another and older one remained unpaid, was no reason for the Judge refusing to consider the evidence adduced by plaintiff in support of her demand, and his not having done so was held to be an error of law.

So also the Judges having entirely ignored the evidence with regard to an entry in the plaintiff's day-book on which the first Court decided the case, was held to be an error of law in the investigation and a proper subject for special appeal.

Glover, J.—This was a suit to recover Rs. 618-12, the price of 1,860 maunds of coal sold and delivered.

The plaintiff is the owner of an extensive coal depôt at Howrah, and the defendant has admittedly supplied his soorkee machine with fuel from this depôt for a considerable time. The transactions between the parties have been many. In this case, the defendant denies having received the 1,860 maunds

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in question, and alleges that the receipts filed to prove delivery are not signed by any one authorized to sign such documents.

The 1,860 maunds are made up as follows :—

400	maunds	at 6 as. 29th Phalgoon	1275.
200	„	at 6 as. 25th Bysack	1276.
100	„	at 5 as. 20th August	1869.
1,160	„	at 5 as. 23rd Aughran	1275.

The dates are said to be those of delivery.

The Moonsiff held that the plaintiff had proved her claim, but the Subordinate Judge on appeal dismissed the suit.

As regards the 1,160 maunds, he found that the plaintiff could produce no receipt or order on the part of the defendant, and that the entry in the *khatta book* was an interpolation, and did not correspond in date with the entry in the day-book. He found also that the date of delivery as recorded in the bill did not correspond with the date in the khatta.

The three other items aggregating 700 maunds the Subordinate Judge disbelieved, because the plaintiff admitted the subsequent payment of a bill for 75 rupees, and the Subordinate Judge thought it improbable that the plaintiff would receive payment of a later bill when older bills were still unpaid. No other reason is given by the Subordinate Judge for his decision on this part of the case.

The plaintiff appeals specially, and we consider that her appeal ought to be allowed. We have been much pressed on behalf of the respondent with the argument, that, right or wrong, the Subordinate Judge's decision is one of fact on evidence with which we cannot interfere in special appeal; but we think that the way in which the Subordinate Judge had disposed of the case amounts to an error of law in the investigation, which has produced error in the decision of the case on the merits, and brings the matter fairly within the purview of Section 372 of the Procedure Code.

And first as to the three items aggregating 700 maunds. The Subordinate Judge's decision is in the following words :—" I have " to observe that, from the bills admitted by " both parties, I find that the plaintiff admits " to have received the amount of a subse- " quent bill to the one under claim, *viz.* the " bill for the month of April. It appears " very improbable that the plaintiff should " have received payment for a subsequent bill " without raising any objection if there was " really a previous bill due to her." Now, this was certainly not a proper way of disposing of the plaintiff's claim to this payment; and however improbable the Subordinate Judge may have thought it, he was bound to consider the evidence adduced by the plaintiff in support of her demand, and his not having done so is an error of law. That evidence we may observe consisted of orders for the coal, receipts for delivery of the same, the evidence of the weighman who measured the coal, and of the boatman who delivered it at the defendant's manufactory: evidence which, if credible (and the Moonsiff considered it so), would have been ample to prove the plaintiff's claim, but which the Subordinate Judge has not even noticed, preferring to base his decision on the improbability of the plaintiff's receiving payment for one bill, whilst another and older one remained unpaid. But even this reason insufficient, as it undoubtedly was, is not supported by the record, for the bill for 70 rupees was paid on the 19th May 1869, at which time there was only one of the three bills unpaid, the other two were not presented until some time afterwards.

On this part of the case, therefore, we think that the Subordinate Judge was wrong in law in his procedure and investigation, and that his error produced a wrong decision on the merits. After considering the evidence we cannot come to any other conclusion but that the Moonsiff was right, and we restore his decision, reversing that of the Subordinate Judge.

Then as to the item of Rs. 362-8 for 1,160 maunds of coal. The Subordinate Judge rejects it, first, because there is no order or receipt forthcoming; and, secondly, because the entry in the *khutteau book* appears to be an interpolation, and that in the *rookur* is suspiciously placed; no other reason is given for reversing the Moonsiff's decision.

Now, strange to say, a receipt for this amount of coal, as delivered on the 22nd Aughran 1275, is on the record, and is signed by the defendant's *khajanchee*. No one appears to have known of this document in either of the Courts below, and the plaintiff had already in her written statement alleged that the receipt had been mislaid. It was filed by the defendant himself amongst a mass of similar papers which he filed for the purpose of showing that Bissambur was the person authorized to sign weights, and not other persons as alleged by the plaintiff. The existence on the record of this receipt was not known, when Bissambur was examined, but he could not say that he had never given a receipt for that amount of

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coal on the day stated It has been contended that this receipt, so unexpectedly discovered, refers to some other delivery of coal, although the date of it corresponds exactly with the entry in the plaintiff's books, and of course it may turn out so to be.

As to the objection of the Subordinate Judge to the *khuttean*, it may be bad or good. We cannot in special appeal enquire into it; but his refusal of all credit to the entry in the day-book, simply because it appears at the bottom of the page, at the end of the day's transactions, is ridiculous. He has not noticed any one single item of the evidence adduced by the plaintiff, the written orders, the receipts, the sworn testimony of the witnesses, the defence itself, which was, it may be remarked, that the orders and receipts were signed by those having no authority so to sign. His judgment is given in the absence of a receipt, and on the appearance of the books. Such a judgment is in the highest degree unsatisfactory; and as it entirely ignores the evidence on which the Moonsiff decided the case, it is also an error of law in the investigation of the case, and is a proper subject for special appeal.

We think that there must be a new trial so far as regards the plaintiff's claim to the value of the 1,160 maunds of coal, and we direct that that trial be held either by the District Judge himself, or by the first Subordinate Judge of the station.

The plaintiff will have a decree for the value of the 700 maunds of coal, *viz.*, 256 rupees, and will have costs on that amount. The remainder of her claim will be re-investigated, and costs in respect of that part of the claim will follow the result.

The 9th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of Occupancy (how made Transferable)—Custom—Presumption.

Case No. 1270 of 1871.

Special Appeal from a decision passed by the Additional Subordinate Judge of Fureedpore, dated the 5th August 1871, *affirming a decision of the Moonsiff of that district, dated the 20th February* 1871.

Unnopoorna Dossia (Plaintiff), *Appellant,*

versus

Ooma Churn Doss and others (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellant.

Baboos Doorga Mohun Doss and *Nuleet Chunder Sen* for Respondents.

In order to make a right of occupancy transferable, it must be shown that it is so transferable according to the custom of that part of the country in which the tenure is situated. Where no mention is made in a *dowl* of any right to transfer. the existence of the power to transfer cannot be presumed.

Glover, J.—THERE is only one point in this special appeal, and that is whether the holding which the plaintiff says that he purchased from Ameerooddeen was a saleable one. Both Courts below have found that it was not.

It appears that this tenure was a common ryotee jumma; and in the *dowl* given to Ameerooddeen, the vendor of the plaintiff, no mention is made of any right to transfer. It is contended that, inasmuch as the *dowl* contains no restrictive clauses, it must be presumed that the power to transfer existed. This is entirely against the current of decisions of this Court, and it has been held that in order to make a right such as this, which is no higher than a right of occupancy, transferable, it must be shown that it is so transferable according to the custom of that part of the country in which the tenure is situated. Now it has been found by both the Courts below that no such proof has been given.

The special appeal is dismissed with costs.

The 10th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Sale in Execution—Parties against whom Execution sought—Notification and Proclamation of Sale—Decree against Representative of Deceased Person—Guardian and Minor.

Case No. 925 of 1871.

Special Appeal from a decision passed by the Judge of Patna, dated the 27th May 1871, *affirming a decision of the Subordinate Judge of that district, dated the 29th December* 1870.

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Shaikh Abdool Kureem (Plaintiff), *Appellant*,

versus

Syud Jaun Ali (Defendant), *Respondent*.

Mr. C. Gregory for Appellant.

Mounshee Mahomed Yusoof for Respondent.

Where an application for execution of a decree omits to give the names of all the parties as required by Section 212 Act VIII of 1859, even if it shall appear from other parts of the proceedings who those parties are, the parties named must be understood to be the parties defendants against whom the execution of the decree is sought.

Parties present at a sale are not bound to refer to the decree as laid down in Marshall 614, nor must they be considered as knowing its contents unless they are stated in the notification of sale. The proclamation and notification under Section 249 are intended to inform persons what is to be sold and to give the names of the parties defendants whose rights and interests in it are to be sold.

In the case of a sale in execution of a decree against a party as the representative of a deceased person, the proper course is to give in the description of the property to be sold the name of the defendant against whom the decree was obtained, and, in describing what was to be sold, to say the right, title, and interest of the defendant as the representative of the deceased.

A guardian has no right or interest in a minor's property, and the Courts ought to be extremely careful with regard to allowing the property of minors to be sold in execution of decree.

The purchaser in this case was held to have acquired under his purchase no title to the property of the minor, the property not having been described as the property of the minor.

Couch, C. J.—SECTION 212 Act VIII of 1859, which prescribes the form of application for execution of decrees, says expressly that amongst other things shall be given the name of the person against whom the enforcement of the decree is sought.

It would not be sufficient to say that the decree is sought to be enforced against the judgment-debtors; the names must be given.

In this case, two names are given; it is true that in another part of the proceedings the parties against whom the decree is sought to be enforced are spoken of as judgment-debtors; but where the application omits to give the names of all the parties, we think, even if it should appear from other parts of the proceedings who those parties are, that the persons named must be understood to be the parties against whom execution of the decree is sought.

Then the proceedings go on, and the notification of sale gives the names of the two persons who are called judgment-debtors: they must be understood to be the persons against whom the decree is sought to be enforced and whose rights and interests are intended to be sold, and we think only the right, title, and interest of the persons so named can be considered as sold.

The case to which we have been referred in Marshall's Reports* differs from the present, and there are some passages in the judgment in which we cannot concur. The learned Chief Justice says in that case, "if the "parties who went to that auction had referred to the decree, they would have found "that the debt for which the sale was to "take place was not the widow's but Jugo "Mohun's, and that the property to be sold "under the decree was not the widow's but "Jugo Mohun's, because Jugo Mohun was "really the debtor, and the widow was sued "merely in her representative character."

We do not think that the parties who are present at the sale are bound to refer to the decree, and must be considered as knowing its contents, unless they are stated in the notification of sale, in fact the decree would not ordinarily be there to refer to. The proclamation and notification under Section 249 of Act VIII of 1859, are intended to inform persons what is to be sold, and to give the names of the parties defendants whose rights and interests in it are to be sold.

The learned Chief Justice takes as an illustration the case of a decree being made against a party as the representative of a deceased person, and the execution being by attachment and sale of the property of the deceased. We think the proper course in such a case as that would be to give, in the description of the property to be sold, the name of the defendant against whom the decree was obtained; but in describing what was to be sold, to say the right, title, and interest of the defendant as the representative of the deceased, and then it would appear what was intended to be sold, namely, the property of the deceased person. There should be a due observance of the provisions of the law: and where the notification and proclamation say that the right, title, and interest of a certain person is to be sold, that only should be considered to be sold, and it should not be said that if the parties had looked at the decree they would have found that what was intended to be sold was something else, and that the purchaser intended to buy that.

Here there was no power to sell the right and interest of the minor under such a proclamation as this. A guardian has no right or interest in the minor's property: he represents the minor for the purpose of defending suits, and he manages the property for the minor; but that is not having a right or

* P. 614.

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interest in it which can be sold. And it seems to us that the Courts ought to be extremely careful with regard to allowing the property of minors to be sold in execution of decree. These are cases in which the proceedings ought to be carefully watched, and care ought to be taken that the property of minors is not disposed of except with proper precautions, and it is distinctly made to appear that the property of the minor is about to be sold.

In this case, that did not appear. An attempt is now made to include it in the property that was sold. It may be that it was intended to be sold and some mistake had been made in the notification, but the purchaser must take the consequences of that; he cannot acquire any title to the property of the minor under this purchase.

The appeal must be dismissed with costs.

The 10th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Suit for Declaration of Title under Pottah—Plea of Invalidity of Pottah—Possession—Acquiescence—Limitation—Appeal Dismissed—Costs of Co-respondents.

Case No. 456 of 1871.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 19th September 1870, *affirming a decision of the Subordinate Judge of that district dated the 12th April* 1869.

Sunt Lall Misser and others (three of the Defendants), *Appellants*,

versus

Bhurosee Issur and others (Plaintiffs), and others (Defendants), *Respondents*.

Baboo Romesh Chunder Mitter for Appellants.

Baboo Boodh Sen Sing for Respondents.

In a suit by plaintiffs (who had been in possession of the land in dispute under and ever since the date of a pottah granted to them by the Collector in 1843) to have their title under the pottah declared, that defendants were held, by their long acquiescence in taking no steps within 12 years to have the pottah declared invalid, to have concluded themselves from now saying that it was illegal and that the Collector had no power to grant it.

The Judge was wrong in dismissing the appeal generally with costs against the appellant, the effect of which was to make the first defendant liable to pay not only the costs of the plaintiff but of the other defendants who were made co-respondents, and particularly as it appeared from the previous decrees to have been determined that one of the co-respondents was not entitled to have his costs.

Couch, C.J.—In this case the pottah under which the plaintiffs claim, and which is the title they seek to have declared, was granted by the Collector in 1843, and the plaintiffs have ever since, and, apparently, even before that time, been in possession of the land, and since 1843 in possession under the pottah.

Now if the defendants had desired to impeach the act of the Collector in granting the pottah, on the ground which is now put forward, that he had no power to grant it under the settlement of 1840, and that his act was illegal, they must have brought a suit to set it aside within 12 years. They did nothing of the kind from 1843. Up to the present time the plaintiffs have been allowed to remain in possession; and now when they seek to have their title under the pottah declared, the defendants say that they are at liberty to set up the invalidity of the act of the Collector.

We think that after such a lapse of time they cannot be allowed to do that: they have, by their long acquiescence in taking no steps whatever to have the pottah declared invalid, concluded themselves from now saying that it was illegal and that the Collector had no power to grant it.

The cases which have been referred to do not apply, because they were cases where the plaintiff was asking to have a title declared and proving nothing but possession, giving no evidence of the title which he sought to have declared. But in this case the title sought to be declared is shown, namely, the pottah. We think, therefore, that the present appeal, on the ground that the act of the Collector was invalid, cannot be allowed, and the decree must stand.

Then, with regard to the question of costs, when we look to the previous proceedings in the suit, there seems to be an error on the part of the Judge in dismissing the appeal generally with costs against the appellant, because that would make the first defendant Beharee Misser liable to pay not only the costs of the plaintiff but of the other defendants Duryao Misser and others who were made co-respondents. But it appears from the previous decrees to have been determined that Duryao Misser was not entitled to have

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his costs. The Judge had no right to interfere with that and to make a decree with regard to the costs which is inconsistent with what had been done in the previous proceedings: but the matter will be set right by our amending the decree, so that it will be that the appeal is dismissed with costs of the plaintiffs against the appellant. There will be no award of costs in favor of Duryao Misser and the other defendants who were respondents. This appeal having failed as regards the plaintiff, he will get the costs of the appeal from the appellant.

The 10th May 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of Suit—Obstruction on Public Road (Removal of)—Special Damage.

Case No. 1267 of 1871.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 21st June 1871, reversing a decision of the Moonsiff of Naraingunge, dated the 30th November 1870.

Bhageeruth Rishee (Plaintiff), *Appellant,*

versus

Gokool Chunder Mundul and others (Defendants), *Respondents.*

Baboos Aukhil Chunder Mundul and *Doorga Mohun Dass* for Appellant.

Baboo Kashee Kant Sen for Respondents.

No suit can be maintained for the removal of obstructions upon a public road, without proof of special damage accruing to the plaintiff.

Kemp, J.—THIS is a suit brought by the plaintiff, special appellant, and others, to have a certain obstruction which they allege was erected by the defendants upon a certain road removed. There is an allegation in the plaint that, on a former occasion when an obstruction was put up, the plaintiffs had applied to the Fouzdaree Court and the Police, but that they obtained no redress inasmuch as it was then held that the road in question was not a public but a private road. The present suit, however, is not brought on the footing that it is a private road, but on the allegation that it is a public road. The words of the plaint are "সাদি, গমি ও গোচর্ম্ম ইত্যাদি লিয়া সর্ব্ব প্রকার আমরা ও অন্যান্য তাবত লোক গমনাগমন করিয়া আসিতে থাকায়." From these words, it is very clear that on the allegation of the plaint the road is a public road. There is no allegation or allusion made in the plaint as to any damage having accrued to the plaintiffs by any act of the defendants in closing this public road. We think, therefore, that the Judge was right in holding on the allegations of the plaint, that this is a public road, and therefore that the decision of the 13th July 1869,* delivered by the late Chief Justice, Sir Barnes Peacock, applies to the case.

We dismiss the special appeals with costs.

The 10th May 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Security (lost or stolen)—Agreement by both Parties to obtain Duplicate—Performance of Contract by Loser (lender)—Laches of Borrower.

Case No. 1319 of 1871.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 10th July 1871, reversing a decision of the second Subordinate Judge of that district, dated the 21st February 1871.

Kaminee Debia (Plaintiff) *Appellant,*

versus

Radha Sham Koondoo (Defendant), *Respondent.*

Baboo Woopendro Chunder Bose and *Bhowanee Churn Dutt* for Appellant.

Mr. Woodroffe and *Baboo Ram Churn Mitter* for Respondent.

Plaintiff's relative borrowed money from defendant on the security of a Government Promissory Note which was stolen from defendant in 1865, and defendant advertised the loss. In 1865 an *ekrar* was executed between the parties, whereby defendant was bound to take steps, assisted by plaintiff, to procure a duplicate. The note was endorsed, not in defendant's, but in plaintiff's name, and no steps whatever were taken by plaintiff until 1869, when the note turned up in the Currency Office. Defendant being unable therefore to perform his part of the contract—HELD that any neglect that had taken place in obtaining a duplicate was entirely owing to plaintiff's laches.

Kemp, J.—IN this case we do not think it necessary to call upon the learned counsel

* 12 W. R., 160.

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for the respondent. The plaintiff sues on the basis of an *ekrar*, to compel the defendant to restore to the plaintiff a 4 per cent. Government Promissory Note, No. 8536 for Rs. 1,000, or else to make good its value to the plaintiff. The facts of the case have been very correctly stated by the Judge and they are briefly these: that the plaintiff's relation Saroda borrowed from the defendant, on the security of this Government Promissory Note, Rs. 500; that this Government paper was stolen from the defendant who advertised its loss in the *Exchange Gazette*; that on the 11th May 1865 an *ekrar* was executed between the parties, whereby the plaintiff says that the defendant bound himself to obtain a duplicate of the paper, and in default was to be responsible.

It appears that the paper was mortgaged to the National Bank by one Banee Madhub; that on the Bank sending the paper to the Debt Office to draw interest, it was detained. The defendant's case is that he is not liable under the *ekrar* inasmuch as he did every thing incumbent on him by the terms of the *ekrar* towards obtaining a duplicate of this paper, but that the plaintiff altogether failed to carry out her part of the contract and therefore he, the defendant, is not responsible.

The first Court gave the plaintiff a decree, 1st, because the duplicate was not obtained owing to any default on the part of the parties, but because the original was discovered; therefore, according to the terms of the *ekrar*, the defendant was liable; 2ndly, because the defendant had not proved that he took all reasonable care for the custody of the Promissory Note: and 3rdly, that, according to the terms of the *ekrar*, the defendant did not take steps for procuring a duplicate.

The Judge has reversed that decision, and we think that the reasons given by the Judge for so doing are correct. He has found, first from the evidence (and this is not disputed), that the Government Promissory Note was not endorsed to the defendant, and it was impossible for the defendant unaided by the plaintiff to have made an application for a duplicate; and it is very clear, so far, that the Judge is perfectly correct, as no application of the defendant without the assistance of the plaintiff in whose name the Promissory Note was endorsed would have been successful. Under the terms of the *ekrar* the defendant was bound to take steps, assisted by the plaintiff, in order to recover the duplicate; the defendant was bound under the *ekrar* to pay half the expenses of obtaining that duplicate, and the plaintiff the other half. Now, it is very clear that this Government Promissory Note was stolen in 1865; that the defendant, after it was stolen, advertised its loss in the public papers; and that no steps whatever were taken by the plaintiff until February 1869. This is found by the Judge as a fact. Now, between 1865 and 1869 more than four years elapsed, and had the plaintiff performed her part of the contract and assisted the defendant as she was bound to do, there would have been time to obtain that duplicate, even making allowance for the two years necessary to elapse before such duplicate can be granted. Subsequently, or many years after the loss of the original paper, it turned up in the Currency Office, and therefore it was impossible for the defendant to perform his part of the contract, and any neglect that has taken place in obtaining a duplicate is entirely owing to the laches of the plaintiff.

We, therefore, entirely concur with the Judge in thinking that it is proved that the defendant did all he could to obtain a duplicate, that he called upon the plaintiff to assist him, and that she neglected to do so.

We, therefore, dismiss the special appeal with costs.

The 10th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Putnee Rent—Assignment.

Case No. 1316 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Fureedpore, dated the 21st July 1871, reversing a decision of the Moonsiff of Kanga, dated the 29th April 1871.

Mohesh Chunder Chakladar and another (Defendants), *Appellants,*

versus

Gungamonee Dossee (Plaintiff), *Respondent.*

Baboo Girza Sunker Mozoomdar for Appellants.

Baboo Obhoy Churn Bose for Respondent.

Plaintiff, a zemindar, being indebted on a bond, gave the bond-holder an assignment on the putneedars for

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the greater portion of the putnee rent to be paid to the bond-holder until the debt was liquidated. The bond-holder, not receiving his money, sued the zemindar in the Small Cause Court, whereupon the zemindar brought this suit against the putneedars for the rent due. The Lower Appellate Court, reversing the decision of the first Court, held that the claim for the rent of 1273 was not barred by limitation, because brought within three years from the time that plaintiff knew of the non-payment of the rent by defendants. HELD, upon the principle of the decision of the Privy Council in 11 W. R., P. C., p. 2, that plaintiff was entitled to recover the rent of 1273.

Glover, J.—THIS was a suit for rent of the years 1273, 1274, 1275, and 1276. The defendants do not deny the tenancy, but plead that for the year 1273 the suit is barred, and they make a number of other objections which it may be perhaps as well to notice in dealing with the grounds of special appeal. The plaintiff's case was that, owing a certain sum of money to Juggut Chunder Koondoo on a bond, she had arranged to repay it by an assignment on the defendants, the putneedars; the putnee rent was 36 rupees 6 annas of which they were to pay 30 rupees 6 annas to the bond-holder until the debt was liquidated. The bond-holder, on the ground that he had never got his money, brought a suit in the Small Cause Court against the present plaintiff in Maugh 1276, and upon this the plaintiff brought this suit against the putneedars for the arrears of rent due.

The first Court dismissed the plaintiff's suit, considering that it was not a suit for rent at all, that it was a suit for damages on breach of contract, that a portion of the claim was barred, and that the plaintiff was not entitled to a decree.

The Judge reversed that decision, holding that the suit was properly brought for rent, that none of it was barred inasmuch as the plaintiff had filed the suit within three years of the time when she came to know that the rent had not been paid by the defendants when the decree on the bond was passed against her in Maugh 1276, and that the claim for the year 1273 was in noway barred by limitation.

The first point taken in special appeal is that the claim for the year 1273 is barred by limitation under Section 1, clause 8, Act XIV of 1859.

According to the words of the Section, no doubt it would be so; but in cases of this kind the circumstances must be taken into consideration and in a somewhat similar case decided by the Privy Council, namely, the case of Ranee Surnomoyee, reported in Vol. XI, Weekly Reporter, page 5, it was held that the landlord was not debarred from his remedy. Without, therefore, going to the extent of saying that ignorance of a default on the part of the putneedar gave the plaintiff a fresh cause of action, we think, on the principle applied in Surnomoyee's case, that the plaintiff was entitled to bring this suit to recover the rents of 1273. Again, it is objected that whereas, in the bond-suit brought by Juggut Chunder Koondoo against the plaintiff, she, being then the defendant, admitted that the money had been paid to the bond-holder by the putneedars she is now estopped from alleging the contrary in this suit. In the first place, the then defendant did not admit anything of the kind; all she did was to make an allegation in her defence to the effect that she believed that the bond to Juggut Chunder Koondoo had been satisfied by the payments made by the putneedars, and, so believing, had declared that the plaintiff's claim was a bad one.

The third and last objection is that the plaintiff adduced no evidence to rebut the evidence brought forward by the defendants to show that the payments had been made. In the first place, as the defendants admitted tenancy and also the amount of rent, there was nothing for the plaintiff to prove. The *onus* was on the defendants to prove payment; they have brought their evidence on that point, and the Courts below have found that it was not worthy of credit. We dismiss the special appeal with costs.

The 13th May 1872.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Hereditary Occupancy—Evidence—Admission—Onus Probandi.

Case No. 1386 of 1871.

Special Appeal from a decision passed by the Judge of Purneah, dated the 27th July 1871, reversing a decision of the Moonsiff of that district, dated the 13th March 1871.

Phody Biswas and others (Plaintiffs), *Appellants,*

versus

Mr. A. J. Forbes and another (Defendants), *Respondents.*

Baboo Tarucknath Sen for Appellants.

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Baboos Hem Chunder Banerjee and *Bhyrub Chunder Banerjee* for Respondents.

The Court declined to regard a statement by defendant's pleader that L was the previous tenant and that L held the land after her son G, as an admission of continuous hereditary holding as of right on the part of defendant, the *onus* being on plaintiff to make out a continuous holding by them or by the persons under whom they claimed.

The Judge having disbelieved the evidence of certain mortgagors as to plaintiff's hereditary occupancy, was not bound to take into consideration certain documentary evidence (*dakhilas*) which were sworn to by the same witnesses.

Jackson, J.—It seems to us that this special appeal fails. The ground insisted on by the appellant's pleader is that in consequence of the admission made by the defendants and the particular case which they set up, namely, that of a relinquishment of the tenure, the burden of proof was wholly on them, and that they had not relieved themselves of that burden. But this was not the view which was taken by the Judge below, nor was it the view which he was bound to take.

It seems to have been supposed that the defendant's pleader admitted a continuous hereditary holding by the plaintiffs and those under whom they claim. The examination of the defendant's pleader has been read to us and it does not show this. He mentions that Lallbuttee was the previous tenant, and that Lallbuttee held the land after her son Goluck Nath; but we cannot give this statement such efficacy as the appellant's pleader contends for, so as to take it as an admission of continuous hereditary holding as of right on the part of the plaintiffs. That being the case, it was for the plaintiffs to make out a continuous holding by them or by the persons under whom they claim; and as they failed to do so, the suit must be dismissed.

It is complained that the Judge has not taken certain documentary evidence into his consideration, namely, some *dakhilahs* which were sworn to by certain mortgagors. If the Judge did not believe the evidence of these mortgagors when they deposed to the plaintiff's hereditary occupancy, it is not likely that he would credit them when they stated that they attested the *dakhilahs*. If they could swear falsely as to the occupancy of the land, they could swear falsely as to the granting of the *dakhilahs*.

The appeal is dismissed with costs.

The 13th May 1872.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges*.

Parties—Mortgage—Contribution—Res adjudicata—Intervention — Reservation — Act VIII of 1859 ss. 2 and 73.

Case Nos. 1391 and 1392 of 1871.

Special Appeals from a decision passed by the Judge of Sarun, dated the 21st June 1871, affirming a decision of the Moonsiff of Pursah, dated the 16th September 1870.

Syud Mobaruck Hossein (Defendant), *Appellant*,

versus

Sheo Gobind Misser (Plaintiff), *Respondent*.

Mr. R. E. Twidale for Appellant.

Baboo Kalee Kishen Sen for Respondents.

Defendant having in his hands one-half of the immoveable property on the mortgage of which the loan was originally advanced, was held to have been properly sued in respect of half of the original liability, no question of contribution by the purchaser of the other half arising.

Defendant having intervened and been made a party under s. 73 Act VIII of 1859 in a former case, in which not only was no decision come to, but the decree expressly reserved all questions as between himself and plaintiff, the case was held not to come under s. 2.

Jackson, J.—We see no valid ground for this special appeal. The question which the special appellant raises with regard to the equity of suing him in respect of half of the original liability appears to be wholly untenable either as a matter of law or of equity and good conscience.

The defendant has in his hands one-half of the immoveable property on mortgage of which the loan was originally advanced. If he had been singly sued for the whole debt the question would have arisen whether the person who had purchased the other half would be liable to contribute. But, as the case stands, we can see no ground for contending that the appellant was not properly sued.

Then it is urged that this matter has been disposed of by a previous suit in which Ram Pertaub was a party. Now, it seems that the present defendant was not originally a party in that case; he intervened and was made at his own request a party by the Court under the provisions of the 73rd Section. But at the conclusion of the case it was found that no decision could be come to as

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between him and the plaintiff, and the decree in that case accordingly in express terms reserved all questions between him and the plaintiff. Therefore, it appears to us that no suit on the same cause of action has been heard and determined between these same parties, and the case does not therefore come under Section 2.

As it is admitted by both sides that one decision will govern both cases, we order that both appeals be dismissed with costs.

The 14th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Usufructuary Mortgage—Ekrarnamah—Admission—Interest—Waiver.

Case No. 189 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 20th June 1871.

Prosunno Coomar Mookerjee and others (Defendants), *Appellants,*

versus

Baboo Buldeo Narain Singh (Plaintiff), *Respondent.*

Baboo Bhowany Churn Dutt for Appellants.

Mr. R. E. Twidale and Baboo Rajender Nath Bose for Respondent.

In a former suit plaintiff, mortgagor, under a usufructuary mortgage claimed recovery of the mortgaged property on the allegation that there had been a satisfaction of the principal sum by reason of the profits of the estate exceeding 12 per cent. interest, but having failed to prove that allegation, his suit was dismissed. He now sues for the recovery of the property under an *ekrarnamah* which did not stipulate for payment of interest. HELD (1) that, though possibly plaintiff ought to have deposited the amount of the principal money in Court when he filed his plaint, yet as no objection on that score was taken at the first hearing, it must now be considered to have been waived; (2) that the case put forward by plaintiff in the former suit did not amount to an admission that there was an agreement to pay 12 per cent; and (3) that even if it did, as the *ekrarnamah* upon which plaintiff now sued did not stipulate for payment of interest, plaintiff was entitled to restoration of the property on payment of the principal alone.

Couch, C.J.—IT is not disputed that, by the terms of the *ekrarnamah*, the mortgagee was to have possession of the property. It appears that there was no stipulation as to the payment of interest, and it was agreed that the mortgagor should be entitled to have the property restored to him on payment of the principal sum; which is all that he asks for in the present suit, and the decree declares that he is entitled to have back the property upon depositing in Court the amount of the principal sum.

The objection is taken that he ought to have deposited the amount of the principal money in Court when he filed his plaint.

Strictly speaking, possibly he ought to have done so; but then the objection ought to have been taken at the first hearing of the suit. It cannot be allowed to be taken now as a ground for dismissing the suit: it was a defect which might have been cured if the objection had been taken at the proper time. Not having been taken then, it must be considered to have been waived by the defendant.

Then with regard to the previous proceedings, we consider that the nature of the previous suit was this; the mortgage was a usufructuary mortgage, but by virtue of the Regulations, if the profits of the estate exceeded 12 per cent. interest on the principal sum, the plaintiff would be entitled to have the surplus applied in reduction of the principal, because the defendant could not, by means of the usufructuary mortgage, get more than the lawful rate of interest; and in the former suit the plaintiff appears to have alleged that there had been a satisfaction of the principal sum by reason of the profits exceeding the 12 per cent. interest. He failed to prove that, and his suit was dismissed. But the case which he then put forward does not amount to an admission that there was an agreement to pay 12 per cent., and that the terms of the *ekrarnamah* were different from what they really are; and even if his conduct in that suit could be treated as any kind of admission, we have got the *ekrarnamah* itself before us, and we know exactly what are its terms. By the present decree the defendant gets all that by his contract he was entitled to; he was to have the use of the property instead of the interest, and he was to restore it upon receiving the principal sum; and the plaintiff seeking the assistance of the Court for the restoration of the property to him does not raise any equity that the defendant should have something more than what was stipulated for; he is only entitled to have that which by the agreement he was entitled to.

The appeal must be dismissed with costs.

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The 14th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Mortgage—Ambiguous Description.

Case No. 195 of 1871.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Sarun, dated the 22nd May 1871.

Shaikh Sooltan Ali, Pauper (Plaintiff), *Appellant*,

versus

Syud Aftakur Hossein and another (Defendants), *Respondents*.

Moonshee Mahomed Yusoof for Appellant.

Mr. R. E. Twidale for Respondents.

An ambiguous description in a mortgage must be taken most strongly against the mortgagor, the party who conveys the property.

Couch, C.J.—THE judgment of the Lower Court in this case appears to be right. Looking at the state of things at the time the mortgage was made, the description in it was quite sufficient to pass Fukhuria as being part of Mouzah Bhujulpore Fukhuria. If the description is ambiguous, it must be taken most strongly against the mortgagor, the party who conveyed the property. He cannot take advantage of the ambiguity and say that this property did not pass, if the description was sufficient to pass it, having regard to the circumstance that there was but one settlement and that there does not appear to have been any distinct description of Fukhuria in the Register. This appeal ought not to have been brought, and we must make an order under Section 309 for recovery of the stamp duty which the appellant would have had to pay if he had not been allowed to appeal as a pauper. The appeal will be dismissed with costs.

The 15th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Witness—Default to Attend (by Defendant when summoned)—Lawful Excuse—Act VIII of 1859 *s.* 170.

Case No. 206 of 1871.

Regular Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 16th May 1871.

Baboo Doorga Dutt Singh (one of the Defendants), *Appellant*,

versus

Jheengoor Jha (Plaintiff), *Respondent*.

Baboos Chunder Madhub Ghose, Bhowany Churn Dutt, and *Gopal Chunder Mookerjee* for Appellant.

Mr. C. Gregory for Respondent.

A defendant's saying that he was willing to attend when he did not attend and showed no reason why he could not, is no lawful excuse for his non-attendance when summoned to attend.

What is or is not a lawful excuse must depend on the circumstances of each case.

Couch, C.J.—THE plaintiff's case was that the consideration-money which he had given the bond was not actually paid at the time, and that subsequently only a small portion of it had been paid by the defendant, and he sought to have the remainder paid to him, which he was entitled to if it had not been paid.

He called two witnesses who were present at the time the bond was given, and who stated that the money was not paid over, and he said that he was willing to abide by what the defendant deposed, and he asked to have the defendant summoned. He may well have thought that it would not be sufficient for him to obtain a decree that the two witnesses that he had should depose only to the non-payment of the money, because he would feel that he had to meet the recital in the bond that the money had been paid. It seems to us that there is nothing to lead to the supposition that the offer which he made to abide by what the defendant deposed to was not a *bonâ fide* one, and that it was a mere excuse or pretence on his part. He asked that the person who must know the truth with regard to this matter, and whose evidence, if given in his favor, would be decisive, might be examined, and, as he was entitled to do, that the defendant might be summoned to appear. It cannot be said that he had given no evidence in the case, for he had given some; and probably he did not call the other persons who were present or the witnesses to the bond because he had reason to think that they would not tell the truth if they were examined.

The question in the case is, whether the defendant being summoned to attend failed to comply with the order without lawful excuse. There is nothing in the case to show that he had any lawful excuse. He seems to have made what, as far as we can see, was a mere

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excuse for not coming, a mere evasion of the order of the Court, and an endeavour to put off giving evidence. His saying he was willing to attend, when he did not attend and showed no reason why he could not, is worth nothing.

We were referred to some cases in the course of the argument from Marshall's Reports and the Weekly Reporter. We think each case under this Section must be looked at with reference to its own circumstances. The question being whether there was a lawful excuse or not, the decision in one case can scarcely be a guide to the decision in another, unless the Court had given the facts of the case and we could see precisely on what materials the decision was come to.

We think the Judge was justified in making the order* which he did, and we cannot see how he could have come to a different conclusion. The appeal must be dismissed with costs.

The 15th May 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Alluvial Land—Assessment of Re-formation—Jurisdiction—Suit—Act IX of 1847 *ss.* 6 *&* 9.

Case No. 220 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 12*th July* 1871.

Dewan Ramjewan Singh and another (Plaintiffs), *Appellants,*

versus

The Collector of Shahabad (Defendant), *Respondent.*

Baboos Romesh Chunder Mitter and Mohesh Chunder Chowdhry for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

Land which, upon inspection of the Survey Map, appears to have been added to an estate, although it may be a re-formation upon the old site, is liable to assessment under Section 6 Act IX of 1847, and no suit will lie in a Civil Court against the orders of the Board of Revenue in such a matter.

Semble.—Such a case would fall also under Section 9 of that Act.

Couch, C.J.—THE case which is stated in the plaint, and which must for the purpose of this appeal be considered to be the true state of facts, is, that "from the time "of the decennial settlement and the mea-"surement of 1206 F. S., and for a long "time subsequently, the land so settled re-"mained in its pristine condition without "the slightest change by diluvion and allu-"vion; only a short time previous to the "survey of 1844, a small tract of land out "of the aforesaid land was washed away "and submerged by the river, but which "subsequently re-forming remained as before "in your petitioner's possession."

Therefore, at the time of the passing of Act IX of 1847, a portion of the land was washed away or submerged; and the estate which was surveyed, and the survey of which was approved by Section 4 of the Act, was the estate without that portion. If instead of there being a re-formation, as is stated, there had been a further washing away or submerging of the land which appeared in the survey approved by the Act, the proprietor would have been entitled under Section 5 to have claimed a deduction from the jumma of the estate. That Section says: "Whenever, on inspection of "any such new map, it shall appear to the "local revenue authorities that land has been "washed away from or lost to any estate pay-"ing revenue directly to Government, they "shall without loss of time make a deduc-"tion from the sudder jumma of the said "estate equal to so much of the whole "sudder jumma of the estate as bears to "the whole the same proportion as the "mofussil jumma of the land lost bears to "the mofussil jumma of the whole estate; "or if the land lost cannot be ascertained to "the satisfaction of the local revenue "authorities, then the said local revenue "authorities shall make a deduction from "the sudder jumma of the estate equal to "so much of the whole sudder jumma of "the estate as bears to the whole the same "proportion as the land lost bears to the "whole estate."

That Section having provided for a loss of a portion of the estate appearing upon the inspection of the new map. Section 6 provides that "whenever, on inspection of any "such new map, it shall appear to the local "revenue authorities that land has been "added to any estate paying revenue directly "to Government, they shall without delay

* That the plaintiff get a decree against defendant No. 1 (who was cited as a witness), and that the latter pay the costs of the plaintiff as well as of the other defendant.

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"assess the same with a revenue payable to "Government according to the rules in "force for assessing alluvial increments, "and shall report their proceedings forth-"with to the Sudder Board of Revenue, "whose orders thereupon shall be final."

We think we must read these two Sections together; and that since in this case there has been an addition to the estate appearing upon the inspection of the new map, although it is, as stated in the plaint, a re-formation upon the old site, it comes within Section 6 and is land added to the estate.

The decision of the Privy Council is a decision with regard to the property in the land which is so re-formed, that is, where the land which was formerly lost to the proprietor by being washed away or submerged, is re-formed upon the old site and the boundaries can be traced; the land so re-formed belongs to him. But that decision does not touch the construction of this Act, which seems to have been intended to provide in a simple way for the case where, upon the inspection of the new map, there appears either to have been a loss of land to the estate or an addition to it as it appeared on the former survey.

It appears to us that this is a case coming within Section 6, where power is given to assess the land which had been re-formed, and then the same Section says expressly that the orders of the Sudder Board of Revenue shall be final in such a matter. If the present plaintiff had any case at all, it was one for the consideration of the Sudder Board of Revenue, and not for a suit in a Civil Court.

Besides that, the 9th Section says that no action shall lie against the Government or any of its officers on account of anything done in good faith in the exercise of the powers conferred by this Act. The Collector, here, was exercising the powers conferred by the 6th Section in determining that the land which appeared on inspection of the new map to be added to the estate was liable to assessment, and was undoubtedly acting in good faith. The case seems to come not only within Section 6, but, if it had been necessary to rely upon Section 9, it comes also within that as a case where the powers of the Act were being exercised by an officer of Government in good faith.

We think, therefore, that the present suit will not lie, and that the judgment of the Lower Court dismissing it ought to be confirmed. The appeal will be dismissed with costs.

The 15th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Usufructuary Mortgage—Suit by Mortgagor for Possession—Account (Effect of)—Interest—Onus Probandi—Costs.

Case No. 29 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 6th December 1870.

Baboo Kullyan Dass (Defendant), *Appellant*,

versus

Baboo Sheo Nundun Purshad Singh, (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Baboo Unnoda Purshad Banerjee for Respondent.

In a suit to recover possession of land in the possession of the mortgagor under a usufructuary mortgage (which is in reality a suit between the mortgagor and mortgagee for an adjustment of the account between them), if upon taking an account it appears that the mortgagee has been fully satisfied, the mortgagor is not only entitled to have the property back, but (the decision in Marshall's Rep. p. 112 being overruled) the Court is bound as a Court of Equity, and acting upon the principle that it is always the aim of a Court of Equity to finally determine as far as possible all questions concerning the subject of the suit, to cause an account to be taken up to the time of the decree, the account so taken being considered binding and the parties not being at liberty, except under peculiar circumstances, to re-open it in another suit.

In seeking to have the account taken and to have it ascertained whether the mortgagee has by means of the usufructuary mortgage obtained more than 12 per cent. interest, and if so, that the surplus may be applied in reduction of the principal, the mortgagee is not asking the Court to authorize a departure from the agreement of the parties (where there is one) that the mortgage-debt should bear no interest during a certain period.

The *onus* is on the mortgagor to prove that the principal sum has been paid or satisfied; and on the mortgagee to show what, if anything, is due to him for interest.

Failure of the mortgagee in his duty, as trustee for the mortgagor, to keep accounts, and to produce proper accounts, is to be regarded as misconduct which ought to be taken into consideration upon the question of costs.

Couch, C.J.—THE plaint in this case sought to recover certain property which had been mortgaged by an usufructuary lease dated the 20th Bhador 1222 F. S. and an *ekrarnamah* dated the 21st Assar 1224 F. S., executed by the widow of Raja Juswant Singh, the ancestor of the plaintiff, and by other co-sharers of the plaintiff, and asked

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that these two instruments should be declared void, the ground of the suit being that the mortgagee had, by the enjoyment of the property and the receipt of the profits thereof, been paid off all that was due to him in respect of principal and interest.

Now, asking that the deeds should be declared void is of course not correct: what is meant is that the mortgage should be declared to be satisfied and the plaintiff entitled to have back the property.

In a case in Marshall's Reports, page 112, it was decided that, in a suit to recover possession of land in the possession of the mortgagee under a usufructuary mortgage, the only question in issue is whether the plaintiff is entitled to enter into possession, and that the finding of the Judge that a specific sum is still due is not conclusive between the parties, but may be disproved in another suit, and such finding, therefore, is not the subject of appeal.

We are unable to concur in that view of the nature of a suit of this description. The suit is in reality, in our opinion, a suit between the mortgagor and mortgagee for an adjustment of the account between them. If, upon taking the account, it appears that the mortgagee has been fully satisfied, the plaintiff, the mortgagor, is entitled to have back the property, and the Court would make a decree for that purpose; but we think that the question in the suit is not simply whether the plaintiff is entitled to have the property back, and that the Court being a Court of Equity and acting upon the principle that it is always the aim of a Court of Equity to finally determine as far as possible all questions concerning the subject of the suit, the account should be taken up to the time of the decree, and the account so taken should be considered to be binding, and the parties should not be at liberty, except under peculiar circumstances, to re-open it in another suit. Therefore, in the present case, we think we must deal with the suit as one for the adjustment of the account to be followed by a decree according to what shall appear, on taking the account, to be the right either of the plaintiff or the defendant.

The first objection which was raised on the part of the appellant was that, in taking the account, interest ought to have been allowed upon the 22,500 rupees from the year 1224 to the year 1235.

Upon this the document to be looked at is the *ekrarnamah* of the 21st Assar 1224. It recites that there had been, on account of 11,011 Sicca rupees bearing no interest, a grant in *churna* of 1,000 *beegahs* of Mouzah Surouta, of which the annual revenue is 1,001 Sicca rupees, from 1225 to 1235 to Baboo Kishen Doss Mahajun, and that the sum of 11,011 rupees would be repaid up to the term of the lease: it also recites that on account of an advance of 16,384 Sicca rupees, the said Baboo Kishen Doss Sahoo holds a case of Mouzahs Gunga Chuck, Sewhad, &c., for six years, commencing from 1223 to 1228 at an annual rent of 1201 Sicca rupees, which on account of interest for the aforesaid *churna* is entered. Then it refers to 2,000 rupees on account of an assignment of 5,500 rupees having been taken from the said Baboo Kishen Doss Sahoo and been applied to the payment of the revenue of the Jageer Mehal of Nawab Moneerooddeen Dowlah in Pergunah Arwal, and then to a sum of 15,000 rupees usufructuary cases of Mouzah Jugro Mainpoora, and says the mortgagee had executed two usufructuary leases from 1220 to 1224 to 1228 and that at the close of 1222 F. S. the proprietary villages in Pergunnah Arwal were sold by auction by the Collector of Behar; it then also refers to a sum of 1,500 rupees being due to Baboo Kishen Doss Sahoo by him and proceeds,—"I consequently do promise and engage in writing to pay the sum of 16,384 rupees, the zur-i-peshgee of Mouzahs Gunga Chuck, Sawdah, &c., and 22,500 rupees aforesaid, aggregating 33,884 rupees, at the close of the lease of Mouzah Gunga Chuck, Sawdah, &c.," —that being the lease for six years which commences from 1223 to 1228. "In the event of my not paying the aforesaid sum of money the usufructuary leases of the said Gunga Chuck at the rental above stated on account of interest on the said sum shall be maintained and continued, and after the payment of Rs. 11,500 (it should be Rs. 11,011) "covered by the usufructuary lease of the "said Mouzah Surouta, the said Sahoo will "receive this annual rent from 1236 *Fuslee* "and will continue to hold the Mouzah until "the payment of Rs. 22,500 aforesaid in "one lump sum." Then, from 1236 F. S., there is a mortgage by way of usufructuary lease for the 22,500 rupees, and nothing is said about interest; but then it proceeds thus "The said Sahoo will not demand from me interest on Rs. 22,500 from 1225 to 1235 F. S." Therefore, there is an express agreement that interest on the 22,500 rupees shall not be paid for that period; and it may be taken also as an implied agreement that after 1235 *Fuslee* that sum shall bear interest.

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It was argued on behalf of the appellant that as the plaintiff in this suit seeks the assistance of this Court and asks to have the accounts taken and the mortgage declared to be satisfied, the Court ought to impose upon him the obligation to pay the interest on this 22,500 rupees from 1225 to 1235.

No doubt the rule is that, where a party seeks the aid of a Court of Equity, the Court will make him do equity before it will grant him relief. But here all that the plaintiff is seeking is that which he is, by virtue of the law which prevented more than 12 per cent. interest being taken, entitled to, *viz.*, to have the account taken and to have it ascertained whether the mortgagee has, by means of these usufructuary mortgages, obtained more than 12 per cent. interest; and if he has, that the surplus may be applied in reduction of the principal, he is certainly not seeking that which would authorize the Court to depart from the agreement of the parties that this sum should not bear interest during those years. We can see no equity in obliging him to pay interest for the period that the mortgagee had agreed that he should not receive interest for. The accounts ought to be taken fairly between the parties, but they ought to be taken according to their contract, subject to any alteration which may be imposed upon them by reason of the law which prevented more than 12 per cent. interest being taken.

The next question is whether the mortgages had been satisfied some years before the suit was brought. Where the plaintiff alleges, as he did in this case, that the mortgages were satisfied and that he was entitled to have back the property, the *onus* is upon him to show that to be the fact; he must certainly give some evidence to satisfy the Court that what he alleges is the truth, and that he is entitled to have back the property.

In the present case, he appears to have given no evidence of that: in his plaint he made a general allegation that it was so, accompanying it with a statement which, it may be said, is on the face of it improbable, because, according to him, the revenue of the property during a long series of years, commencing in 1236 F. S., and coming down to 1270, was precisely of the same amount. Obviously that is an imaginary account of the revenue, and he has not attempted in any way to show what it really was. It cannot be supposed that, if the estate in 1270 produced as he says 4,950 rupees, it produced the same sum in 1236 and in all the intermediate years.

The Judge, then, seeing this, appears to have directed his attention to the evidence which the defendant gave. After speaking of the papers which the defendant had filed, namely, the *jummabundee* papers from 1251 to 1256 and from 1261 to 1262, as far as Surouta is concerned, and from 1261 to 1264, 1266, 1267, 1268, 1269, and 1274, as regards Gunga Chuck, he says:—"These "papers, it is to be observed, are not borne "out by the *luggut* papers filed by the de-"fendant in rent suits instituted by him. "The very appearance of these papers "shows that they are not original collection "papers; had they been such they would "undoubtedly have corresponded with other "documents filed; they appear to me to have "been got up for the occasion." He then speaks of a Memorandum Book which the defendant had filed as being pregnant with the gravest possible suspicion and as not appearing to have been kept regularly from 1236 to 1277, and he says he cannot believe that the Book is *bonâ fide*. But then the Judge seems to have considered that although those documents and this evidence, produced by the defendant, was, as he says, open to the gravest possible suspicion, yet, there being nothing else in the case before him, he was at liberty to make use of it at all events against the defendant, and to say whether upon it the case of the plaintiff was not made out. He says, in a subsequent part of his judgment:—"The accounts appended in the "plaint do not appear to have been adjusted "from unimpeachable figures and facts; "therefore they cannot be implicitly relied "upon. In order to obviate difficulties which "surrounded the case, I have adopted defend-"ant's figures in the manner following:—The "*jummabundee* papers filed by him were care-"fully examined, an average rate per each "village was struck, and from these averages "a second average was made. The result thus "obtained, *viz.*, Rs. 2-6-9¼ per beegah, was "adopted to be the rate of assessment; this "was multiplied by the area which the de-"fendant's papers furnished, *viz.*, 2,387 bee-"gahs 7 cottahs, and the product was "Rs. 5,803-13-11, which of course re-"presents the gross receipts, from which "collection charges were deducted, and the "net balance was placed against the defend-"ant's claim to interest." He then makes out a tabular statement, in which, commencing in the year 1236, he takes the total amount of zur-i-peshgee at Rs. 41,476-4-3, the difference being caused by the sicca rupees being converted into Company's rupees;

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he then takes Rs. 4,977-2 as the interest upon that at 12 per cent., making a total of Rs. 46,450-6-3; then he takes the gross receipts at the amount which he had stated, namely, Rs. 5,803-13-11, and taking collection charges at Rs. 580-6-2, he shows a net balance of Rs. 5,223-7-9, being in excess of the interest. Consequently, if that is a correct way of taking the account, and the tabular statement is supported by the evidence, there would be a gradual reduction of the principal; and according to the tabular statement, the principal sum would have been paid off in the year 1261, and from that date there would be a balance in favor of the plaintiff; and taking the amount of the mesne profits for the last six years, which was all that the plaintiff could claim, he made a decree in plaintiff's favor.

Now, it seems that there are two errors in this mode of dealing with the case. In the first place, he appears, in taking the average quantity of beegahs, namely, 2,387 beegahs 7 cottahs, to have divided by eight, whereas in some of the items of which the average was made up the papers were for nine years instead of eight, and in taking this average there is an error which amounts, when it comes to be calculated, to a sum of Rs. 385 annually; which would be sufficient, according to his tabular statement, to turn the scale, and instead of there being a surplus, after payment of interest, there would be a slight deficiency.

But that is not the only error which he has fallen into; there is one more serious than that. He says that, in ascertaining the average rate, namely, Rs. 2-6-9¼ per beegah, the average rate for each village was struck, and from these averages a second average was made. Now it appears that, with regard to the several villages, two of them had a lower rate than the Rs. 2-6-9¼. and one was at a very much lower rate; it appears also that the villages where the rate was lower, and especially so in the case in which the rate was very much lower, contained a considerably larger quantity of land than the villages where the rate was high; and when the figures come to be looked at, it is obvious that the taking this second average was a fallacious mode of calculation: instead of bringing out a fair average for the whole quantity of the land, it brought out a larger amount than it ought to have been.

The mode in which the rate ought to have been calculated and which there was no difficulty in using, was to take the average rate for each village; and if that is taken, it is found that, after deducting collection charges, the sum which would be applicable to the payment of the interest of the mortgage would be 4,266 rupees, which falls considerably below the amount of the interest, that being 4,977 rupees. It is, therefore, clear that, if the account had been correctly taken upon such evidence as there was before the Judge, the result would have been that, instead of there being, from time to time, a surplus application to the reduction of the principal sum there would not have been sufficient to satisfy the interest, and it would have been accordingly falling into arrears. Therefore, the case of the plaintiff, upon such evidence as there is in the suit, fails. The principal sum has not been paid or satisfied, and he is not entitled to have back his property.

But then we have to say, in order, as we said, finally to determine as far as possible all questions concerning the subject of the suit, what sum ought to be declared to be due from the plaintiff upon the payment of which he would be entitled to have back the property; in other words, we have to say whether anything is now payable to the defendant, the mortgagee, beyond the principal sum.

Now, in considering this part of the case, the conduct of the defendant in not keeping and producing accounts becomes very important. Before, we were enquiring whether any thing was due to the plaintiff upon such accounts as the defendant had produced, and those accounts could fairly be used against the defendant. But when the account has to be taken in favor of the defendant, he is to show what, if anything, is due to him for interest. Then his accounts are not to be regarded as perfectly true and correct. He ought to have kept proper accounts and furnished the Court with the means of seeing what interest is still really due to him if any is. If he has misconducted himself with regard to keeping the accounts of this property, and has failed to produce proper evidence before the Court of the amount of his receipts in respect of it, the consequences must fall upon him. The Court is unable to say, upon such evidence as the defendant has produced, what amount beyond the principal sum is really due to him. He has not acted in the way in which, as mortgagee and as trustee for the mortgagor, he was bound to do, and he has not produced to the Court the accounts which he ought to have produced if he sought to have a decree made in his favor.

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It appears to us, therefore, upon such evidence as there is before us that the defendant is entitled to be repaid the principal sum: but that no decree can be made declaring him to be entitled to any further sum. The decree of the Lower Court will be altered by declaring that there is still due to the defendant the principal sum secured by the mortgage, namely, Rs. 41,476-9-3, and that on payment of that the plaintiff may redeem the property; but if there is any delay in making that payment, then the plaintiff would be liable to pay interest upon the money from this time, and in taking an account of the interest which may be found due from him from the date of this decree, allowance will have to be made for the revenue or profits of the estate which the defendant may receive. The account must be considered as settled up to this time, and it will only be necessary, if the plaintiff hereafter seeks to redeem the property, to take a further account of the interest on the one side and of the revenue on the other. In that way, so far as is possible in the present suit, a decision is come to with regard to the rights of the parties.

Then with regard to the costs of the appeal and the costs of the suit, it is true that the plaintiff has failed in his suit, and ordinarily he would be made to pay the costs of it; but in suits between mortgagor and mortgagee, where a defendant has failed in his duty to keep accounts and has not produced proper accounts, it is regarded as misconduct which ought to be taken into consideration upon the question of costs. We think in this case, although the suit is dismissed, there should be no costs of the suit given to the defendant.

The decree of the Lower Court will be modified according to this judgment, and each party will bear his own costs of the suit including this appeal.

The 26th March 1872.

Present

Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo Law (Mithila)—Joint Family—Acquisitions standing in Name of Individual Members—Rights of Son's Widow—Separate Property—Partition — Succession—Maintenance— Cesser of Commensality—Punchayet.

*On Appeal from the High Court at Calcutta.**

Anundee Koonwur, Mankee Koonwur, and Poonpoon Koonwur

versus

Khedoo Lal.

This was a case in which the questions raised were, what was the *status* of the Hindoo family of which the appellants and the respondent were members, and whether certain acquisitions were to be regarded as part of the estate of the late head of the family, or as the separate property of the individual member in whose name they stood and by whom they were ostensibly made. The PRIVY COUNCIL, in affirming the judgment of the High Court in so far as it held that the acquisitions of the family in the lifetime of the late head of the family were part of his estate, and in declaring other properties also to be part of his estate, observed, with reference to the doubt and difficulty they had felt in dealing with a record the value of which was by no means in proportion to its bulk, and with the conflicting judgments of two Indian Courts, that the case was one which a native Punchayet composed of persons conversant not only with native customs but with the circumstances of this family, knowing what questions to put to the parties and what accounts to call for, and capable of understanding such accounts when produced, would probably have been more competent than any Court of Justice in India or England to try satisfactorily.

The wife of a Hindoo who predeceased his father without male issue, is entitled, as his widow and heiress, to succeed to his separate estate.

Even if the son survived his father, but died subsequently and before a partition, his share, according to the Mithila law, would pass to his brothers to the exclusion of his widow, who would be entitled only to maintenance.

The cesser of commensality serves to remove and qualify the presumptions which the Hindoo law might otherwise raise, that an acquisition made in the name of an individual son of the family was made by the head of the family and as part of the family estate.

IN this case three distinct appeals against a decree of the High Court of Bengal have been consolidated and heard as one appeal. The principal questions raised are, what was the *status* of the Hindoo family of which the appellants and the respondent were members; and whether certain acquisitions are to be regarded as part of the estate of the late head of the family, or as the separate property of the individual member in whose name they stand, and by whom they were ostensibly acquired.

The following is the history of the family in question: Choonee Lal, the father, who died in October 1854, had for many years carried on business as a cloth merchant at Sahibgunj, in Zillah Behar, within that part of India in which Hindoos are governed by the Mithila law. At the time of his death this business was carried on in his sole name;

* From the judgment of E. Jackson and A. A. Roberts, J.J., dated 22nd June 1863.

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but he had previously, and up to the year 1851 or 1852, been in partnership first with one Radha Lal, and, after the death of that person, with his son, Sreekishen.

All parties are agreed that he had no ancestral estate, and that whatever property belonged to him was of his own acquisition. He had three sons, *viz.*, Gopal Chund, the respondent Khedoo, and the appellant, Gunput. About 1839, and after his sons had reached man's estate, he married a second wife, who survived him.

Gopal Chund, the eldest son, became of unsettled, if not of unsound mind, in or before the year 1848, when he left his home as a Byragee, or religious mendicant, and wandered away on pilgrimage to various holy places. His wife, the appellant Mussumat Mankee Koonwur, tendered some evidence in this suit to show that he had been seen alive as late as 1858, and may be still alive; but both the Indian Courts, dicrediting that evidence, have come to the conclusion that he had not been heard of for twelve years before the date of the first decree, and proceeding on the presumption of Hindoo law have treated him as then dead. There is nothing, however, to show that he did not survive his father. He had no male issue, and is represented on the record by Mussumat Mankee Koonwur, who, if he be dead, would, as his widow and heiress, be entitled to succeed to his separate estate.

Gunput, the younger son, has died since his appeal from the decree of the High Court was allowed. He, too, had no male issue, and his appeal has been revived by his widow and heiress, Mussumat Anundee Koonwur. He left, however, a daughter, Mussumat Poonpoon Koonwur, who has an infant son, Lulloo Baboo; and she is an appellant against the decree in respect of the interest which she claims in part of the property in dispute. Khedoo Lal, the respondent, and the plaintiff in the suit, has at least two sons, Brij Bhookun Doss, and Mahomed Lal, of whom mention is made in the suit, but who are not parties to it.

From this statement of the family, it follows that the property of which Choonee Lal died possessed, whatever it was, descended to his sons living at the time of his death in equal shares. If Gopal Chund were then dead, the estate would decend to Khedoo and Gunput in equal moieties. And even if Gopal is to be taken to have survived his father, but to have died subsequently, and before a partition, his share, according to the Mithila law, would pass to his brothers, to the exclusion of his widow, who would be entitled only to maintenance. This does not appear to be contested. The question in dispute is, which, if any, of the various acquisitions of the family, standing in the separate names of different members of it, are to be treated as part of the estate of Choonee Lal, and descendible to his heirs.

The suit was commenced by the respondent on the 1st of November 1859. It was originally brought against Gunput and his daughter, Mussumat Poonpoon Koonwur, described as the mother and guardian of Lulloo Baboo; and the plaint treated the share and interest of Gopal as vested in his two brothers. The appellant, Mankee Koonwur, however, intervened as an objector in respect both of the share in his father's estate, to which Gopal, if alive, was entitled; and of that part of the property claimed, which she insisted was his separate estate, and by an order of the Principal Sudder Ameen, in whose Court the suit was brought, she was made a defendant.

The plaint claimed a moiety of all the property specified in the schedule annexed to it, and valued at upwards of two lacs of rupees, the respondent alleging that he had been dispossessed of it. Some objections have been taken to the frame of the suit on the ground that the respondent has not included amongst the subjects of it that property which is held by him and his sons in their respective names. But their Lordships are of opinion that, on a fair construction of the plaint in connection with the respondent's written statement, which will be afterwards referred to, it must be held that he does offer to account for the whole of what is so held as part of his father's estate.

The plaint, though it prays for delivery of possession, seems to be framed rather with a view to obtain a declaration of the partibility of the disputed subjects, than to carry out a partition by metes and bounds of the estate to be consummated by the delivery of actual possession.

The following are the issues settled in the suit :—

1. Whether, according to the statement of the plaintiff, the whole of the property in dispute belongs to the paternal estate and is undivided ? or whether, according to the averment of Gunput Lal and Mussumat Mankee Koonwur, defendants, part belongs to the paternal estate, and part has been acquired by Gunput Lal and Gopal Chund during the time of their separation and messing apart ?

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2. Whether the property mentioned in the written statement of Mussumat Poonpoon Koonwur belongs to her, or not ?

3. Whether Gopal Chund, the husband of Mankee Koonwur, is lost, or whether he is residing towards the North-Western Provinces ; and if he is lost, whether the claim of the plaintiff to a moiety is right or not ?

3. Whether the estimate of the effects and goods and chattels in litigation, and the amount expended, is correct or not ?

Before considering these issues and the evidence applicable to them, their Lordships think it desirable to pursue the history of the family.

It is admitted on both sides that, when his two elder sons came of age, Choonee Lal opened for each a separate cloth-shop, and established him in it. The precise dates at which these shops were opened are not quite certain. The respondent admits them to have been in existence before 1835, and the appellants insist that they were established before 1829. According to Mewa Lal, a witness for the respondent and the brother of his step-mother, they were established in 1829 and 1831. The respondent appears to have followed his father's example, and to have opened two other cloth-shops, one in the name of each of his sons. He insists, however, that all these shops and their profits were and are part of Choonee Lal's estate ; whilst the appellants, of course, contend that each was and is the respective property of the person in whose name the business was carried on, Choonee Lal having no interest therein. Gunput, the third, remained for some time in the cloth-shop of Choonee Lal and Bhadha Lal, but, as he says, as a gomastah employed at a salary of 50 rupees per mensem. Afterwards, and about the year 1844, a banking firm was opened in the names of Gunput Lal and Sreekishen Lal, which was carried on in their names until 1850, when Sreekishen retired, and the business was thenceforward, and until the death of Choonee Lal, carried on in the names of Choonee Lal and Gunput Lal. The question, what interest, if any, Choonee Lal had in this concern, is one of the material issues in the cause ; the respondent contending that the beneficial interest in the half-share during the partnership with Sreekishen, and the whole interest after the dissolution, belonged to Choonee Lal; the appellants insisting that he never had any interest in that *kotee*, the half-share originally, and afterwards the whole, being the separate and self-acquired property of Gunput. Again, both parties are agreed that, at the time of the death of Choonee Lal, his three sons had ceased to live in commensality with him or with each other. But the time at which such separation took place is in dispute, the appellant contending that it was complete in 1829, and the respondent insisting each brother withdrew from the state of commensality with his father at a different time, *viz.*, Gopal about 1839, the respondent about 1846, and Gunput as late as 1852.

The state of the landed property standing in the names of the different members of the family is as follows :—

The respondent, in his written statement, says that Mouzahs Budem and Hurchundpore and Rughoonathpore and Jhekutea in Pergunnah Kotumba, and two houses and a coach-house situate in Street No. 4 of Sahebgunj, were all acquired with the profits of the cloth-dealer's shop bearing his name, and were then "under his control." These, as was before stated, do not form part of the properties specified in his plaint ; but they are covered by the general conclusion of his written statement, which is in these words :— "The conclusion is, that all the properties and effects, and moneys and common articles of this estate bearing the name of your petitioner's father, or of any of the brothers, or of any of the sons, constitute the estate left by, and that acquired with the funds of, my father." Of the landed properties specified in the plaint, some are admitted to be part of Choonee Lal's estate. But as to the rest, Mouzah Tilhara and an upper-roomed house in Sahebgunj, in which the banking *kotee* has been carried on, are claimed by Mankee Koonwur as the separate and self-acquired property of her husband, Gopal Chund. Other parts (the particulars of which are stated) are alleged to be the separate and self-acquired property of Gunput ; whilst the several properties specified in her written statement are claimed by Mussumat Koonwur as "her exclusive property, with which neither the respondent nor Gunput Lal has any concern."

Before considering the conflicting claims to these properties, it seems to their Lordships to be desirable to ascertain and determine, if it be possible, when the brothers first became separate in food from their father and each other ; in other words, when that commensality, which is the normal condition of an undivided Hindoo family, ceased.

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The finding of the High Court on this point is as follows:—

"We are of opinion that, from the admissions of the parties, and the dates of the purchases of the houses in which the different sons were established by their father, the three sons began to live separate from their father at different dates, concurrent with or subsequent to their father's second marriage in the year 1246 (A. D. 1839), in which year the eldest son, Gopal Chund, got a house to himself, while Khedoo Lal and Gunput Lal went into separate houses in the year 1253 (A.D. 1846) and 1259 (A.D. 1851) respectively. We think, too, that there was from those dates an undoubted separation in food between the father and each son as he left the paternal house." The appellants contend that, as early as 1829, the three brothers had all become separate in food from their father and from each other; and have argued at the bar that the fact has been so found by the Principal Sudder Ameen.

The judgment of the Principal Sudder Ameen does not, as their Lordships read it, expressly fix the date of the separation; but its general effect is undoubtedly on this point more consistent with the case of the appellants than with that of the respondent. The evidence in the cause is conflicting and far from satisfactory. The finding of the High Court seems to proceed upon the several dates of the purchases of the houses in which the three brothers ultimately came to live; and to assume that each brother withdrew singly and at a different time from the state of commensality. This does not appear to their Lordships to be probable. On the other hand, the witnesses for the appellants, speaking with the usual inaccuracy of native witnesses as to time, are not agreed as to the date of the separation. Thanoo Chowdhree puts it as late as 1834; Goureesunkur makes it as late as 1832. On the other hand, Gunga Ram Kandoo, though a witness produced by the respondent, supports, on this point, the case of the appellants. Mewa Lal says:—"I do not recollect the year, but when the family increased, Choonee Lal provided his sons with separate houses and paid their expenses." On the evidence, their Lordships are by no means satisfied that the separation took place so early as 1829.

On the other hand, they do not think that the date of each brother's separation can safely be determined by the date of the purchase of the house in which he ultimately lived. They are disposed to think that the separation took place on or shortly after the second marriage of Choonee Lal in 1839.

Another observation which arises upon the evidence in the cause, is that this cesser of commensality, whenever it took place, does not appear to have operated as a complete separation of the different members of the family, or to have prevented Choonee Lal from continuing to exercise many of the functions which would ordinarily belong to the head of an undivided Hindoo family. The whole family continued to reside in the same town. Some of the witnesses depose that marriages and other family ceremonies continued to be performed in Choonee Lal's House, and at his expense, as they would have been had no separation taken place. And this testimony is confirmed in the case of the marriage of Poonpoon, the daughter of Gunput, by a passage in the correspondence which will be afterwards referred to. Again, it appears by the evidence that, after Gopal Chund went away, his separate establishment was broken up, and his wife and family returned to live under the same roof with Choonee Lal.

The cesser of commensality is only material to the determination of the issues in the cause, in so far as it removes or qualifies the presumptions which the Hindoo law might otherwise raise, that an acquisition made in the name of an individual son of the family, was made by the head of the family, and as part of the family estate. According to their Lordships' view of the evidence, it is not proved to have taken place at the date of some of the acquisitions which are in question in this suit; and the effect to be given to it, in weighing the conflicting evidence concerning transactions of a date subsequent to that at which it took place, is necessarily diminished by such evidence as that which has been just referred to.

Their Lordships will, in the first instance, following herein the example of the High Court, consider the evidence touching the earliest of the acquisitions in question—Mouzah Tilhara.

That property was purchased in the year 1835, at a revenue sale, in the name of Gopal Chund, for 4,400 rupees. Their Lordships, for the reasons above stated, are disposed to believe that, at that time, the cesser of commensality relied upon had not taken place. They will, however, consider the evidence relating to this property independently of any presumptions which might arise from the fact that the family was then joint in food. It may further be admitted that there

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is no documentary evidence corroborative of the assertion made by some of the respondent's witnesses; that the purchase-money was paid out of the funds of Choonee Lal; and further that, if the shop carried on in the separate name of Gopal Chund was his own separate property, he may well at that date have been in a position to pay out of the accumulated profits of that shop a sum of 4,400 rupees. It happens, however, that we have evidence concerning the enjoyment of this estate, which is wanting as to the other properties in dispute.

It has been proved that this property, between the years 1841 and 1855-56, was under several successive leases demised to Nundcoomar (one of the respondent's witnesses, and the brother of Choonee Lal's second wife), sometimes jointly with other persons, sometimes alone. One of the leases, that granted to Nundcoomar on the 10th of December 1849, is in the Record; it of course purports to be granted in the name of Gopal Chund, and is signed by him. But it is also countersigned by Choonee Lal. It was, indeed, suggested at the bar that the Choonee Lal, whose name is so subscribed, being described as putwarree of Mouzah Sahebgunj, was not the father of Gopal, but some other person of the same name. Their Lordships, however, see no reason for adopting that conclusion. A circumstance of far more importance is that Nundcoomar has produced a long series of letters addressed to him as tenant of this property by Choonee Lal in his lifetime, and after his death by Gunput. The genuineness of these letters their Lordships have no reason to doubt. They are to be found in this Record. They cover a period from 1841 to 1856-57, when the tenancy of Nundcoomar terminated. Many of them therefore are anterior in date to 1848, when Gopal left his home, and were written at a time when there is no reason to suppose he was of unsound mind or incapable of managing his affairs. It is, however, impossible, in their Lordships' opinion, to read these letters without coming to the conclusion that they were such as the real owner of the estate would write to his tenant, and that they are inconsistent with the case made by the appellants, *viz.*, that Kusba Tilhara was the separate property of Gopal Chund, and was only managed for him and his family after his insanity had declared itself, first, by his father, and afterwards by his brother, Gunput. In the earlier years, rent and produce are acknowledged by Choonee Lal as received by him on his own account, without reference to Gopal Chund.

In No. 273, p. 187, which is dated in 1252 or 1845, he writes: "Pay Meer Gholam, six rupees for rent of shop occupied by Baboo Gopal Chund for three months, *and place it to my account, and it will be deducted from the rents.*"

In No. 279, p. 188, which is dated in 1845, he complains of the rent being in arrear, requires 800 C. rupees to be sent immediately, and says, "Do not delay, as I am desirous of sending the revenue to Patna. Till the revenue is sent and receipt taken, my mind is not at ease, *because it affects my landed property.*" No. 255, p. 183, written in 1843, is the letter cited by the Judges of the High Court. It may be inferred from it both that Choonee Lal, as the head of the family, was about to celebrate the marriage of Poonpoon, the daughter of Gunput, and that he was requiring the tenant of Kusba Tilhara to send part of the produce of the estate to be used on that occasion.

In No. 303, p. 194, written in 1852, he reproaches Nundcoomar with being in arrear, and says, "You are well aware that I was in need of expenses this year; it would have been proper for you to have advanced ten rupees more by way of assistance; you might have taken credit in the following year;" and he threatens Nundcoomar with a proceeding in the nature of a distress. This is the language rather of the owner of the estate than of a trustee for the master and absent proprietor.

In like manner, after the death of Choonee Lal, Gunput writes in the character of proprietor, not in that of manager for the absent Gopal. He considers what repairs should be made; threatens his uncle when in arrears, and reproaches him with having ill-used the ryots and dependents. In No. 393, at p. 216, he, too, requires produce to be sent for the marriage of Baboo Laljee's daughter, with which Gopal would seem to have no concern. In No. 395, at the same page, he writes, "You requested me to write a letter to Patna that you should deposit the rents of Kusba Tilhara there; but I have no desire that money should be deposited there, as a large sum of mine is deposited there; therefore I request you to send in cash the rent of Kusba Tilhara up to Phagun instalment in full and soon."

Again, No. 387, at p. 214, written in 1856, is a remarkable letter, for it not only gives various directions which imply ownership, but it contains the following passages,

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which seem to point to the joint interest of the respondent in this property : "Uncle, I have been laid up with fever, therefore I have sent Khedoo Lal brother for enquiry." And again, "Uncle, I have already written to you the full particulars ; I have also explained to Khedoo Lal brother; please give Khedoo Lal your good opinion regarding any point he might ask, and act accordingly."

Their Lordships can find no trustworthy evidence that either Choonee Lal or Gunput, whilst thus acting and writing, accounted for the rents of this property to Gopal or to Gopal's family ; and, finding the direct evidence on the part of the respondent thus corroborated, they concur in the conclusion of the Judges of the High Court, *viz.*, that Kusba Tilhara was purchased by Choonee Lal on his own account, though in the name of his eldest son.

Their Lordships will next proceed to consider what is the effect of the evidence as to the banking *kotee* established in 1844, from which a considerable part of the family wealth seems to have been derived. The appellant Gunput has contended broadly that in this *kotee* Choonee Lal had no interest. It is, however, unquestionable that, after the dissolution of the partnership with Sreekishen the business was carried on in the joint names of Choonee Lal and Gunput Lal ; and the Principal Sudder Ameen, though his decree in other respects was adverse to the respondent, gave effect to the ostensible title, and held that Choonee Lal had a half-share in this *kotee*. Gunput has represented that, after the establishment of his brothers in separate shops, he remained in his father's original shop as a gomastah at 50 rupees per mensem. It is very difficult to believe that, by his earnings in this capacity, or by means of any other separate employment, he accumulated money enough to pay, in 1835, 7,500 rupees for the lease of Coorkihar ; to pay the price of the 8 annas of Gorabhurat purchased in his name in 1842 ; and, finally, to establish this *kotee*. It seems to be far more probable that this business, which was originally carried on in partnership with Sreekishen Lal, the partner of Choonee Lall in the cloth-shop, was, in fact, established and carried on by Choonee Lal, though in the name and with the aid of the personal services of his youngest son. At all events, it lay upon Gunput, in whose dominion the books of this concern were, to show far more clearly than he has done that his father had either no interest or only a limited interest, in this concern. And, upon the evidence as it stands, their Lordships can find no sufficient grounds for dissenting from the conclusion of the High Court that the banking-house was, at the time of his death, the sole property of Choonee Lal.

In their Lordships' opinions the fate of the appeals must be determined by the findings upon these two questions—the real ownership of Kusba Tilhara and the interest of Choonee Lal in the banking *kotee*. For, whilst the respondent has broadly contended that everything which stood in the name of any member of the family belonged to Choonee Lal, so the appellants have as broadly contended that nothing was Choonee's except that which stood in his own name, and that *benamee* transactions were unknown to the family. It is hardly possible upon the evidence to draw a definite line between these two cases. The difficulty of doing so is greatly increased by the finding as to the *kotee ;* since, unless he had the separate interest, which he says he had, in that *kotee*, it is difficult to see whence Gunput derived the funds by means of which many of the purchases in his own name were made. Their Lordships are not insensible to the difficulties of the other side. If the evidence as to the shops carried on in the separate names of Gopal and of the respondent and his sons had stood alone, their Lordships would have inclined to the opinion that they were separate property. It is, however, to be observed, as to these, that the respondent admits that the separate shops opened in his name or in the names of his sons, and all the investments made out of the profits of these shops, form part of the joint family estate ; and their Lordships, for the reasons above given, have found that Mouzah Tilhara, the principal and almost the only property alleged to have been purchased by Gopal out of the profits of his shop, was in fact purchased by Choonee Lal in the name of his son. The ikranamah, again, though it does not touch directly any of the properties in dispute, affords a strong inference in favor of the theory of separate interests and separate transactions; and it is difficult to explain why so elaborate a contrivance should have been adopted in order to shift property belonging to the father from the name of one son to that of another. The case is one which a native Punchayet, composed of persons conversant not only with native customs, but with the circumstances of this family, knowing what questions to put to the parties, and what accounts to cal

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for, and capable of understanding such accounts when produced, would probably have been more competent than any Court of Justice in India or England to try satisfactorily. Their Lordships have, in this case, felt much doubt and difficulty in dealing with a record the value of which is by no means in proportion to its bulk, and with the conflicting judgments of two Indian Courts. But, upon the whole, and for the reasons above stated, they have come to the conclusion that it is their duty to advise Her Majesty not to disturb the carefully considered judgment of the High Court, so far, at least, as relates to the acquisitions of the family in the lifetime of Choonee Lal. As to those which have been made after his death, the eight annas of Backergunj, purchased in Gunput's name, cannot be supposed to have been purchased otherwise than out of the family funds in Gunput's hands. There is more difficulty in respect of the lease of Koorhihar which has been renewed in the name of the appellant Poonpoon Koonwur. But their Lordships are of opinion that she has failed to show, as she might have shown, that this renewal was paid for by her own funds. They believe, on the evidence, that the money came from Gunput, and if it came from Gunput it must be presumed, like the purchase-money of Backergunj, to have come from the family funds. Therefore, on this point also, their Lordships think the judgment of the High Court should be affirmed.

On the argument of the appeal it was contended for the appellants, and admitted on behalf of the respondent, that the decree of the High Court would in any case require some qualifications. Their Lordships are also of that opinion; but, as at present advised they are not sure that it will require any alterations except the introduction of a declaration that the separate shops carried on in the separate names of the respondent and of his two sons, and also the landed properties admitted by the respondent to have been purchased out of the profits of those shops, and to be under his control, are also part of the estate of Choonee Lal, deceased; and that, in estimating the half-share of the respondent in that estate, he should give credit for those assets, and any other portion of the estate in his possession or control.

Having regard to the necessary alterations in the decree, and to the nature of the suit, their Lordships think that each party should bear their own costs of the appeal.

The form of the decree, as altered, in pursuance of their Lordships' recommendation, will be as follows:—

It is ordered and decreed that the decree of the Lower Court be and the same is hereby reversed, and the suit of the plaintiff, Khedoo Lal, for a half share of all the property real and personal left by his father, Choonee Lal, deceased, decreed: And it is declared that the estates and landed property standing in the names of Gopal Chund and Gunput Lal, or of any other person or persons, *benamee*, or in trust for them or any of them, are the property of the said Choonee Lal deceased, and acquired with his funds: And it is further declared that the lease of Mouzah Koorkihar was renewed with the funds, not of Mussummat Poonpoon Koonwur, but of the family, which were then entrusted to the defendant the said Gunput Lal: And it is further declared that the banking house as well as the house property claimed were the sole property of the said Choonee Lal deceased: And it is further declared that the shops carried on in the separate names of the said plaintiff Khedoo Lal, and of each of his two sons, and Mouzahs Budun and Hurchundpore and Rughoonathpore and Jheketea in Kotumba, and the two houses and coach-house in Street No. 4 of Sahebgunj, which are all mentioned in the written statement of the plaintiff, Khedoo Lal, and any other property standing in the names of the plaintiff and of his two sons, or any of them or of any other person or persons, *benamee*, or in trust for them or any of them, were also the property of Choonee Lal, and part of his estate: And it is further declared that the said plaintiff is entitled to a half share of the estate of his father Choonee Lal deceased; but that in estimating such half share the plaintiff is to be charged with the value of such of the above-mentioned properties as are in the possession or control of him or of his said sons or any of them, and with the mesne profits thereof: And it is further declared that the said plaintiff is entitled to recover 17,575 rupees and 13 annas, being a moiety of the sum of 35,151 rupees and 10 annas, being part of such estate, and fixed by the said Lower Court as the mesne profits of the said banking house: And it is further declared that the said plaintiff is also entitled to a half share of all mesne profits obtained from the landed property left by the said Choonee Lal deceased since the date of his demise. And it is further declared that the defendant Mankee Koonwur, the wife of Gopal Chund,

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one of the sons of the said Choonee Lal deceased, who is said to be missing, is entitled to maintenance out of the said estate, which will be awarded by the said Lower Court in execution, if required: And it is further ordered and decreed that the said defendant Anundee Koonwur as the widow and heiress, according to Hindoo law, of the said defendant Gunput Lal (now deceased), from and out of the estate and effects, if any, which may have come into her hands or into her possession, do pay the said plaintiff the sum of 3,012 rupees, being the amount of costs incurred by him in the High Court of Bengal, with interest thereon at the rate of 12 per cent. per annum from the date of the decree of the said High Court to the date of realization thereof: And it is further ordered and decreed that the said defendant Anundee Koonwur, as such widow and heiress in like manner, and from and out of the same estate and effects, do pay to the said plaintiff the costs incurred by him in the Lower Court, with interest thereon at the rate aforesaid, from the date of the decree of the said Lower Court to the time of realization.

The 2nd May 1872.

Present:

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert Collier.

Limitation—Act XIV of 1859 *s.* 20—*Boná fide Proceeding to keep alive Decree — Petition for Execution of Money attached in another Suit.*

*On Appeal from the High Court at Calcutta.**

Roy Dhunput Singh

versus

Madhomotee Dabia.

A petition presented *boná fide* by a decree-holder for execution in one suit of money attached in another suit is a proceeding taken within the meaning of s. 20 Act XIV of 1859, to enforce or keep in force a decree. The fact that it was in the end abortive, does not take from it the character of a proceeding to enforce the decree.

In this appeal the only question which arises is, whether within three years preceding the application for execution made in the Court below any proceeding had been taken to keep the original decree in force; the question depending on the 20th Section of Act XIV of 1859. The precise date of the original decree has not been stated, but that date is immaterial, because the question is whether there was any proceeding within three years preceding the application for execution which was made on the 24th April 1869; and undoubtedly it must be shown that within three years of that date some proceeding was taken to keep the original decree in force.

The first proceeding relied on is a former application or suit for execution, the petition in which bore date the 12th December 1865, under which there was an order for the sale of a putnee talook, which was to take place on the 26th February following. On the day of the sale, by agreement, an order was made for the postponement of the sale for two months, and upon that order being made, it was further ordered that the case be struck off the file. It was contended for the appellant that this execution suit must be considered to have continued in living force, although by the suspensory order no proceedings were to be taken by way of sale for two months, and that the three years did not commence to run until the end of these two months. Their Lordships do not think it necessary to decide that question; they desire to give no opinion judicially upon it; having come to the clear opinion that the proceedings which were founded by the subsequent petition of the 20th March 1866 are sufficient to take the case out of the operation of the limitation.

The petition of the 20th March 1866, which was filed before the above-mentioned period of two months had expired, after referring to the decree, and to the execution and the postponement of the sale, alleges that the judgment-debtor had subsequently taken out a decree against a debtor of his own, and sued out execution, and caused some property to be sold, and that the purchase-money, an amount of 551 rupees, was received on deposit, and then the petitioner proceeds, "while my execution was pending "I caused the amount belonging to the judg-"ment-debtor to be attached and file this "petition, and pray that my execution suit "may be restored to the file, and that the "aforesaid attached amount, Rs. 551, be "paid to my mookhtar."

This petition, if *bonâ fide*, would clearly be a proceeding to enforce the judgment; its object being to obtain execution of the money attached. It was referred to the officer of

* From the judgment of Glover and Hobhouse, JJ., dated 11th February 1870, 13 W. R., 164.

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the Court, and the officer upon that reference found that no moneys were attached in execution of the decree in which the petition was filed, that is the decree in the present suit, but that certain moneys had been attached in another suit between the appellant and the respondent. The report is dated on the 3rd of May. On the 12th of May an order of the Court is made upon it, which has the following preamble: "Whereas no money has been attached, no orders "can be passed for the payment of such "money, nor can other steps be taken. It "is accordingly ordered that the case be "struck off the file and the mookhtarnama be "returned." It seems to result from the report of the officer of the Court, and the order made upon that report, that no execution could issue upon the petition in consequence of the money not having been attached in this suit, and that there was another suit between the same parties, in which that sum of money had been attached.

It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bonâ fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colourable one, not really with a view to obtain the money; if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion. It appears that the decree-holder really desired to obtain execution of this money, and the fair inference is that he had mistaken the suit in which he could apply for execution, and having the attachment in another suit, he, by mistake, applied for execution in the present one, in which he had not obtained the previous attachment which is necessary to ground execution.

Then, assuming it to be a *bonâ fide* proceeding, which failed in consequence of that mistake, their Lordships think that the original petition was a proceeding to enforce the judgment, and to have execution of it; that it was a continuing proceeding duly prosecuted by the appellant up to the time of the report, and further up to the time when the judgment was finally given; and that during the whole of such pendency the decree-holder must be considered as going on with one and the same proceeding. Their Lordships do not consider that the fact that it was, in the end, abortive, takes from it the character of a proceeding to enforce the decree. The consequence will be that the 12th May 1866, when the petition was dismissed, is the date from which the three years ought to commence to run. This decision is entirely in accordance with the judgment of this Committee in the case of Maharajah Dheraj Chund Bahadoor and Bulram Singh, and does not conflict with any case to which their Lordships have been referred.

The result is that their Lordships will humbly advise Her Majesty to allow this appeal and to order that the judgment under appeal be reversed, and that in lieu thereof the appeal to the High Court be dismissed, and the judgment of the first Judge be affirmed, with costs. The appellant will have the costs of this appeal.

The 17th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law — Suit by Reversionary Heirs— Alienations by Widow made 50 years ago— Evidence of Legal Necessity—Presumption— Adoption—Onus Probandi.

Case No. 91 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 16th January 1871.

Chowdhry Herasutoollah (Defendant), *Appellant,*

versus

Brojo Soondur Roy and others (Plaintiffs), *Respondents.*

Mr. Woodroffe and *Baboos Romesh Chunder Mitter* and *Mohinee Mohun Roy* for Appellant.

Mr. Branson and *Baboo Tarinee Churn Ghose* for Respondents.

In a suit by the sons of the reversionary heir of a Hindoo ancestor to recover property sold by his widow 50 years ago to the defendant's predecessors, the Court—considering the unreasonableness of expecting direct evidence of legal necessity for the alienations in question after so great a lapse of time, the adequacy of the consideration given by the purchasers, the due registration and publication of deeds 50 years old and containing a

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recital of legal necessity, the proved knowledge of the alienations at the time they were made by the then reversionary heir, his conduct and silence up to the time of his death, or for nine years after the widow's death when the succession opened out to him, and the delay made by his sons in bringing this suit—held the defendants entitled to a strong presumption in their favor, which had not been rebutted by the plaintiffs, that their predecessors purchased the estates in question after due enquiry, and after satisfying themselves in good faith of the existence of a legal necessity for the sale thereof.

Where the *factum* of an adoption was admitted, or at all events not questioned, in the Lower Court, the *status* of the adopted son had been recognized by the family for many years, and the adopted son died possessed of his adopting father's property and performed his shradh—HELD that the strongest presumption arose in favor of the validity of the adoption, and that the *onus* was on those who questioned it in appeal to prove that the ceremonies necessary to render it valid were omitted or not performed.

Glover, J.—THIS was a suit by the plaintiffs, calling themselves the reversionary heirs of Radha Gobind Roy, to recover certain landed property from the hands of the defendants to whose predecessors it had been illegally sold by Kanchun Monee Dossee, the widow of the said Radha Gobind. The plaintiffs allege that the widow having only a life-interest in the estate was incompetent to alienate any part of it except for such proved necessity as the Hindoo law allows, and that there was in fact no such necessity.

The plaintiffs are the sons of Binode Lall Roy, who in the genealogical tree at the head of the plaint is set down as the son of Sham Soondur Roy, but who in the plaint itself is described as the great-grandson of Kanchun Monee's father-in-law. They claim two items of property: No. 1, Mouzah Gobindpore, sold by Kanchun Monee to Mirza Akbur Ali on the 25th of Chyet 1225 B.S., corresponding with April 1819 A.D., for Rs. 6,001; and No. 2, Turuf Jogye to Atabur Hossein on the 7th of Kartick 1277 B.S., or October 1820, for Rs. 10,500. Property No. 1 also was afterwards sold to Atabur Hossein, and his descendants are the present defendants.

The defendants replied (1) that Binode Lall Roy was not the son of Sham Soondur, and that the plaintiffs, therefore, has no *locus standi;* (2) that the suit was barred by limitation; and (3rd) that their ancestor purchased the property for valuable consideration in good faith, believing that the widow had the right to sell in consequence of a legal necessity.

On the back of this written statement there is a note by the Subordinate Judge to the effect that the defendants through their vakeel qualified their allegation regarding Binode Lall Roy; they admitted that he was an adopted son of Sham Soondur Roy, but denied that the usual ceremonies enjoined by Hindoo law in cases of adoption had been carried out.

Kanchun Monee Dossee died at Brindabun in the district of Muttra, North-Western Provinces, many years after the alienations were made. The date of her death is alleged by the plaintiffs to have been the 4th of Jyst 1266 B.S. There was a good deal of argument in the Court below as to her position at Brindabun, the defendants alleging that she had become a Boystobee, and had in consequence retired from all worldly associations. The Subordinate Judge found no proof of such retirement, and the question was not pressed before us on appeal.

The Subordinate Judge fixed and tried five issues, two in bar, *viz.*, champerty and limitation, and three on the merits:—

(1.) Whether Binode Lall Roy was the adopted son of Sham Soondur according to the requirements of Hindoo law?

(2.) Whether Kanchun Monee got the property as heiress of her husband, Radha Gobind, or in gift from him? and

(3.) Whether the sales by Kanchun Monee were made for such necessity as the Hindoo law recognizes and allows?

That first issue was fixed in consequence of the interference in the suit of a vakeel, with whom the plaintiffs had on the 27th of Magh 1276 entered into an agreement stipulating to give him a 6-anna share of any property recovered from the defendants, the vakeel carrying on the suit on their behalf at his own expense. Whilst the suit was pending, the vakeel withdrew, or alleged that he withdrew, his aid from the plaintiffs, and both parties filed a petition to that effect. On reading that petition, the Subordinate Judge rejected the defendant's plea of champerty, and disposed of the issue in favor of the plaintiffs.

On the second issue in bar, he found that Kanchun Monee died on the 3rd Jyst 1266, and that this suit instituted on the 30th Bysack 1277 was therefore in time.

On the merits he found (1) that Binode Lall Roy was adopted in due form and that the plaintiffs were therefore the heirs of Kanchun Monee; (2) that Kanchun Monee took the property as heiress of her husband, and not by gift from him; and (3) that the defendants had failed to prove the necessity for the sales.

The result was a decree for the plaintiffs with costs and interest.

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The defendants appeal on the following grounds :—

(1.) The plaintiff's suit is barred by limitation.

(2.) There is no proof of Binode Lall Roy's legally valid adoption.

(3.) The plea of legal necessity for the sales has been sufficiently proved.

The petition of appeal consists of thirteen clauses, but these three sufficiently include all the points which we shall have to consider.

On the first point, Mr. Woodroffe on behalf of the appellants contends that as the plaintiffs have brought their suit admittedly eleven years after Kanchun Monee's death, the burthen of a very distinct proof is upon them to show the precise date of that death, and that they come within 12 years of that date. He contends that the evidence adduced by the plaintiffs on this point is altogether insufficient and unsatisfactory.

We have had this evidence read to us, and it appears to me worthy of credit. It is the evidence of witnesses entirely unconnected with either party to this suit, and who can have no sort of interest one way or the other. It is corroborated in the strongest manner by the Khatta books of the idol house of Brindabun for 1265-66 B. S., and I think it proves that Kanchun Monee died at Brindabun on the 3rd or 4th of Jyst 1266. It cannot be supposed that these books were interpolated or fabricated for the purposes of this suit. Something was made of a supposed discrepancy between the Brindabun books and the Bashna House accounts filed by the plaintiffs. In the former the death of Kanchun Monee is mentioned as having taken place in Jyst 1266, whilst various items of expenditure on account of her shradh are entered in the plaintiffs' accounts as having been disbursed in Assar 1265. I think that Mr. Branson's explanation of this discrepancy, *viz.*, that zemindaree accounts are made up according to the "Punyah" is a reasonable one ; and it seems quite clear that if the Bashna accounts had been open to the objection now taken, such objection would have been strongly urged in the Court below where the mistake would have attracted immediate notice. The only reasonable explanation of nothing having been made of this apparent discrepancy between the two accounts is that nothing could be made of it, and that the difference of date was explicable by the different ways in which the two khattahs were kept.

On this part of the case I think that the Subordinate Judge was fully justified in finding that Kanchun Monee died in Jyst 1266, and that from the date of the succession opening out to them the plaintiffs have brought their suit within the statute limit of 12 years.

Another point in connection with the issue of limitation was raised by Mr. Woodroffe, to the effect that there was evidence to show that Kanchun Monee took the property in dispute as Shebait of the idol during Radha Gobind's lifetime, and that her position, therefore, was not that of a Hindoo widow at all ; and that if this were so, Kanchun Monee's possession was from the first adverse to the members of Radha Gobind's family, and that the period of limitation ran out even before Kanchun Monee retired to Brindabun.

There is no sufficient evidence, I think, that Kanchun Monee took the properties as shebait of an idol. That the Hoodah might have been originally purchased in the name of an idol is likely enough, but there is nothing to show that the estate was ever considered or treated as endowed property. On the contrary, we find the purchaser Radha Gobind, within a few days of the Government auction-sale, disposing of one of the mouzahs (Hareerampore) of the Hoodah to Sham Soondur Roy.

Moreover, in the deed of sale of Kartick 7th, 1227, Kanchun Monee describes the property as the self-acquired property of her husband. In the other deed of sale dated Bysack 1226, there is no doubt a recital to the effect that the Hoodah is recorded in Kanchun Monee's name in conjunction with the idol, but this would not be evidence of the fact that she was in possession of the zemindaree on an independent title. On this point I see no reason to differ from the finding come to by the Subordinate Judge.

We now come to the question of the adoption of Binode Lall Roy, and Mr. Woodroffe contends that the Subordinate Judge was mistaken in supposing that the defendant's vakeel made any such admission as is recorded on the back of the defendant's written statement. Mr. Woodroffe admits that, if authority to adopt be proved, it would be for his clients to show that an adoption made under that authority was invalid by reason of any of the requisite ceremonies having been omitted. The point has been ruled in Sabo Bewa *v.* Nuboghun Mytee, XI Weekly Reporter, 380.

It seems to me impossible to hold that there was any contention in the Court below,

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either as to the authority to adopt, or as to the *factum* of the adoption. The Subordinate Judge was a native gentleman conducting the trial in his own language, and it cannot be supposed that he made any mistake as to the admission made by the defendant's vakeel. The body of the written statement contains a distinct denial of the fact that Binode Lall Roy was the son of Ram Soondur at all, and this is afterwards qualified by the vakeel conducting the case by an explanation that what was meant was that Binode Lall was not the son of the loins of Sham Soondur, but that he was an adopted son of his, albeit the adoption was not valid in consequence of the omission of the necessary ceremonies. Had the Subordinate Judge been mistaken on this point, there would have been an immediate objection taken to the issue fixed by him, which was whether Binode Lall Roy had been adopted according to the Hindoo Shastras, meaning thereby with due ceremonial observances, and after his decision there would no doubt have been an application to admit a review of judgment, had the Subordinate Judge's mistake given the defendants such a good ground for objection.

It seems clear, moreover, from the nature of the questions put to the plaintiff's witnesses, that the point at issue was not the adoption itself, but whether that adoption was properly carried out. And there is a considerable body of evidence to the fact that Binode Lall Roy performed the shradhs both of Sham Soondur and of his widow Apurva Monee, and was in possession of the family property after Sham Soondur's death.

This being so, it was for the defendants to prove that the adoption was bad for want of the necessary ceremonies, and it is not too much to say, that they have not made the slightest attempt to do so. Their witnesses speak to the fact of a general belief that Binode Lall Roy was adopted, and one of them says distinctly that Binode Lall was adopted, but none of them put forward any doubt as to the adoptions being valid by reason of the omission of ceremonies. And when we find that Binode Lall acted for many years as the adopted son without objection taken by any one, that he died possessed of his adopting father's property and performed his shradh, the presumption is of the strongest that the adoption was a valid one. At all events it was for the defendants to show that it was not. Therefore on this point also I agree with the Subordinate Judge.

The third objection is really the substantial one, namely, that there is sufficient proof on the record that the sales were made by Kanchun Monee for such necessity as the Hindoo law allows. Mr. Woodroffe, however, contends that, under the very peculiar circumstances of this case, it was for the plaintiffs to show why a quiet and *bonâ fide* possession of 50 years should be disturbed, and that the *onus* of proving that there was no necessity for the sales rested with the plaintiffs.

It seems to me that no precise rule can be laid down in cases like this, but that each case should be decided according to its own peculiar circumstances. Ordinarily, a reversioner would be entitled to call upon a purchaser to show that he had made enquiry before buying, and had satisfied himself of the existence of the alleged necessity. But in this case direct proof of such enquiry and of such satisfaction is impossible. The sales were effected in 1225 and 1227 B. S., corresponding with 1819-1820 A. D., or more than 50 years ago, and the property itself is now in the third line of descent from the original purchasers. It has been said that the fact of there being Government revenue due at the time, and that the estate was on the point of being put up for sale in consequence of such default, were matters that could have been easily proved on the part of the defendants by a reference to the Collector's office. But this is a mistake. Records of this unimportant kind are by the orders of Government destroyed within a few years, and the papers now in question must undoubtedly have been destroyed many years ago. The original purchasers are dead, and they would have been the only persons who could have given direct evidence of there having been a full and satisfactory enquiry as to the existence of a legal necessity on Kanchun Monee to sell. Mr. Woodroffe argues that the recital in the deeds, that Government revenue was due, and that the estate was going to be sold in consequence, is in itself proof of the legal necessity, and the case of Womesh Chunder Sircar *v.* Digamburee Dossee, (III Weekly Reporter, 154) has been quoted in support of the proposition. I do not think that the case in question decides this point. There is a remark, no doubt, in the judgment that a recital in a deed is "one species of evidence," but the case was not decided on the evidence afforded by any such recital.

It has been held, however, in Rajaram Tewaree *v.* Luchmun Pershad, XII Weekly

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Reporter, 478, that a recital in a deed of sale which, if true, showed that there was a necessity for borrowing, made it incumbent on the Court trying the case to raise an issue on the subject, but this was done in the present case.

The Privy Council in the case of Rajlukhee Debia *vs.* Gokool Chunder Chowdhry (12 Weekly Reporter, P. C. 47), have laid it down that a recital in a deed of sale by a Hindoo widow is not of itself evidence of necessity, and this I take to be the settled law of the question.

But there may be circumstances as stated in the Privy Council decision just quoted that may raise a presumption that the transaction was a fair one and justified by Hindoo law although direct proof of necessity may be wanting.

In the well-known case of Hunooman Pershad Pandey *v.* Mussamut Babooee Mundraj Koonwree, VI Moore, 393,* the Privy Council ruled that a lender is bound to enquire into the necessities of the loan and to satisfy himself as well as he can. And if he does

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* The 26th July 1856.

Present:

Lord Justice Knight Bruce, Sir Edward Ryan, Lord Justice Turner, Sir John Patteson, and Sir Lawrence Peel.

Mortgage — Ancestral Estate — Charge by Manager— Onus Probandi—Presumption—Trial of Issues—Construction (of Native Deeds and Contracts).

On Appeal from the Sudder Court at Agra.

Hunooman Pershad Pandey

versus

Mussamut Babooee Mundraj Koonweree.

Principles upon which the Courts in India are to decide issues depending before them.

Native deeds and contracts ought to be construed liberally, regard being had to the real meaning of the parties, rather than to the form of expression.

Under the Hindoo law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* manager a charge in lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title.

The question as to the *onus* of proof in such cases is one not capable of a general and inflexible answer; but the presumption proper to be made will vary with circumstances. Thus, a mortgagee, who is setting up a charge in his favor made by one whose title to alienate he knew to be limited, must prove the facts which embodify the representations made to him of the alleged deeds of the estate and the motives influencing his immediate loan; but such proof must not be required from one not an original party, after a lapse of time and enjoyment and apparent acquiescence. Where also a charge is created by the substitution of a new security for an older one, and the consideration for the older one was an old precedent debt of an ancestor not previously questioned, the presumption will arise in favor of a consideration that binds the estate.

Under the Hindoo law, the power of a manager for an infant heir to charge an ancestral estate is a limited and qualified one to be exercised in a case of need, or for the benefit of the estate. Where the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The lender is bound to enquire into the necessities for the loan, and to satisfy himself that the manager is acting for the benefit of the estate. But if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and he is not bound to see to the application of the money. The mere creation of a charge by a manager, securing a proper debt, cannot be viewed as improvident management; and a *bonâ fide* creditor should not suffer when he has acted honestly and with due caution but is himself deceived.

Mode of taking accounts when the defendant is mortgagee in possession.

Knight Bruce, L.J.—THE complainant in the original suit was Lal Inderdowun Singh, described in the plaint as proprietor of the Raj of Pergunnah Munsoor Nuggur Bustee. The suit was against the present appellant, the chief defendant, the mother of the complainant. The complainant sought by his plaint the possesion of certain immoveable property described in his claim, the particulars of which it is unnecessary to state. He sought also to set aside a mortgage-bond, bearing date Assar Sooud Poornumashee 1246 Fuslee, set up by the appellant; to oust the appellant as mortgagee in the Collector's records, and to recover mesne profits.

To this suit the defendant put in his answer. The title of the complainant to the lands as heir was not denied by the answer; but the defendant alleged his title as mortgagee (except as to some *birt* lands, the claim to which was abandoned in the suit, and to which it is unnecessary further to refer). The substantial dispute between the parties was, as to the lands for which the suit proceeded, whether the defendant could resist, under his title as mortgagee to the extent of that interest, the title of the complainant as heir and proprietor of the lands.

It is unnecessary to enter in detail into the pleadings or proceedings in the suit. It is sufficient to state that, in the result, the Sudder Ameen decided in favor of the security, dismissed the claim generally; but that on appeal from that decision, the Sudder Court decided against the security, and in substance granted the relief asked by the plaint, except in so far as it was abandoned.

The reasons for the decision of the Appellate Court are contained in their judgment. The Court says:—"The question with which the Court have first to deal, respects the right of the Ranee to execute the instrument before them." They then remark "that the bond itself assigns to the Ranee a proprietary character, and that it was not amongst the defendant's pleas that the Ranee acted as her son's guardian, but that he has claimed for her the proprietary character, both in his answer to the plaint, and still more broadly and unreservedly in his answer to the pleadings in appeal. The plaintiff, on the other hand, has throughout argued for the avoidance of the bond, by denying the Ranee's proprietary title in any way; and such being the issue joined between the parties, the Court looking to the fact that the estates in dispute unquestionably devolved on the plaintiff, to the exclusion of the Ranee, on the death of the plaintiff's father, Raja Sheobuksh Singh, have no hesitation in declaring that even on the assumption that the Ranee voluntarily executed the bond, and received full consideration for it, the bond is not binding on the plaintiff, and that neither he nor his ancestral property can be made liable in satisfaction of it. It is needless for the Court, their enquiries being thus stopped *in limine*, to enter on the real merits of the transaction as between the Ranee and Hunooman Persad Panday."

Their Lordships collect from this judgment that the Court thought that a bar was interposed by the pleadings, and by the Ranee's act of assumption of proprietorship, to the further consideration whether the appellant's charge could in any character be sustained against the estate.

The Court did not enter upon the question of the validity of the charge, in whole or in part, as a charge effected by a *de facto* manager, or proprietor, whether by right or by wrongful title, nor advert to the fact that the charge included some items of former charge wholly

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enquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge. And again that the

unaffected by the objection which they considered of so much weight.

This judgment may be considered under the following points of view:—

First.—Did the appellate jurisdiction rightly construe the pleadings, and take a right view of the issues framed under the direction of the Judge, according to the practice of those Courts?

Secondly.—Did it take a right view of the relation in which the Ranee intended to stand to her son's estate? and,

Thirdly.—Did it consider the point, whether the rights of these parties could wholly depend upon the question whether that relation was duly or unduly constituted?

On the first point their Lordship's think it right to observe that it is of the utmost importance to the right administration of justice in these Courts that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be, by adjournment, for the decision of the real points in issue.

But their Lordships think that, if the wording of the issues be carefully considered, it will be found that the issue in substance is, whether the charge under the instrument bound the lands. The words in which the Principal Sudder Ameen states the issue on the point are: "whether it (the mortgage-bond) ought to have effect against the mortgaged villages." It was not an issue limited to the particular description or character in which this act was done, and a misdescription or error in that respect would not have been fatal to the charge. Consequently, their Lordships cannot agree with the Sudder Dewanny Adawlut, upon the first point, that the real question in dispute between these parties, *namely*, whether the charge bound the lands in the hands of the heir, was not substantially included in the issues which were evidently intended to raise it. Neither can their Lordships adopt the reasoning on the conclusion of the Sudder Dewanny Adawlut upon the second point as to the relation in which the Ranee meant to stand, and substantially stood, to the estate of her son.

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. Now, what is meant by the assumption of proprietorship on the part of the Ranee which the judgment ascribes to her? It is not suggested that she ever claimed any beneficial interest in the estate as proprietor; had she done so, it would have been, *pro tanto*, a claim adverse to her son; and it is conceded by the respondent's counsel that she did not claim adversely to her son. The terms of "proprietor" and of "heir," when they occur, whether in deeds or pleadings, or documentary proofs, may, indeed, by a mere adherence to the letter, be construed to raise the conclusion of an assumption of ownership, in the sense of beneficial enjoyment derogatory to the rights of the heir; but they ought not to be so construed unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her: that she must be viewed as a manager, inaccurately and erroneously described as "proprietor" or "heir"; and it is to be observed that the Collector takes this view; for whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as "*surburakar.*" If the whole context of all these documents and pleadings be taken into consideration, and the construction proceed on every part, and not on portions of them, they are sufficient, in their Lordships' judgment, to show the real character of her proprietorship.

Upon the third point, it is to be observed that, under the Hindoo law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title. Therefore, had the Raneee intruded into the estate wrongfully, and even practised a deception upon the Court of Wards, or the Collector exercising the powers of a Court of Wards, by putting forth a case of joint proprietorship in order to defeat the claim of a Court of Wards to the wardship, which is the case that Mr. Wigram supposed, it would not follow that those acts, however wrong, would defeat the claim of the incumbrancer. The objection, then, to the Ranee's assumption of proprietorship, in order to get the management into her hands, does not really go to the root of the matter, nor necessarily invalidate the charge; consequently even had the view which the Sudder Dewanny Adawlut took of the character of the Ranee's act, as not having been done by her as guardian, been correct, their decision against the charge without further enquiry would not have been well-founded. It would not have been accordant with the principles of the Hindoo law, as declared in *Coleb. Dig.* vol. 1, p. 302, and in the case of Gopee Churn Burral *v.* Mussamut Ishwuree Lukhee Debia (3 S. D. A. Rep. 93), and as illustrated by the case cited for the appellant in the argument, against the authority of which no opposing decision was cited. Their Lordships, however, must not be understood to say that they see any ground of probability for the assertion that the Ranee really meant to deceive the Court of Wards, or the Collector exercising its authority, by any consciously false description of herself. The title to this Raj cannot readily be supposed to have been unknown in the Collector's office, nor is it probable that the Ranee could have deceived the office by such a false description of herself.

It is a circumstance worthy of remark, too, that the complainant does not ascribe this conduct to her in his plaint. The case that the plaint makes is not that she intruded upon him and assumed proprietorship; the plaint itself says she had possession as guardian, that is, as managing in that character; and on a review of the whole pleadings and documentary evidence, and of the probabilities of the case, their Lordships think it a strained and untrue construction to assign any other character to her acts than that which the plaint ascribes to them, notwithstanding the use of terms inconsistent with it. For these reasons, their Lordships think that the judgment of the Sudder Dewanny Court cannot be supported on the grounds which that Court has assigned.

It then remains to be considered whether the judgment is substantially right, though the reasons assigned for it are not satisfactory or sufficient.

If the evidence disclose, as it is contended for the respondents that it does disclose, no *primâ facie* case of charge at all on this ancestral estate, then as the only bar to the resumption by the heir of his estate is the alleged mortgage title over it, the proof of which lies on the mortgagee, the complainant's title to the estate, to the mesne profits, and to the other relief is made out: but if, on the other hand, the evidence discloses even a *primâ facie* case of charge, some enquiry at least ought, as it seems to their Lordships, to have been directed.

The question then next to be considered is whether a *primâ facie* case of a subsisting charge is made out by the appellant. This question involves the consideration of two points: first, the actual *factum* of the deed;

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presumption in such cases varies with circumstances and is regulated and dependant upon them.

Now the best test of the good faith of the purchasers of these properties and of their having satisfied themselves that there was

and, next, the consideration for it. First as to the *factum*. The execution of the bond by the Ranee is stated by several of the attesting witnesses. It was argued, however, on behalf of the respondent, that the Court ought not to act on their evidence. Some discrepancies, such, however, as are not unfrequently found in honest cases in native testimony, were dwelt upon. The Sudder Ameen who decided this case originally has made some pertinent remarks on the confirmation which circumstances give to the oral evidence that the bond is the deed of the Ranee. The decision by a Native Judge, possessing the intelligence which this judgment of the Sudder Ameen evinces, on a question of fact in issue before him, is, in the opinion of their Lordships, entitled to respect; he must necessarily possess superior knowledge of the habits and course of dealing of natives, and that knowledge would be likely to lead him to a right conclusion upon a question of disputed fact. The Sudder Ameen observes, in substance, that possession went along with this bond, and that the mortgagee was inscribed in that character as proprietor on the records of the Collector. He was therefore put in possession as mortgagee, and was publicly known as mortgagee in the Collector's office.

It is to be observed further that his receipt of the rents and profits of the lands included in this conveyance would diminish, *pro tanto*, the annual income of the estate, which would come to be administered by the Ranee, and that this state of things continued for several years after the execution of the bond. The Ranee's ignorance, then, of such title, possession, receipt, and diminution, is, as the Sudder Ameen justly observes, not a probable supposition. It could be rationally accounted for only on one supposition—that the Ranee was a mere cypher, and entirely ignorant of that which was done in her name. This, however, does not appear to have been the case: she herself denied it on a subsequent contest as to the managership; and the act of the Collector in his decision upon that dispute, in putting her into the management, confirms her own statement of her capacity. Had her incompetency been of so flagrant a character, as the above hypothesis demands to be attributed to her, it is not reasonable to suppose that it would have been unknown in the Collector's office, nor is it reasonable to suppose that the management would have been confided to her had such been her character. It was argued, indeed, that she may have become by that time capable; but it is to be observed that a long course of neglect and mismanagement which is attributed to her, would not be a school of improvement.

It was argued that the complainant was not to be bound by the Ranee's allegations of her own competency that she had tasted the sweets of management, and would desire their continuance. Certainly the complainant is not to be bound by her assertion; but it is not the assertion that is relied on as confirmation. What is relied on is the result of the contest, and the acknowledgment of her as one competent to the management of the estate by an officer interested in its right administration.

Their Lordships cannot but concur with the Sudder Ameen in thinking that these circumstances do materially confirm the story of the attesting witnesses as to the Ranee's execution of the deed. The story of her non-execution of it is based, in a considerable degree, on a supposition of her incapacity. That the deed is hers, is, in the opinion of their Lordships, further confirmed by the great improbability of the history which some of the witnesses of the respondent give as to the *factum* of the instrument. The story told by the witnesses, Heera Lal and Gyapershad Patuk, is so destitute of probability, so little in harmony with the ordinary conduct of men in like circumstances, that their Lordships can place no reliance upon it. According to the case of the respondent, this bond was fraudulently executed in the name of the Ranee without her sanction or knowledge, in order to fix a false charge of Rs. 15,000 in the defendant's favor, on the property of the infant Raja. The defendant and several associates were, according to this story, conspiring together for this object. According to the witnesses who give nearly *verbatim* the same account of the transaction, these conspirators had witnesses ready, though not present, who were to attest consciously the false deed as true; yet such is at once the impatience and the folly of these conspiring parties that every one of the witnesses, each of whom is described as dropping in by chance as it were, is solicited without any assigned adequate motive, and with no previous sounding, to become a party to this fraud by consciously attesting the false deed as true. Each witness declines, and each is entreated to secrecy, and each preserves the secret inviolate, contrary to duty, and without any assigned motive for secrecy. The communication and the concealment are both without motive according to the account which is given us. And the story of this utterly needless commission of his crime is told of a man used to business, intelligent and described by the respondents as the habitual accomplice of crafty and designing men, the *karindas*, in acts of fraud.

Taking the whole circumstances as to the *factum* of this instrument into consideration, their Lordships concur in the finding by the Sudder Ameen as to it.

Next, as to the consideration for the bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for, according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is, *primâ facie*, to support the charge, and the *onus* of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewanny Adawlut at Agra, in the case of Oomed Rai *v.* Heera Lall (6 Sudder Dewanny, N. W. P., 218), was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently this *dictum* may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. Thus, where the mortgagee himself with whom the transaction took place, is setting up a charge in his favor made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him

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such a necessity upon Kanchun Monee as would justify her in selling them and in advancing their money, would be found, I apprehend, in the sufficiency of the price

than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his Decisions in the 2nd vol. of Morley's "Digest," seems the foundation of this practice. (See also the case of Brown *v.* Ram Kunaee Dutt, 11 S. D. A. Rep., 791.)

It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, when the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable. The case before their Lordships is one of a mixed character; the existing security represents loans and transactions at various times and under varying circumstances; it is a consolidating security; and as to part, at least, namely, the ancestral debt; there is, in the opinion of their Lordships, ground to raise a *primâ facie* presumption in the appellant's favor of a consideration that binds the estate. It is unnecessary to the decision to pursue the enquiry as to the other items of charge, but that part of it which relates to the advance for payment of the revenue seems to be at least *primâ facie* proved as against the estate. And, as to the whole charge, there is also at least *primâ facie* evidence in the admission of the plaintiff, proved by several witnesses, uncontradicted on the point. As to the debt of the ancestors, it was said that it was already secured, and that the estate being ancestral, could not, according to the law current in the N. W. P. be charged in the hands of the heir for an ancestor's debt. But it is to be observed as to the change of security that there was a reduction of interest; it is therefore a transaction, *primâ facie*, for the benefit of the estate; and though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, as, indeed, the case above cited from the 6th vol., of the Decisions of the Sudder Dewanny. Adawlut, North-Western Provinces, incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindoo law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt. Their Lordships, therefore, are clearly of opinion that a *primâ facie* case of charge for something was made out; and it is not necessary to determine, nor, indeed, have their Lordships the necessary facts before them to enable them to determine, for how much, if for anything, this deed must ultimately stand as a security.

One point remains to be considered, namely, whether, in taking the account between these parties, the defendant is to be charged, as mortgagee in possession, with the actual rents and profits, or only with the rent fixed by the *pottah*. It is said for the appellant that the Sudder Dewanny Adawlut did not set aside the *pottah*. In terms they certainly did not. But their Lordships think that it was part of one mortgage-security, consisting of several instruments of equal date with the mortgage-bond; and that it was intended to create, not a distinct estate, but only a security for the mortgage-money. Mr. Palmer contended that a stipulation, such as this *pottah* evidences, may stand in India between mortgagor and mortgagee, and that the regulations as to interest do not touch such a case. The regulations provide for the case of an evasion of the law as to interest by invalidating the mortgage-security, and forfeiting the claim of the mortgage to his principal and interest; but Mr. Palmer contends that, where there is no such evasion, and a *bonâ fide* and fair rent is fixed upon as representing, *communibus annis*, the rents and profits of the estate, the Court ought to stand on that, the agreement of the parties, and not to direct the taking of the accounts between mortgagor and mortgagee on any other basis. It is certainly possible that, by reason of the provision that the rent shall be a fixed one, notwithstanding losses and casualties, the mortgagee might be a loser, in his character of lessee, on an account calculated on this basis; but, notwithstanding that contingency, their Lordships think that, as it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and that the decree of the Sudder Dewanny Adawlut, directing an account of the actual rents and profits, therefore, proceeds on the right principle, and it is in accordance with the true nature of the security and the spirit of the Regulations.

In the case of Roy Juswunt Lall *v.* Sree Kishen Lall, reported in the Decisions of the Sudder Dewanny Adawlut in 1852, vol. 14, p. 577, the Court seems to have thought that, where a mortgage lease was granted, and whilst the term was running, the mortgage account could not be taken; but it appears from that case that in former decisions of that Court not reported, where the lease had expired, the Court directed the account to be taken on the ordinary footing of the receipts of rents and profits of the mortgaged estate. Their Lordships think that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate created as part of a mortgage security, whatever be its form or duration, can be viewed only as a security for a mortgage-debt, and must be restored when the debt, interest, and costs, are satisfied by receipts.

Upon the whole, their Lordships are of opinion that the cause must be sent back for further enquiry. They think it desirable, however, in order to prevent a future miscarriage, to state the general principles which should be applied to the final decision of the case.

The power of the manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that, if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of

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paid for the lands. A doubtful purchaser might be included to risk an inadequate price, in the hope that no reversioner might come forward to dispute the matter with him; but where the full value of a thing is given, and where the purchase is made publicly and in the immediate neighbourhood of many members of the family who had all an interest in preventing improper alienations, it is only a fair presumption that the purchaser *has* made all such enquiry as was open to him, and *has* satisfied himself to the best of his power that there existed such a necessity as allowed a life-holding widow to alienate. The silence of the relatives alone would, I am inclined to think, be almost enough to protect an honest purchaser under such circumstances.

Now, Gobindpore, estate No. 1, was bought by Akbur Ali for Rs. 6,001. The proportion of rent fixed upon it, with reference to the whole Hoodah Belaspore, was Rs. 490, as appears from the plaintiff's written tatement; so that the price paid was more than twelve times the Sudder jumma, and that, fifty years ago, would have been a fully adequate price to pay for land.

Turuf Jogye, estate No. 2, was sold to Atabur Hossein for Rs. 10,599. The Sudder jumma of this estate was Rs. 950, so that the price paid amounted to nearly eleven years' purchase, and was undoubtedly a fair price for the property.

Moreover, these sales were, immediately after being effected, duly registered, and mutation of names in the Collector's Register was made. They were made also, it must be remembered, whilst Sham Soondur, the undoubted reversionary heir to Radha Gobind after his widow Kanchun Monee's death, was alive, and a resident of the same part of the country, this Sham Soondur being himself a shareholder in the Hoodah by the purchase of Hureerampore from Radha Gobind.

After Sham Soondur's death, we find Apoorva Monee, his widow, joining in a petition for a Butwarah of the Hoodah Belashpore with the purchasers from Kanchun Monee.

Of course, it may be said, as in fact it has been said by Mr. Branson on the part of the reversioners, that, so long as Kanchun Monee lived, neither Sham Soondur nor Apoorva Monee had any particular interest in interfering; but admitting that their legal rights would not have been jeopardized, it was, I think, a most unlikely thing for them to have stood by to all appearance consenting parties, whilst their family inheritance was being sold without valid necessity to strangers.

Then, if we look to Binode Lall Roy's conduct, it seems to favor the idea that the family considered Kanchun Monee's alienations to have been justifiable. Binode Lall Roy lived for nine years after Kanchun Monee's death, and consequently nine years after the succession to Radha Gobind's estate opened out to him, and yet he took no steps to obtain his rights. His sons, the plaintiffs in this case, waited two whole years more, and then only came forward, so far as it appears, in consequence of the above-mentioned vakeel's interference in the case. I confess that I look upon this man's petition of withdrawal with much suspicion, and feel tolerably certain that he is even now the moving spirit of this litigation. It is alleged, of course, that poverty has prevented the sons of Binode Lall Roy from pressing their rights hitherto. But if the vakeel have really withdrawn from the suit, the plaintiffs

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his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can really have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

Their Lordships will, therefore, humbly report to Her Majesty in the following terms:—

"Their Lordships are of opinion that the Ranee ought to be deemed to have executed the mortgage-bond dated *Assar Soodee Poornumashee*, in the pleadings mentioned, as and in the character of guardian of the infant Lal Inderdowun Singh.

"And their Lordships are of opinion that the validity, force, and effect of the bond, as to all and each of the sums, of which the sum of Rs. 15,000, thereby purporting to be secured, is composed, depend on the circumstances under which the sums, or such of them as were advanced by the appellant, were respectively so advanced by him, regard being had also, in so far as may be just, to the circumstances under which the same were respectively borrowed.

"And their Lordships are also of opinion that, assuming the bond to be invalid and ineffectual, the appellant, would, nevertheless, be entitled to the benefit of any prior mortgage or mortgages paid off by him affecting the property comprised in the bond, if and in so far as such prior mortgage or mortgages was or were valid and effectual.

"And their Lordships, therefore, are of opinion that the d crees of the Zillah and Sudder Courts, respectively, ought to be reversed, and the cause remitted to the Sudder Court, with directions that enquiry be made into the several matters aforesaid, and that all such accounts be taken, and such other enquiries made as, having regard to such matters and to the circumstances of the case, may be found to be necessary and proper, with directions also that the Sudder Court do proceed therein as may be just, both with respect to the said mortgage-bond and the several instruments of even date therewith; and that the costs of the appeal be costs in the cause, to be dealt with by the Sudder Court."

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now would be as incapable of carrying on this suit as they ever were. But there is no ground that I can see for any such profession of poverty. According to their own account Kanchun Monee got from her husband property to the extent of Rs. 25,000. It is nowhere alleged that she made any other alienations than the ones now complained of. It is quite clear that when Kanchun Monee went to Brindabun she was very poor, for she had subsistance allowanee of Rs. 5 a month, and the family paid Rs. 7-8 for her funeral expenses. If she ever got Rs. 25,000 worth of property from Radha Gobind, what has become of the balance? What, moreover, has become of Sham Soondur's and of Apoorva Monee's property? It is in evidence that they had property and that that property descended to Binode Lall Roy, from whom, of course, it went to the plaintiffs. The excuse of poverty, therefore, seems altogether unfounded; and the only reason for bringing this suit after so many years of silence and apparent acquiescence, I should set down to the influence of the speculator vakeel.

Taking, therefore, all the circumstances into consideration, the length of time since the sales, which prevents the obtaining of any direct evidence, the full price given by the purchasers, the proved knowledge of the alienations at the time they were made, by the then reversionary heir, the unexplained silence of Binode Lall Roy up to the day of his death, and the delay of bringing this suit by his sons, I am of opinion that the defendants are entitled to a presumption in their favor, that their ancestors purchased the two estates in question after due enquiry, and after in good faith satisfying themselves of the existence of a necessity which would allow of Kanchun Monee's selling. The plaintiffs have given no evidence to rebut this presumption.

I think that the judgment of the Subordinate Judge should be reversed and the plaintiff's suit be dismissed with costs.

Kemp, J.—I concur in reversing the decision of the Subordinate Judge. The main points are—

1*st*,—Is the suit barred?

2*nd*,—The question of the adoption of Binode Lall Roy, the father of the plaintiffs.

3*rd*,—Are the alienations by Kanchun Monee, the widow of Ram Gobind, valid under the Hindoo law?

On the first point I entirely concur with Mr. Justice Glover, and have nothing to add.

On the second point, it seems to me clear that the *factum* of the adoption of Binode Lall was not seriously questioned in the Lower Court. The pleader for the defendants was asked about the adoption. His answer was as follows. I translate literally; "Binode Lall is not the ঔরষ; *i. e.* son be-"gotten of the loins of Sham Soondur; he is "the adopted son, but the ceremonies ক্রীয়া "were not performed in compliance with the "Shasters." Again, in the written state-"ment of the defendants I find it stated "Binode is not the son of Sham Soondur."

The *factum* of the adoption being admitted, or at all events not questioned, in the Lower Court, it rested with the defendants, particularly taking into consideration that the *status* of Binode Lall as the adopted son of Sham Soondur was recognized by the family for many years, to prove that the ceremonies necessary to render that adoption valid were omitted or not performed. The defendants have, in my opinion, wholly failed to prove this.

On the third point, which was more laboured than any other point in the argument before us, I concur with Mr. Justice Glover. It is not fair to expect from the defendants, after fifty years have elapsed from the date of the alienations, proof that the original alienees satisfied themselves that there was legal necessity for the sales by the widow Kanchun Monee. The recitals in the deed would not, in my opinion, be evidence of such necessity if we were deciding as between the reversioners and the original alienee within a reasonable period after the death of the widow. In such case, the alienee would be in a position to prove that he satisfied himself of such necessity; nor are such recitals in my opinion conclusive evidence even in this exceptional case where we are dealing with the documents or vendees of the original alienees after a lapse of half a century: but in a case where we find a recital, in deeds 50 years old, and which were duly registered and published, of the existance of a legal necessity for the alienations; where we find that the consideration paid was a fully adequate one; and, lastly, where we find that the conduct and silence of Binode Lall for nine years after the death of Kanchun Monee when the succession opened out to him as heir of Radha Gobind have been such as to raise a strong presumption, which has not been rebutted, that those recitals were true and *bonâ fide*, we should be wrong in disturbing the long possession of

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the defendants and their predecessors which has continued without dispute for half a century.

The 18th May 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Anislie, *Judge.*

Watercourse—Interference with Right to.

Case No. 922 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 30th May 1871, *reversing a decision of the Moonsiff of Aurungabad, dated the 29th September* 1869.

Nund Kishen Singh and others (Defendants), *Appellants,*

versus

Lalla Nirunjun Lall (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Nil Madhub Sen for Respondent.

Plaintiff sued to have a *Pyne* filled up on the allegation that defendant's clearing had caused him injury. It having been found that what plaintiff complained of had not been done and consequently that plaintiff had not the right of suit which he claimed—HELD that the Lower Appellate Court should have dismissed the suit, instead of declaring plaintiff's right established and giving directions as to what should be done in the future with regard to the *Pyne.*

Couch, C.J.—THE claim which the plaintiff made in the suit was to have the bed of the *Pyne* filled up to the extent of three yards broad east to west and to another extent in depth ; and the issues raised were the proper issues to be raised, namely, whether the plaintiff was entitled to the *Pyne* at all, and whether there had been the injury which he complained of.

The Judge in hearing the appeal has expressly found that it was not proved that, in consequence of defendants clearing the *Pyne* according to the custom any injury has been caused to the plaintiff; and in a previous part of his judgment he says also,—"On an enquiry held in respect of the trial of this issue, it seems that the aforesaid *Pyne* has not been made deeper at present than it was in former times." He finds that what the plaintiff complained of had not been done, and consequently the plaintiff had not the right of suit which he alleged he had and upon which he had come into Court. The result of that is that the plaintiff's suit ought to be dismissed ; he has failed to make out that he has the ground of suit which he alleged he had. That was done by the Lower Court ; but on the appeal to the Subordinate Judge, he, instead of dismissing the suit, reverses the decision of the Lower Court which was the right one, and then declares that the plaintiff's right is established and gives various directions as to what should be done in the future with regard to the *Pyne.*

It might be that it would be desirable for the parties that that should be adopted, and that mode of enjoying the right should be followed ; but the question is, had the Court, in hearing the appeal, power to impose those terms upon the plaintiff ? The Court had no power to do that ; it was not a matter which was submitted to the Court. The question which was submitted and was to be determined, and as to which a decree was to be made, was whether the plaintiff had shown that he had the right of suit which he alleged he had. It was found that he had not, and the suit was properly dismissed by the first Court. The decree of the Appellate Court must be reversed with costs, and the decree of the Lower Court, dismissing the suit, will stand.

The 20th May 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Jurisdiction—Interference by High Court (under s. 15 *of Charter Act)—Order by Judge (under Act VIII of* 1859, *s.* 269)—*Resistance or Obstruction to Delivery of Possession (under s.* 264)—*Regular Suit.*

In the matter of

Mussamut Zuhoorun Begum and another, *Petitioners,*

versus

Syud Mahomed Wajed, *Opposite Party.*

The Advocate-General for Petitioners.

Mr. J. T. Woodroffe for Opposite Party.

The Court declined to interfere under Section 15 of the Charter Act in order to set aside an order lawfully made by a Judge under Section 269 Act VIII of 1859 upon a complaint made to him of resistance or obstruction to the delivery of possession under Section 264 ; and

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stated that it would not have interfered even if the order had been made without jurisdiction, after the delay that had taken place, the petitioners' remedy being to bring a regular suit to establish their right.

Couch, C.J.—THIS is an application to the Court under Section XV of the Act for establishing the High Court, asking the Court to set aside an order made by the Judge of Gya on the 30th September 1871. The application for the copy of the Judge's order was made on the 3rd October, and the copy was delivered on the 23rd of November, and the petition for the order now asked for was filed on the 15th of February, nearly three months after the copy was delivered.

Now, we agree in the view which various Judges of this Court have taken with regard to the manner in which the power conferred on the Court by Section XV of the Charter Act should be exercised. I may say that, some years ago, I viewed with considerable apprehension the commencement of the exercise of this power when I was sitting in another Court, and I feared very much that it would lead to many applications for the interference of the Court where the parties would be in reality trying to get the benefit of an appeal where the law had said that they ought not to have one. I am not prepared to say that there may not be some cases where the Court would not feel itself bound by the general rule either of want of jurisdiction or refusal to exercise jurisdiction; but I think those cases would be few, and that this is not one of them; nor would the Court be right in exercising such a power where the party did not come promptly to the Court and ask for its interference. Here, there has been a delay of nearly three months, of which we have had no explanation. The case has occupied a considerable time (we do not say too long, for it is one of some importance to the parties); but the facts on which the decision depends are very simple.

The present petitioners appear to have obtained an order for having possession delivered to them in February 1871, and that order they say was executed. It is clear that it was not executed by giving actual possession, because there was a *ticcadar;* it must have been executed according to the provisions of Section 264 Act VIII of 1859.

The opposite party having applied to the Court for the execution of the decree which he had obtained, on the 6th of June 1871 an order was issued from the Court to put him into possession; and that was to be executed under Section 264. Then it appears that, on the 11th of June, the peon proceeded to the villages in order to execute the order by fixing a copy of the certificate of sale, and making proclamation to the occupants of the property, and that he was then obstructed in doing so by the ticcadar and the servants of the present petitioners. The facts about which there is no dispute are stated in the Nazir's return of the 14th of June.

That distinguishes this case from that in the XIII Weekly Reporter, page 418. We do not think that we need refer to the observations which we made in the course of the argument about that case. The ground of the decision there was, that there had been a putting into possession under Section 264 and a subsequent endeavour to collect the rent, and there was an obstruction to that. Here the obstruction was to the delivery of possession under Section 264.

Now, we have to see, whether this was a case in which the Judge had jurisdiction under Section 269. The learned Advocate-General said (we took down his words and asked him whether that was what he meant) that possession cannot be given when the property is in the possession of a person other than the defendant, or not claiming under the defendant. But if we look at Section 269 we think that is a proposition that cannot be supported for a moment. Section 269 says,—"If it shall appear that the "resistance or obstruction to the delivery of "possession was occasioned by any person "other than the defendant claiming a right "to the possession of the property sold as "proprietor, mortgagee, lessee, or under any "other title, or if in delivery of possession "to the purchaser any such person claiming "as aforesaid shall be dispossessed," the Court shall enquire into the matter, &c.

These words, any such person claiming as aforesaid, that is, as proprietor, &c., show that it was contemplated that such persons—persons other than the defendant and not necessarily claiming under him—might be dispossessed, and it would be necessary to resort to the proceedings in this Section, or, if not necessary, they would be at liberty to do so. The object of these provisions seems to have been that there should be a power in the Court to prevent anything which would be an offence against the public peace taking place in the execution of decrees; and where there was an obstruction or resistance it should be prevented, and should be left to the Court to decide what should be done, leaving the question of title to be determined by a regular suit. Then what gives jurisdiction

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is the executing of the decree by either the actual delivery of possession under Section 263 when the property is in the occupancy of the defendant, or by the symbolical delivery of possession under Section 264, and there is a resistance or obstruction. If those circumstances are combined, and there a complaint is made, the Court has jurisdiction to enquire into the matter.

Then the power which the Court has, is to pass such an order as may be proper in the circumstances of the case. The Court is not bound to pass any particular order; it is not directed here that, if the facts be as described, the Court is to pass a prescribed order, and if the facts be otherwise, another order, but it is to pass such an order as may be proper in the circumstances of the case. These words appear to us to leave it to the Court which hears the complaint to say what is the proper order, and it would not be right for this Court to exercise the powers conferred by Section XV in taking into consideration whether the order passed was a proper one or not. It may possibly be an order which we should not have made under the circumstances; we may not think it a proper order. But that is not the question. The question which we consider we have to determine is, had the Judge of Gya, when the complaint was made to him of the resistance or obstruction, the jurisdiction to enquire into the matter and pass an order? We think he had that jurisdiction, and he has not made an order which he had not jurisdiction to make. In this case he has made an order in effect declaring that the opposite party, Mr. Woodroffe's client, shall have possession, such possession as can be given under Section 264—an order which might lawfully be made. If that is done, the Court ought not to interfere under Section XV. Certainly, we should not be disposed to interfere, even if we thought that the order was one made without jurisdiction, after the delay that has taken place. And the present petitioners are not without a remedy, because it is quite open to them to bring a suit to establish their right, and there does not appear to be any reason for supposing that the opposite party would not be able to pay the costs of such a suit if the petitioners should succeed in it.

We do not see any reason why we should interfere with the order which has been made in this case. A rule was granted by two of the learned Judges of this Court; but rules are granted on *ex parte* statements: and, even supposing that all the facts were correctly stated, and no facts were kept back, we know that when a case comes to be argued and counsel to be heard on both sides, the Court is much better able to arrive at a satisfactory conclusion upon the facts, and to see how matters really stand between the parties. We think the rule must be discharged with costs which we assess at Rs. 200.

The 20th May 1872.

Present:

The Hon'ble W. Markby, *Judge.*

Appeal to Privy Council—Specific Costs—Costs of translating and preparing Record—Extravagance and Waste.

In the matter of

Sharoda Pershad Mullick (Appellant to England), *Petitioner,*

versus

Luchmeeput Singh Doogur and others (Respondents to England), *Opposite Party.*

Baboo Ram Churn Mitter for Petitioner.

No one for Opposite Party.

Although upon ordinary principles of construction, where an order of a Court directs generally in the first instance that costs should be paid, and then afterwards specifies a particular sum in respect of those costs, the specified sum comprises all the costs to which the party will be entitled; yet, considering that whenever a specified sum is allowed by the Privy Council as costs of appeal, that is considered to cover the costs of appeal in England only, and that it never has been the practice of the Privy Council to make any order in specific terms as to the costs incurred here for translating and preparing the record for transmission to England; and considering also that it has been too long the practice of the High Court to allow costs in all cases, to adopt now a different rule, and that there seemed nothing in the record to suggest that there had been any unnecessary expense incurred in this case,—the Court allowed the costs in question.

Semble.—Had there been apparent extravagance and waste in the preparation of the record for transmission to England, the Court would have referred the parties to the Privy Council for an order on the subject.

Markby, J.—As this application now stands, it prays that the Court will send the

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order of Her Majesty in Council, together with the usual certificate of the costs of translation and preparation of the paper-book of the Privy Council appeal, to the Lower Court for execution in the usual course. The order in Council directs that the decree of this Court of the 26th March 1868, and the order of the 10th July 1868 be and the same should be reversed with £238 16*s.* 6*d.* sterling costs, and that the decree of the Principal Sudder Ameen of Dinagepore of the 11th April 1867 should be affirmed with costs.

Now, it appears to me, looking to that order of Her Majesty, that, upon the face of it, the only costs of the appeal to Her Majesty to which the appellant is entitled is the sum therein specifically named as the costs of such appeal. It is true that the report of the Privy Council upon which the order is founded, advised Her Majesty that the decree of this Court should be reversed "with costs." But those words do not occur in the order of Her Majesty, as neither do the subsequent words contained in the report of the Privy Council,—that the decree of the Principal Sudder Ameen should be affirmed with costs in India. But even if I were at liberty to decide this matter upon the report of the Privy Council, and not upon the order in Council (which I do not think I should be at liberty to do), still, looking at the report of the Privy Council, it seems to me that all the costs to which the appellant is entitled in the Privy Council appeal is the sum I have mentioned, because the report of the Privy Council goes on to say:—"In case your Majesty should be pleased to approve of this report and to dismiss the appeal, then their Lordships do direct that there be paid by the respondents to the appellant the sum of two hundred and thirty-eight pounds, sixteen shillings, and six pence sterling for the costs thereof." And where an order of a Court directs generally in the first instance that costs should be paid, and then afterwards specifies a particular sum in respect of those costs, then, on ordinary principles of construction, I should say that those specified costs comprise all the costs to which the party will be entitled.

But the doubt arises in this way. In almost all the appeals which go to the Privy Council, there are costs incurred here for translating and preparing the record for transmission to England; and I am informed, and, as far as I can discover, correctly informed, that it never has been the practice of the Privy Council to make any order in specific terms as to these costs, and that whenever a specific sum is allowed by the Privy Council as costs of appeal, that is considered to cover the costs of appeal in England only, and that it has always been assumed that an order drawn in this form covers the costs here, though they are not mentioned; and of course, if so, the applicant is entitled to them, as this Court has no discretion to disallow any costs allowed by the Privy Council. Now, I feel bound to say that it seems to me to be by no means a matter of course that, because the costs are allowed which are incurred in England, the costs for translating and preparing the record for transmission to England should be allowed also. It has been constantly the subject of remark both here and in England that the records which are transmitted by us are unnecessarily long; but this Court has very little power over that matter, as we are compelled to transmit in some shape or other all such documents, except merely formal documents, as the parties require. We have, however, made rules for the express purpose of enabling the Privy Council to judge whether the record transmitted is open to this complaint, and whether costs which are unnecessary have been incurred in this respect. But these rules will be wholly ineffectual if it continue to be assumed as a matter of course that all decrees of the Privy Council which give a specific sum for costs give by implication the costs here also. But having said this, because it appears to me desirable to draw attention to the matter, I do not think I should be justified in disallowing these costs. I think it has been too long the practice of this Court to allow them in all cases for me now to adopt a different rule, and I should be the more unwilling to disallow the costs of this case, because having seen the paper, and having formed an opinion as far as I could, it seems to me that it is not probable that the Privy Council would have thought it necessary to deprive the appellant of these costs, their Lordships having allowed the general costs. I can see nothing at all in this record to suggest that there was any unnecessary expense incurred here. Therefore, upon the whole, I think I ought to allow this application to be granted. Possibly, had there been apparent extravagance and waste in the preparation of the record for transmission to England, I should have referred the parties to the Privy Council for an order on this subject.

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The 25th April 1872.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Ghatwalee Lands—Regulation XXIX of 1814—*Railway Company (Lands taken by)—Compensation-money (Division of).*

Case No. 1261 of 1871.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 10*th August* 1871, *affirming a decision of the Moonsiff of Deoghur, dated the* 31*st January* 1870.

Bhageeruth Moodee and another (Plaintiffs), *Appellants,*

versus

Rajah Jabur Jummah Khan and another (Defendants), *Respondents.*

Baboo Nil Madhub Sen for Appellants.

Baboo Kalee Kishen Sen for Respondents.

According to Regulation XXIX of 1814, the zemindar retains an interest in Ghatwalee lands.

Compensation money for land taken up by a Railway Company should be divided by the parties entitled to it in the ratio of their respective interests in the land.

Jackson, J.—THIS was a suit for a share in certain compensation money for lands taken up by the Railway Company, the money being in deposit in the hands of the Collector.

The plaintiff represents the Mokururreedar under the Ghatwal, the lands being part of one of the Beerbhoom Ghatwalees, while the defendants are the Zemindar, the Ghatwal, and Government. The sum in deposit is about 900 rupees, and the process adopted by the Moonsiff, in which the Judge has concurred, was to ascertain the approximate value of the Mokururreedar's interest, and pay him a corresponding portion of the money, and give all the remainder to the Zemindar, by which the plaintiff has got something more than one-third of the whole, the rest going to the defendant.

Some faint attempt was made on behalf of the appellant to argue that the Zemindar was not entitled to any share at all; but, looking at the terms of Regulation XXIX of 1814, it is manifest that the Zemindar does retain an interest in those lands which are declared to be, and continue, a portion of his estate.

The question then is, what shall be the proportion in which the money should be divided between the plaintiff and defendant?

It is not contended that the rule followed by the Court below is correct, and the rule which is usually adopted is that the parties should divide the money in the ratio of their respective interests in the estate. The Moonsiff has found that the amounts derivable from the land in question by the Mokururreedar and Zemindar respectively are Rs. 22-8, and Rs. 7-8 out of 30 rupees, which will make the Mokururreedar's share three-fourths and the Zemindar's one-fourth. We think, therefore, that according to previous decisions, this should be the rule in the present case, and that the plaintiff should be declared entitled to three-fourths and the defendant to one-fourth of the compensation-money.

Under the circumstances, each party will bear his own costs of this appeal.

The 10th May 1872.

Present:

The Rt. Hon'ble Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Evidence—Title—Possession.

*On appeal from the High Court, Calcutta.**

Wise

versus

Brojendro Comar Roy and others.

In this case the Privy Council, after a review of the evidence, held that the plaintiffs (respondents) had failed to prove either title or possession, so as to entitle them to disturb the long possession of the defendants (appellants); observing that, if their Lordships had been sitting as a Court of first instance, they would have deemed it impossible, upon such proof of title as the plaintiffs had given, to disturb an admitted possession of upwards of ten years. It seemed to their Lordships that the High Court, having originally treated the title of the plaintiffs as depending upon a release by the Judicial Commissioners, and finding that the release was not made out, fell back upon a proceeding of the Deputy Collector, and had not given sufficient consideration to the nature of the proceedings of that subordinate officer, and the manner in which they were dealt with by his official superiors.

THE appellant in this case has purchased the title of the defendants in the suit to the land in dispute. The respondents were the plaintiffs in that suit, which was brought for the recovery of what may now be taken to be the 2,092 beegahs and 13 cottahs of land, comprised in Dag No. 39, as laid down in the large map of Chur Bhudrasun Talimabad,

* From the judgment of Trevor and Campbell, dated 27th January 1865.

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which is in evidence in the suit, and which was made in 1847 upon the Government survey of 1846. In dealing with the case it will be convenient to speak of the parties as the plaintiffs and the defendants.

The plaintiffs were the owners of a zemindary called Ramnugger, and the defendants were the owners of a zemindary known as Chur Mokoondeah. Both zemindaries have, since their stetlement at the time of the perpetual settlement, suffered much from the invasion of the river ; but the Chur Bhudrasun Talimabad, which was at some time before 1832 thrown up in the river, and of which the land in dispute forms part, must be taken to have been a chur formally and regularly decreed to be the property of the Government, to no part whereof could either party have shown title against the Government as of right as an accretion to or a reformation upon their original property. That seems to be the effect of that decision in 1832, in the first resumption suit which is the starting point, so to speak, of the case.

Again, the land in dispute is admitted to have been in the defendants' possession for upwards of ten years before the commencement of the suit. A question has, however, been raised whether by the award in the Act IV case of the 11th of July 1848, the reversal whereof is one of the objects of the suit, that possession was affirmed to be a possession then existing in point of fact ; or whether the defendants, wrongfully and under colour of that order, and shortly after its date, succeeded in obtaining possession of the disputed land. And, as something may turn upon the nature and the commencement of the defendants' possession, their Lordships think it will be desirable to determine in the first instance what was the effect of the Magistrate's proceeding of the 11th July 1848.

In order to do this, it is necessary to advert to some of the earlier proceedings. It has been already stated that the whole of Chur Bhudrasun was found in the resumption suit, some time in 1832, to be the property of Government. The Government appears, however, to have dealt liberally with the neighbouring proprietors who had suffered from the ravages of the river, and it is admitted that by way of compensation, portions of this chur were re-leased to the proprietors, both of Mokoondeah and Ramnugger. It is beyond dispute that the latter, the proprietors of Ramnugger, had previous to 1846, acquired 1,961 beegahs and 17 cottahs of land, the position of which is indicated on the map of 1847 by Dags 10, 7, and 8—at all events by dags on the north of what is marked on the map as a nullah which has elsewhere been called the "Gung :" and that the defendants, the proprietors of Mokoondeah, had also acquired portions of land lying to the north of the same nullah, the position of which or of part of them is indicated by the letter X upon the smaller map, which has been reduced from the larger map.

It appears that, subsequently to these assignments of land, a further change in the course of the river took place. The nullah is said to have become suddenly a very large stream ; to have swept away a good deal of land to the south of the original chur ; to have afterwards receded towards what in 1846 was the main channel of the river further south ; and in doing so to have cast up and left a considerable portion of alluvion, forming the chur or portion of a chur in which are situated the two dags which have been so much mentioned in the argument on this appeal, *viz.*, Dags Nos. 38 and 39, and some land to the west of Dag No. 38. In 1846 this land, or at all events some portion of it, became the subject of another resumption suit before Mr. Deputy Collector Fletcher, between the defendants, or those who then represented the defendants, and the Government. The end of that suit was, that, in conformity with a general order of the Sudder Board of Revenue, it was, on the 28th December 1846, struck off the file without prejudice to any further claim on the part of the Government, but leaving the defendants in possession of the land which they claimed in that proceeding for the present, and subject only to such future liability to revenue as the Government by some subsequent suit might establish against them.

The learned counsel for the respondents have strenuously argued that the subject of that proceeding did not include Dag No. 39, but was limited to Dag No. 38, and possibly to other lands to the westward of Dag 38. It appears, however, to their Lordships, that what was claimed is shown by the report and map of the Ameen Kristomungul Gooho, and, looking to them, their Lordships are of opinion that the claim must be taken to have comprehended the land laid down in the survey map as Dag No. 39.

The report of the Ameen is on pages 117-8 of the record. He says that he proceeded to the spot, accompanied by the witnesses, and "mapped and measured consonantly to "[illegible] identification, and in the presence of

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"those witnesses, the chur on the immediate "south of the Wagoojesta lands of the De-"fendant Kahtoon, deceased, by a line 56 "yards in length, which was the standard "current in the pergunnah." The map is lying before me, and it seems to their Lordships, comparing it with the other map, that it clearly includes the whole of that southern chur, as I may call it, as it then existed. The Ameen goes on in his report to say, "As the evidence of the said witnesses dis-"closed that the said lands were restorations "of the diluviated lands of the original mou-"zahs and kistmuts belonging to the defend-"ants, and increments to her Goojesta lands, "your humble servant has measured the said "lands;" and the 2,277 beegahs of land on the contiguous south of the Goojesta lands under No. 3, and the 102 beegahs of land under No. 1, on the south of No. 3, and the 384 beegahs of land under No. 2, and 810 beegahs of land under No. 4, are all laid down and marked in the map as lands of which Mahommed Jokee Chowdhree was then in possession, which were treated as the subject of the pending contest between that person and the Government.

As to No. 4, the 810 beegahs, it is impossible, their Lordships think, to come to any other conclusion than that, rightly or wrongly, they were placed towards the eastern extremity of the chur, and that they formed part of that which was afterwards put down in the larger map as Dag No. 39.

Their Lordships omit, for the present, to consider the subsequent proceedings of the Revenue Authorities, because these relate rather to the title of the plaintiffs; but have dwelt upon the proceedings before Mr. Fletcher because they seem to their Lordships to be in a great measure the foundation of the decision of the Magistrate in July 1848, and, therefore, to be material with reference to the question now under discussion, *viz.*, the possession then awarded to the defendants.

The Magistrate's proceeding is at page 187 of the record. The plaintiffs, or rather the petitioners, in that proceeding were Mahomed Ishmael and Mahomed Israel, who claimed under a third title; but the Chowdhries who represented Mokoondeah were originally made the opposite parties, and Nund Coomar Roy, who then represented the plaintiffs' interest and the zemindary of Ramnugger, appears to have come in as a claimant, and to have been afterwards treated as one of the opposite parties. It is remarkable that this proceeding seems to have been the first in which the plaintiffs and the defendants, or those whom they represent, were really litigating any question concerning this land face to face or in presence of each other.

The subject of the proceeding may be taken to have been an accretion only to the land now in question or the larger part of it; but it seems to their Lordships that if the proceeding is examined and the reasons for the Magistrate's decision are looked at, it will be found that he clearly proceeded upon the finding that the defendants and not the plaintiffs were then in possession of the land now in question. He says at page 118, line 33, "Therefore the points to be resolved in "this case are as to how, and as an annexa-"tion to whose estate, is the disputed accre-"tion formed, and in whose possession the "said accretion is:" he then says, "The "evidence oral, and the exhibits, adduced on "both sides, have been considered, and it "appeared, on inspection of the map pre-"pared by the Ameen Kristomungul Gooho, "appointed by the Collector of this place, "dated the 26th December 1846, and other "documents, that the sota, or water-course, "which existed on the south in contiguity "with the wagoojesta lands given in release "as an exchange for the diluvion of the "said Chur Makoondea, the zemindary in "possession of the defendant, and on the "north of the settled mouzahs of that per-"gunnah, gradually gained strength and "carried off the original mouzahs Bisteepore "and others, and then threw up an accretion "partly in contiguity with the south of the "said Wagoojesta lands;" "that in respect "of this new formation a suit under Regu-"lation II of 1819 was brought and struck "off consonantly to the letter of the Sudder "Board No. 1, dated January 2nd, 1846, "and that the said chur then came into pos-"session of the Chowdhry defendant." Then he says, "It is clear that the disputed "land was formed on the immediate east of "the 810 beegahs of land indicated under "No. 4, on the east of the map prepared by "the Ameen, as in the possession of the "Chowdhry defendant and within the land "specified in the alleged roboocarry. Fur-"ther, on inspection of the map filed by the "Chowdhry defendant, which quite tallies "with the map prepared by the Ameen," and so on, "and from the oral evidence of "his witnesses, the disputed accretion is "proved to have been formed on the imme-"diate east of the 810 beegahs of land in-"dicated on the Ameen's map as being in a "northerly direction of the pepul tree which

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"stands on the kutcherry, at the main chow-"darussie, and on the immediate west of the "gong in the possession of the defendant, "and that the Chowdhry defendant had been "in possession of the same by cultivating it "through ryots, &c., on the allegation that it "was a reformation of the diluviated lands "and kismuts of Bisteepore, Alumpore, and "other mouzahs and kistmuts within the "said Chur Mokoondeah," and upon these grounds he gave the land then in dispute to the Chowdhries as a further accretion to that of which they were already in possession. Reading this judgment by the light thrown upon it by the Ameen's map, and the position thereby assigned to the 810 beegahs, their Lordships think it is impossible to say that the Magistrate did not find, and intend to find, that the possession of the whole eastern part of the new chur, and therefore of the land now in dispute, was in the defendants, or that the fact so found was not the real ground of his determination.

It may be further observed that it is admitted even by the witnesses, whose depositions were read to-day by Mr. Bell, that from the time of that proceeding the plaintiffs lost the possession of that of which they said they were previously in possession, and it seems to their Lordships that there is no independent or trustworthy evidence of any act of dispossession other than the ordinary execution of the Magistrate's order. Therefore, considering this, and also the great improbability that if anything had been done inconsistent with or in excess of the Magistrate's order wrongfully by the defendants, the plaintiffs would have slept upon that wrongful act as long as they have slept upon the order, their Lordships are fortified in the conclusion that the effect of the proceeding of the Magistrate was to treat the defendants as in possession of the land in dispute, and to make that possession one which could be disturbed only by a regular suit.

Now, if that be so, the cases cited by Sir Roundell Palmer were hardly required to show that the long possession of the defendants under the order of the magistrate cannot be disturbed, and ought not to be disturbed unless upon proof, by the most cogent evidence on the part of the plaintiffs, of a superior title.

Then what is the title which the plaintiffs have alleged and proved in this case? As their title was originally stated, it was this. After stating how they got into possession of the 1,961 beegahs and 17 cottahs, and referring to an Act IV case, with another party Ramruttun Bose, they say, "The Uncovenant-"ed Deputy Collector proceeded in the year "1846 to the spot, but did not release to us "the said lands, though they had before been "released in our favor. He measured the "said new reformed chur, and found it to "contain an area of beegahs 2,092-13, where-"upon he issued notice to us requiring us to "enter into a settlement for the said chur, at "a total assessment of Rs. 30, and to pay "Rs. 998-9½, on account of mesne profits "for the lands on the north bank of the river "which had been released to us; upon this "we appealed from the said order of the "above Deputy Collector to the Revenue "Commmissioner, who, on the 17th Septem-"ber 1847, passed an order based on the "finding that no original lands, except what "had before been released, remained in our "possession, remised in our favor the amount "measured by the Uncovenanted Collector, "who, on the 17th February 1848, carried that "order into execution, and from that time "we held possession of the said lands and "the subsequent alluvials formed contigu-"ously to them." They afterwards go on to mention the Act IV case of July 1848, and say that they were dispossessed under colour of the before-mentioned award.

Therefore, it is clear that the title they originally relied upon was a re-lease by an order of the Revenue Commissioner of the 17th, now admitted to be a misprint for the 27th, of September 1847, an order dealing both with the demand against them of 998 rupees odd, for arrears in respect of revenue upon the 1,961 beegahs, and with the attempt to assess the Rs. 30 upon the land in dispute, and that they treated the order of the Deputy Collector of the 17th February 1848 as merely an order which carried that order of the Commissioner into execution. The replication relies still more strongly upon the order of the Deputy Collector; but it does not seem, nor does it appear ever to have been understood, to treat that as the foundation of the title or to give up the alleged effect of the order of the Commissioner.

The following is a short history of the proceedings in the suit. The Principal Sudder Ameen found upon the evidence before him in favour of the plaintiffs; there was an appeal from that to the High Court, and that Court, apparently understanding the pleadings in the sense in which they have been stated, and treating the order of the Commissioner as the subtantial foundation of the title of the plaintiffs, remanded the case for an enquiry upon one point. The judgment

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says, "The main contention between the "parties is whether the land in dispute is "identical with that released to plaintiff by the "Revenue Authorities on the 17th September "1847; if it is, plaintiffs are clearly entitled "to it." It then directs a local investigation by an Ameen; and says, "The Ameen will "then, in the presence of both parties, "ascertain whether any or all of the lands "in dispute are identical with any or all of "the lands released to the plaintiffs in 1847, "and report the result of his enquiry to the "Principal Sudder Ameen. Immediately on "the receipt of his report, the Principal "Sudder Ameen should, regardless of the "number on his file, again take up the case, "and give plaintiff a decree for so much of "the land as is found to be identical with "that released to the plaintiff; should none "of the land in dispute be identical with "that released to plaintiff, the Principal "Sudder Ameen should dismiss the suit with "costs." The Ameen made this investigation, and his report is consistent with what is now admitted to be the fact, namely, that the order of the Commissioner which had been pleaded had not dealt with the land in question, or with the assessment upon it of the Rs. 30; but was entirely confined to the claim of the Rs. 998, and to the rights of the plaintiff in the 1,961 beegahs; and the Principal Sudder Ameen, dealing with the issue sent down to him by the Superior Court, as he understood it, and perhaps as it is literally to be taken, dismissed the suit. There was then a second appeal; and the High Court on that occasion seems to have misunderstood the nature of the admission which had been made by the defendants. They treated it as an admission not that the land in dispute was Dag No. 39, but that Dag No. 39 had been released to the plaintiffs, and held that the appellant was changing his ground when he contended that there was no sufficient evidence that those lands had been released. They no doubt found that although the lands had not been released by the Commissioner's order of the 27th February 1847, they had been released by the order of the Deputy Collector of the 7th February 1848. But acting very much on the notion that the defendant was shifting his ground, and departing from an admission by which he was bound, they do not seem then to have given much consideration to the question, whether the order of the Deputy Collector was such an effectual release of the land as would confer a title on the plaintiffs.

There was then an application for a review, and further documentary evidence, including the report of Mr. Latour, was filed. The review was granted, and the Court upon the hearing of the cause on review adhered to their former judgment; and in a very short judgment said, "After hear-"ing the petitioner, we are satisfied that, as "a matter of fact, Dag 39, being the 2,092 "beegahs in dispute, was released to the "petitioner by Mr. Deputy Collector John-"son, and that the subsequent report, relied "on by the petitioner, while impugning the "propriety of that proceeding, by no means "shows that it was reversed. On the con-"trary, the report goes entirely to show that "the petitioner had succeeded in obtaining "release and possession of the disputed land. "We therefore reject this application."

There was then an application for a second review, and that was refused.

The result, therefore, of the decrees, or rather of what took place upon the remand, was to reduce the case to a very narrow compass, namely, to the question whether the proceedings of Mr. Johnson did operate as such an effectual release of the land to the plaintiffs as to constitute in them a title which ought to prevail against the possession of the defendants.

Accepting that as the issue which ultimately became the material issue in the cause, their Lordships have now to consider what is the effect which ought to be given to those proceedings. It would seem that contemporaneously with the proceedings before Mr. Fletcher, which ended on the 20th of December 1846, the settlement of the whole Chur Bhudrasun was proceeding under Mr. Deputy Collector Johnson, and the earliest document we have relating to that is the survey chittah which is set out at page 274, dated 2nd December 1846. The second column of that document states the names of the parties in possession of the different dags. The whole chur is divided into the dags which appear upon the larger map, and the survey paper begins by giving the holdings of Nundo Coomar Roy, and sums them up as containing 1,675 beegahs 19 cottahs.

It then goes through the other proprietors, and it gives Dag No. 38 as in the possession of Mohurrum Khatoon, that is, of those whom the defendants represent. Then comes Dag No. 39, which is described as "parcel on the east side" (that is of Dag 38), "north of the following river, south of "Nund Coomar, with water." In the column of the persons in possession there is nothing but two dots; and their Lordships

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are of opinion that it would not be a fair construction, considering that "ditto" is put in many other places when the column goes on continuously with the same possessors to treat those dots as implying that Mohurrum Khatoon are treated as in possession of Dag 39.

On the other hand, it is clear that from those dots it would be impossible to infer that the possession of Dag 39 was then recognized as being in the plaintiffs; and the fair conclusion which their Lordships would draw from the document is that the dag was therein treated as an accretion still belonging to Government, of which no person was certainly in occupation, and in respect of which no settlement had been made.

Then, at page 42, there are two extracts apparently from that measurement chittah to which I have just referred. No. 122, "copy "of chittah dated the 2nd December 1846," contains a description of Dag No. 39, which corresponds almost entirely with that in the larger chittah. The one at the top of the page having given 2,092 beegahs 15 cottahs as the dimensions of Dag No. 39, and treated it as unfit for cultivation, has written on its back the words "Nundo Coomar Roy." Again, at page 41, we find a paper headed "particulars and amount of Jummabundee "settlement of Khas Mahal;" and in the column containing the names of the parties in possession, Nundo Coomar Roy is put down as in possession of 1,675 beegahs 19 cottahs; and then these words follow, "Par-"cel 39 chur, not fully formed, on aggregate "jumma 2,022 beegahs 15 cottahs," with a jumma or rental of Rs. 30. We have no precise account how that jummabundee, which is not dated, but which is said to be for the year 1846, was made. If genuine, it must have been prepared after the last survey chittah, in which this land was treated as not being in any person's possession or subject to any settlement, was made, and therefore between the 2nd and the 31st day of the month of December 1846.

The next document is the Sheristadar's report, which is dated 15th February 1848; and appears to have been made with reference to a proceeding before the Deputy Collector which took place upon a petition or objection of the defendants' party. It is very difficult to see why it was brought into a proceeding to which the plaintiffs were not parties. But the document is in these words, "Before "this, in accordance with the order of the "Commissioner, from Chur Bhudrasun Ta-"limabad land was released to Nundo Coomar "Roy by raising mounds as directed in Act "IV. Order has been passed to put a stop to "the realization of rent on account of the "same." That seems to refer to the land to the north of the nullah. Then it goes on, "Incarnation of Justice, 2,092 beegahs 15 "cottahs of land of the new chur, in the pos-"session of the aforesaid Roy, have been "measured, and a total rent of Rs. 30 being "calculated, has been included in the jum-"mabundee. Whether that rent is to be "struck off or demanded? What is to be "done? Incarnation of Justice, is the "Master. For Incarnation I represent this."

Then two days afterwards the Deputy Collector, Mr. Johnson, made an order on the objection of the party who then represented the defendants, and that is the order which is now supposed to be the principal foundation, if not the sole foundation, of the plaintiffs' title. The first paragraph of that (at page 253) deals with the objection of the petitioner, which seems to have included or to have related to all the lands that were the subject of the suit before Mr. Fletcher, which was struck off. If, therefore, their Lordships are right in supposing that that suit included the land in question, the objection would relate to the land in question. It would seem that the Deputy Collector did not so understand it; but, however that may be, he dealt with it in this way: he said, "The above-"mentioned petitioner filed a petition to the "effect that for these lands which have accret-"ed to his released lands he had instituted "a suit in my Court, and that that suit has "been struck off in consequence of a letter "despatched by Government, and that the "lands found by Kisto Mongul Goohoo, the "Ameen appointed in that case, to be in his "possession, and who drew a map according-"ly, were the released lands belonging to his "zemindary. That petition being rejected "by me" (we have not, I think, the order rejecting it), "the petitioner preferred an ap-"peal to the Collectorate; but the learned "Collector, on 17th November of the year "1847, recorded a proceeding to the effect "that a suit, No. 106 under Regulation II, "being instituted by Mohurrum Khattoon, "wife of petitioner (Mahomed Jokee Chow-"dhry) in that Court with respect to the dis-"puted land, and he did not settle them "since they were the lands of Mouzahs Bish-"nopore," &c. That order we have; and that no doubt reversed the order of the Deputy Collector. Then he says, "The order "to refund the collections reached my Court "on the 1st February last." There he leaves

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the claim of the defendants; the effect of his order being afterwards to release whatever he had claimed in respect of those lands. Then he says, "The Sheristadar of this "Court measured 2,092 beegahs 15 cottahs "of Nundo Coomar Roy's land among the "newly re-formed churs in the last year; for "which a settlement was made on a total "fixed revenue of Co.'s Rs. 30, and it was "included in the jummabundee. A report "had been sent by him for an order, whether "that revenue should be collected or not. "Whereas it is my duty to obey the rooba-"karree and the circular made by the Board "of Revenue, on account of which the lands "were released from the claims of Regulation "II, and to fix the boundaries of these lands "which are held by Nundo Coomar Roy, "after releasing them from the claim of that "jumma, and it being requisite to prepare "papers for ascertaining what amount of jum-"ma is deducted on account of the released "lands, and how much land is left to Govern-"ment: Ordered, that in accordance with "this proceeding of the Deputy Collector, "lands of the aforesaid persons be released, "after striking off Regulation II case, and the "revenue be remitted."

There has been some contest as to what was the effect of that, whether it might not be a release to the defendants rather than to the plaintiffs; but their Lordships upon the whole, and particularly on looking to the next proceeding, have come to the conclusion that what the Deputy Collector meant to do was to release whatever might be claimed in respect of lands held by the defendants, without determining what those lands were; and that he also intended to treat the lands in dispute as being in the possession of Nundo Coomar Roy; and (though it seems an extraordinary thing to do this by an order made upon a petition of another party) to release the revenue assessed upon them to Nundo Coomar Roy.

This next proceeding is his general report concerning the settlement of the whole Chur Bhudrasun Talimabad. Their Lordships without going through that lengthy document, desire to state that, in their opinion, its general effect as to the matter in dispute was to carry out the intention of the order of the 17th of February by treating the Rs. 30 as revenue assessed, but to be remitted, and to be remitted to Nundo Coomar Roy; and that it is impossible to suppose that that was not Mr. Johnson's intention.

This report, however, is obviously and on the face of it a mere recommendation, for the final sentence of it is this: "That this "proceeding, with a statement praying for "his approval of the settlement, and all the "papers, after a comparison thereof with the "list, be submitted accordingly," that is, to the Collector of the district for his approval. It accordingly then went before Mr. Latour, the Collector, and we have his order of the 16th September 1848. He therein states that the proceeding related to the settlement of Chur Bhudrasun Talimabad; and that the papers had come up to him; and then he takes objections to that proposed settlement. He says, "It is not unknown that he" (the Deputy Collector) "has unjustly released "some lands on the south side of the said "mehal to Nundo Coomar Roy and Mohur-"rum Khatoon, and some lands on the north "side to Ramruttun Bose," &c. He also says, with respect to the land immediately in question, "The 2,092 beegahs 15 cottahs of "land in the possession of Nundo Coomar "Roy ought to be reversed, and these lands "ought to be included within the settlement of "the lands decreed to Government." And his final order is, "That having included "the whole of the particulars of the said "mehal in an English report, the papers of "the settlement be forwarded to the Re-"venue Commissioner for confirmation of the "settlement for three years," and notice is to be served upon a party named.

The effect of that order was, as far as it goes, to express the dissent of the superior officer, the Collector, from the recommendation that the 2,092 beegahs 15 cottahs should be treated as released to the plaintiffs; but no doubt it does that, not as dealing with any question of title between the plaintiffs and the defendants, but in assertion of what that officer considered to be the rights of the Government, and the result of his proceeding was to send the whole of the proceedings to a higher authority for further consideration.

With them Mr. Latour sent the elaborate report, which was produced for the first time before the High Court upon the review, and is at page 297. In paragraphs 16 and 17 of that paper he treats the plaintiffs as having got a great deal more from Government than they ought to have got; and, after going through other matters, he says that Nundo Coomar Roy has obtained a relinquishment of 2,092 beegahs 15 cottahs fresh formation, and in the margin refers to Mr. Johnson's order, adding the words "overruled, however, by "me," clearly treating that as a thing that had not been finally determined. Then, in the 73rd paragraph, he says, "On reference to the

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"map it will be shown that one portion of "that new formation 2,092 beegahs 15 cot-"tahs has formed opposite the lands released "to Nundo Coomar, and on a representation "of Mr. Johnson's Sheristadar. couched in "the language rather of an *advocate* for "Nundo Coomar than that of a Government "servant, these lands, on which an aggregate "jumma of Rs. 30 had been imposed, have "been released to Nundo Coomar. If the "Sheristadar had any legitimate doubts, he "could have asked Mr. Johnson orally what "orders were necessary."

It is not necessary that their Lordships should express any opinion about the Sheristadar's conduct. It is not clear how the jummabundee came to show that these lands were in Nundo Coomar's possession; but if that jummabundee were regularly drawn up, it would not be unnatural for the Sheristadar to address an enquiry concerning the realization of the revenue to his superior.

The final recommendation of Mr. Latour was that the case of Nundo Coomar should be revised and considered. Therefore he clearly was so far from treating by that report the land as finally released to the plaintiffs that he considered it ought to be made matter for subsequent investigation, and that the rights of the parties in it ought to be ascertained.

Now, it is a singular thing that the revenue officers should have been, as undoubtedly they seem to have been, ignorant of the fact that while these later proceedings were going on, the Act IV suit had been decided, and that Nundo Coomar had lost, if he ever had, the possession of the land in question. That circumstance may, however, account for the absence of any evidence in this record that action was afterwards taken with respect to Nundo Coomar's holding pursuant to the recommendation of Mr. Latour. And this view of the case seems to their Lordships to be in a considerable degree confirmed by what afterwards took place between the Government and the defendants in the course of the settlement proceedings of 1851 and 1856. It appears upon the face of those proceedings that they were taken in pursuance of Mr. Latour's suggestion, that further investigation of the rights of the Government as against the parties in possession was necessary.

The first of those proceedings, which is at page 192, does not mention expressly the particular Act IV case, which treated the defendants as in possession of these lands. It refers to another Act IV case, which they seem to have had with a person named Hur Coomar Thacoor; but at page 193, line 29, there is this passage, "The said fact was "reported to the Commissioner by the former "Deputy Collector, Mr. Edward Latour, in "his letter No. 269 of the 25th September "1848, in connection with the settlement "report, whereupon a fresh investigation was "ordered;" and that, it appears, was the investigation which was then taking place. The previous paragraph refers again to the land measured by Kristo Mungul Gooho, and to the resumption suit before Mr. Fletcher which was struck off.

On this first proceeding, Mr. Reid, the Deputy Collector, seems to have thought that the Government might be entitled to revenue; but he says, at line 65, "as he" (the Chowdhry) "has been in possession of "the said lands under the orders contained "in the decision in the suit struck off," (that is, the suit before Mr. Fletcher,) "and in the "Act IV case, the said lands cannot be at "once resumed or settled; therefore I main-"tain it necessary to draw up a report in "English on the matter as directed by the "Commissioner in his letter No. 41 of 6th "March 1849." Then he orders, "That for "the time being the petitioner be retained "in possession of all the new formations in "the manner he has been holding them; that "all particulars connected with the matter at "issue be embodied in an English letter, and "sent to the Commissioner for the proper "orders," and so forth.

It is clear upon the admitted facts of the case that at that time, in 1851, the defendants were in possession of the land in question, and therefore it seems clear that what Mr. Reid intended his order to operate upon was the whole of that new chur including the Dag No. 39, and that that was the subject of the investigation.

This is made even more clear by the final and longer proceeding at page 200, where there is a distinct reference to the Act IV case, in which Ismail was one of the plaintiffs; and the nature of the investigation is clearly stated at page 202, line 10: "By "the papers it appears that this case, having "been instituted in accordance with the "tenor of the letter No. 120½, of the "Revenue Commissioner, dated the 2nd July "1851, has been in abeyance up to this time "on account of the investigations, &c., not "having been completed;" and the final order is, "That the objections of the claim-"ants being rejected, the quantity of 27,459 15 1½ dhoors of land, measured by Gooroo-

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"dass Sen, Amlah, as new accretions adjoin-
"ing the petitioner's Wagoojustee be released
"to the petitioner free from the Government
"claim, and that the record be kept among
"the decided cases." It is to be remarked that though other claimants had come in to dispute the defendants' right to a settlement, the plaintiffs had failed to do so.

Reviewing the whole of these proceedings, their Lordships have come to the conclusion that Mr. Johnson's proceedings gave only what may be called at most an inchoate title to the plaintiffs; that that title was never confirmed; on the contrary, that the propriety of giving that title was disputed at the earliest opportunity by Mr. Latour; that in the meantime the parties themselves came into conflict; that the possession of the lands was awarded to the defendants; that Mr. Johnson's proceedings were never followed up by any further investigation as regarded the plaintiffs, because in fact they had ceased to be (if they ever were) in possession; and that, although the Government officers still asserted for a time a right to assess revenue on this land, they ultimately determined that it should be held free from assessment, and made a final settlement to that effect with the defendants.

If their Lordships had been sitting as a Court of first instance, they would have deemed it impossible upon such proof of title as the plaintiffs have given to disturb an admitted possession of upwards of ten years, and though they feel the force of the objections urged by Mr. Bell, and the difficulty of setting their judgment against that of Indian Judges who have had so much more experience of these revenue proceedings, they are unable to find in the judgments of the High Court any grounds upon which they think that the decree in favor of the plaintiffs can be supported.

It seems to their Lordships that the learned Judges having originally treated the title of the plaintiffs as depending upon a release by the Commissioner, and finding that that release was not made out, fell back upon the proceedings of the Deputy Collector, Mr. Johnson; and that they have not given sufficient consideration to the nature of the proceedings of that subordinate officer, and the manner in which they were dealt with by his official superiors. Upon the whole case, therefore, their Lordships have come to the conclusion that the plaintiffs have failed to prove either title or possession which can entitle them to disturb the long possession of the defendants; and that this appeal ought to be allowed. The recommendation, therefore, to Her Majesty will be that the appeal be allowed; that the two last decisions of the High Court be reversed; and that the appeal to the High Court against the second decision of the Principal Sudder Ameen be dismissed, and his decree dismissing the suit be affirmed.

The defendants, of course, will be entitled to their costs in the Indian Courts, and the appellant to his costs in this Court as against the respondents.

The 13th May 1872.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Jurisdiction—Act VIII of 1869, *B. C.—Separate Register of Suits—(Object of)—Occupation of Land—Rent—Charity.*

Case No. 1390 of 1871.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 7th September 1871, *reversing a decision of the Moonsiff of that district, dated the* 15*th June* 1871.

Jallalooddeen (Plaintiff), *Appellant,*

versus

Major James Burne, Manager (Defendant), *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

The provision in Act VIII of 1869, B. C., directing suits instituted under that Act to be entered in a separate register, was for statistical purposes, and not for the purpose of separating into parts, the jurisdiction exercised by one Court, so as to render a suit brought under that Act liable to be struck off in order that a fresh suit might be brought under Act VIII of 1859 in the same Court and on the same cause of action, even supposing that the suit was not really a suit for rent, and that the consideration stipulated to be paid for the defendant's occupation of the land was *charity* and not rent.

Jackson, J.—THE decision of the Additional Judge in this case appears to us to be very surprising.

The facts are these:—The Maharajah of Durbhangah, who was at that time Maharajah Chutter Singh Bahadoor, having occasion for one beegah two cottahs of land, part of an endowment held by the plaintiff's ancestor, on which land this Maharajah desired to

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make a garden, took and occupied it, and in consideration of such occupancy paid in the first place a certain fixed amount of grain, and, subsequently, that amount of grain was commuted to a monthly allowance of 3 rupees and 8 annas, which was paid regularly for a series of years down to Falgoon 1276, payment thereafter being withheld.

The plaintiff sued in the Moonsiff's Court to recover the same. The question was raised, which appears to us to be a purely formal and a very needless question, as to whether the suit was a suit for rent or for an allowance in the nature of charity, and consequently whether it was a suit under Act VIII of 1869, B. C., or no.

The Moonsiff, considering the suit to be really a suit for rent, and finding that the amount was actually due to plaintiff, gave him a decree, save only for a small portion of the claim, namely, the allowance for one month previously paid, which the plaintiff had by some mistake included in his claim, and as to which he himself furnished the means of detecting his error by indicating where the evidence of payment could be found.

On appeal the case came before the Additional Judge, Mr. Henderson, and that gentleman says :—

"On appeal, it was chiefly urged that this "cannot be looked upon as a rent suit, the "money having been given in charity. This, "therefore, is the point to be tried.

"The plaintiff files a *sunnud* from Chat-"tar Singh and other papers from the Court "of Wards. The *sunnud* appears to me to "show that the Maharajah's ancestors appro-"priated the plaintiff's land for the purpose "of making a garden, giving him, as an equi-"valent, first of all food, and subsequently a "monthly allowance as charity,—the plaint-"iff's ancestor being a *fakeer*.

"The other papers would tend to show "that, in the year 1260 F. S., the food allow-"ance was stopped, and in lieu thereof a "monthly allowance at the rate of Rs. 3-12 "was fixed. It would further appear that, "arrears accruing, the plaintiff received a "portion of that amount, the balance being "remitted by the plaintiff, and the Commis-"sioner fixed Rs. 3-12 for the future rate of "payment.

"The conditions of the *sunnud* do not "specify fully whether the equivalent for the "land were given as charity or as rent; it "merely proves that some return for the land "being considered necessary, the arrange-"ments it contained were effected. There "is no proof whatever that the food and "subsequently the monthly allowance were "given as rent.

"Besides this, in the receipts for payments "given by the plaintiff, the amount is not "styled rent. The Moonsiff's interpretation "of the transaction is that the Maharajah, "not liking, holding the important position "he did in the district, to become the tenant "as it were of one of his own ryots, styled "the equivalent for the land charity, *i. e.*, "support, and not rent, but that the latter "was really what the exchange meant. "This construction is inadmissible when, in "the document charity, *i. e.*, money for "support, is certainly more clearly implied "than rent. In my opinion, the suit cannot "be brought under Act VIII of 1869. "The Civil Court is the only course of action "left open to the plaintiff. For this reason, "the case must be struck off the Act VIII "of 1869 file, on which grounds it should "have been dismissed in the first instance by "the Lower Court."

We very much lament that, in the Lower Appellate Court so flimsy a defence should have been allowed to prevail, and also that it should have been urged here on behalf of the Court of Wards.

The Maharajah for his own purposes wanted the plaintiff's land. The plaintiff's ancestor agreeing to give the land, which apparently he could not alienate, the Maharajah as a sop for his own vanity fixes probably a larger allowance than usual to be paid, and in consideration of this the owner of the land acquiesces in its being called *charity*, instead of rent. This amount continues to be paid for a number of years till the occupier or lessor suddenly thinks fit to stop it, and the question is raised whether this amount was charity or rent. It is, in fact, the consideration stipulated to be paid for the defendant's occupation of the land. The circumstance of the plaintiff's ancestor having been a *fakeer* in no respect affects the plaintiff's right to recover the equivalent so agreed upon by whatever name it be called. The question whether the suit is one under Act VIII of 1869, B. C., or not, appears to be of the most frivolous character.

The Bengal Legislature, when it passed Act VIII of 1869, restoring to the Civil Courts the jurisdiction of which they had been for a time deprived, and empowering them to try suits for rent and others of a kindred nature, thought fit to direct that the suits instituted under the provisions of the Act should be entered in a separate register. This provision, however, was introduced

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obviously for statistical purposes, and not for the purpose of separating into parts the jurisdiction exercised by one Court.

We cannot conceive how the plaintiff's allegation, that the suit was brought under Act VIII of 1869, B. C., should render it liable to be struck off, in order that he might bring a fresh suit under Act VIII of 1859, in the same Court and on the same cause of action, even supposing that the suit was not really a rent suit.

The plaintiff is unquestionably entitled to the amount for which he sues, and we therefore set aside the decree of the Lower Appellate Court, and restore that of the Moonsiff.

In restoring that decree, we strike out that portion of it which orders the plaintiff to pay to the defendant costs in proportion to one month's allowance, which was claimed by some inadvertence and disallowed.

The plaintiff will have costs only upon the amount decreed to him, but the defendant will have no costs.

The appellant will have his costs of this appeal, as also those of the appeal below.

The 14th May 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Procedure—Witnesses.

Case No. 272 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 6th September 1871.

Bhujooram Mundul (Plaintiff), *Appellant,*

versus

Raj Coomaree Debia and others (Defendants), *Respondents.*

Mr. J. T. Woodroffe and *Baboos Unnoda Pershad Banerjee* and *Mohinee Mohun Roy* for Appellant.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Respondents.

Case showing an utter disregard of correct procedure in the number of postponements, the irregular manner in which the witnesses were examined, the refusal to grant time to produce witnesses unavoidably absent, the final hearing of the case in what (without evidence on either side) was a mere skeleton of a case, and the pronouncing of judgment by a different Judge from him who had heard the evidence.

Jackson, J.—After hearing the learned counsel for the appellant in this case, it is quite clear, and the respondent's pleader does not gainsay the opinion, that there has been not only no trial, but nothing either resembling or approaching a trial in this case.

It would be wearisome and needless, especially needless as the matter will be considered differently presently, to enumerate the endless postponements of this unfortunate case, from the filing of the plaint on the 3rd of May 1870, to the judgment pronounced on the 6th of September 1871. There have been in all not less than 12 or 13 postponements, several of them taking place on dates previously fixed by the Court itself for the hearing of the case, and on which witnesses of one party or the other were in attendance. It seems that only two witnesses on behalf of the plaintiff, and none on behalf of the defendant, have been examined; and those two were not examined on the same date, nor was judgment pronounced until many months after the examination of the last of them, and by a different Judge from that who had heard the evidence of the witnesses.

When the case was called up for final hearing, the plaintiff's vakeel represented to the Court that the witnesses could not be in attendance because of the inundation (and he might have added because no one could have foreseen that the witnesses would be examined on the date fixed), and he applied for time to produce his witnesses. His application was disregarded, argument took place, and judgment was pronounced on what—because there was no evidence taken on either side—may be called the skeleton of a case.

To determine finally the rights of parties on such an investigation as this, would be a mere mockery of justice.

We set aside the proceedings and decision of the Court below, and we remit the case to that Court with directions to fix a day on which the parties will be expected to produce their witnesses, and they will have every facility afforded them for that purpose. The day fixed must be positively the day of hearing, and the hearing and examination of the witnesses and judgment must be consecutive.

The Court will take care to determine beforehand any question which it is necessary to determine as to whether the application of the plaintiff to examine the defendants, or to have certain witnesses examined by commission should be complied with or not.

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The costs of this appeal will be costs in the cause.

In the mean time, the proceedings of this case will be laid before the English Committee that they may consider what steps it may be advisable or necessary to take with reference to such a lamentable disregard of correct procedure.

Markby, J.—I concur.

The 20th May 1872.

Present :

The Hon'ble W. Markby, *Judge.*

Security for Costs of Appeal—Time for Demanding — Act VIII of 1859 *s.* 342 — *Pauper Appellant.*

In the matter of

Jogendro Deb Roykut, *Petitioner,*

versus

Funindro Deb Roykut, *Opposite Party.*

Mr. R. T. Allan for Petitioner.

Baboos Sreenath Doss, Bhogobutty Churn Ghose, and *Chunder Madhub Ghose* for Opposite Party.

By the words "before the appellant is called upon to appear and answer" in Section 342, as compared with similar words used in subsequent Sections, especially Sections 345 and 346, is meant not the date mentioned in the notice, but the date on which the appeal is called on to be heard; and the Court has a discretion at any time before the hearing of the appeal to make an order demanding security for costs from the appellant.

Where the appellant was, according to his own statement, a pauper, and it appeared that others presumably able to furnish the necessary security were interested in the matter, the case was considered a proper one in which security should be given.

Markby, J.—THIS was a suit which was heard originally and dismissed : it was again heard upon remand by this Court and again dismissed. The plaintiff then applied for leave to appeal in *formâ pauperis ;* and some time after, in August 1871, Mr. Justice Bayley and Mr. Justice Paul made an order dismissing that application on the ground that they saw no reason to suppose that the decision of the Judge was contrary to law or to any usage having the force of law or otherwise erroneous. So far as they could judge then of the merits of the decision, they considered it an unimpeachable judgment.

Thereupon, the plaintiff filed his petition of appeal in the usual way, and lists of documents required to be translated have been filed by the appellant and the respondent towards the end of February. Then on the 22nd March this application (for demanding security for costs from the appellant) was made.

The first objection that has been taken to the application is that, under Section 342 of the Code of Civil Procedure, the Appellate Court has no authority to demand security, because the date named in the notice for the respondent to appear and answer has elapsed.

It seems to me that that construction would be unreasonable ; the time within which the appellant is to appear and answer is only just sufficient time to enable him to come up and enter appearance in the Court : and although in form the notice is to appear and answer on that early day, it is perfectly well understood that, by the practice of the Court, the case will not be heard until very much later ; and I think that by the expression "before the appellant is called upon to appear and answer" in Section 342, comparing them with the use of the similar words in the subsequent Sections, especially Sections 345 and 346, is meant not the date mentioned in the notice, but the date on which the appeal is called on to be heard, and that this Court has a discretion at any time before the hearing to make this order.

The next objection that is raised is that there has been delay in making this application and that is a different objection. Now I do not think that I have anything to do with the case reported in the 6th Volume of the Weekly Reporter, that case having been decided upon its own merits as also the case in 7 Moore. It seems to me, this application is not made at an unreasonable time. The most important element in the costs of this case after the stamp is the preparation of the paper-book for the use of the Court ; and allowing for the time that would be necessary for making the calculation after the respective lists were filed, that element in the costs was not ascertained until some time in the beginning of March ; and I do not think it an unreasonable course for the respondent to wait and see what the result of that calculation would be before making this application so as to enable him to state to the Court what would be the fair amount upon which to call upon the appellant to give security. I think also, looking to the circumstances of this case, that it is a proper one in which security should be given. I do not of course wish to give the slightest opinion as to the merits of the case. But the matter has been considered by the Judge

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of the Court of first instance, and in the opinion of a Division Bench of this Court it has been satisfactorily disposed of. That opinion will have no possible effect when the matter comes before the Court more fully to be argued. But looking to the fact that, by the plaintiff's own statement, he is a pauper and utterly unable to meet the costs which the respondent will have to incur,—looking also to the fact which is stated in the petition and which is uncontradicted, that other persons who are presumably able to furnish necessary security, are interested in this matter,—I think it is only reasonable to give the respondent some security for his heavy outlay in this appeal.

I think, therefore, that I ought to make the order that security be given for a fair sum which will cover all the costs of the appeal, and I fix that sum at Rs. 4,000.

The 21st May 1872.

Present:

The Hon"ble W. Markby and W. Ainslie, *Judges.*

Decree of Privy Council—Interest—Rate of—On Costs.

No. 77 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Backergunge, dated the 17th February 1872.

Ameeroonissa Khatoon (Judgment-debtor), *Appellant,*

versus

Meer Mahomed Mozuffur Hossein Chowdhry and another (Decree-holders), *Respondents.*

Baboo Sreenath Banerjee for Apellant.

Baboos Doorga Mohun Doss and *Rashbeharee Ghose* for Respondents.

Where a decree of the Privy Council gives interest, but does not clearly specify the rate, the Court should ascertain, if possible, from the other parts of the decree itself, or from other documents which may be read in conjunction with the decree, what rate was intended to be given.

Where the decree gives interest upon the principal sum recovered only, but not upon costs, the plaintiff is not entitled to such interest.

Markby, J.—THE questions that we have to consider in this case arise upon an order of Her Majesty in Council made in the suit of Moulvee Abdool Ali, defendant, appellant, *versus* Meer Mahomed Mozuffur Hossein Chowdhry and others, plaintiffs, respondents. The order directs that the decree of this Court should be confirmed but subject to the proviso thereinafter made. The proviso is somewhat of a complicated character, because it does not finally fix the amount upon which execution is to issue, but makes that amount dependent upon the result of an enquiry in this Court; and it directs that, upon that sum whatever it may turn out to be, the plaintiff is to have interest from the 29th July 1859, and it is also directed that he is to have the costs payable by the appellant in the two suits, and the costs of the appeal, that is, the appeal in this Court.

The first ground which has been raised for our consideration is, at what rate it was intended that the plaintiff should have interest. Now the rule that we have thought best to act upon in cases of this kind, which come not unfrequently before this Court, is, when the interest is not clearly specified, to see whether from the other parts of the decree itself or from other documents, if there are any which one is at liberty to read in conjunction with the decree, it can be ascertained what rate the Court intended to give. If that cannot be ascertained in that way, my own opinion is that we should not be at liberty to take the course which has been suggested to us by the appellant now before us, namely, to allow such a rate of interest as we should think reasonable. But in the case before us we do not think there is any real difficulty in ascertaining what rate Her Majesty in Council intended to give. The decree of this Court having been confirmed subject to modification, we are at liberty, indeed we are bound, to see what relief was given by that decree, because, except so far as that decree is modified, it has become embodied in the order of Her Majesty in Council. Now one distinct and separate part of the decree of this Court was that the plaintiff should be entitled to recover interest upon the principal sum recovered in the suit at the rate of 12 per cent., and we think we can fairly infer from what Her Majesty says in her order that it was intended to give interest on the amount recovered at the same rate as this Court has given. We think, therefore, the plaintiff is entitled to execute this decree with interest upon the principal sum recovered at the rate of 12 per cent.

But then the Lower Court has also given interest at the same rate upon the costs of the two suits and on the costs of the appeal in the High Court; and it is objected, and we think the objection is well-founded, that no

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interest upon those sums have been given by the order in Council. If it had been intended to give interest not only upon the principal sum recovered, but also upon costs, the words "with interest thereon" would have followed after all the several sums of money allowed by the order, had been specified, and not, as they now stand, after the first of those sums only. We think the true construction of this order is that the first of the sums specified is given with interest, and all the other sums specified are given without interest. And we think there is a fair reason for that distinction: no doubt, it is by no means unfrequent to give interest upon costs, but on the other hand undoubtedly costs stand upon a different footing from the money claimed. It may very well have been that the Privy Council may have thought in this case that it was not necessary, seeing that a very large amount of interest would accrue under any circumstance upon the principal, to give any interest upon the costs.

On these grounds, we think that, as regards the first point, the judgment of the Court below should stand; but as regards the second point it must be modified in this respect that the plaintiff will be declared not to be entitled to any interest in respect of the costs of the two suits and the costs of the appeal in this Court.

We make no order for costs of this appeal.

The record will be sent down to the Lower Court without delay.

The 22nd May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Small Cause Court—"Contract" in s. 6 Act XI of 1865 (*Meaning of*)—*Implied Contract —Suit for Plaintiff's Share of Money received by Defendant—Special Appeal—Questions of Title.*

Case No. 962 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Gyah, dated the 25th May 1871, *reversing a decision of the Moonsiff of that district, dated the 31st January* 1871.

Sunkur Lall Pattuck Gyawal (Defendant), *Appellant,*

versus

Mussamut Ram Kalee Dhamin and others (Plaintiffs), *Respondents.*

Baboo Bhowany Churn Dutt for Appellant.

Baboo Kally Mohun Doss for Respondents.

The word "contract" in s. 6 Act XI of 1865 was intended to include a suit to recover money received by the defendant to a share of which the plaintiff is entitled; the foundation of the claim being that the defendant, with regard to the portion of the money which belonged to the plaintiff, received it for and on behalf of the plaintiff upon an implied contract to pay it over to him.

When a suit is of a nature cognizable by a Small Cause Court, there is no right of special appeal although a question of title is incidentally raised; the finding of the Small Cause Court not being conclusive and being only for the purpose of determining the suit brought in that Court.

Couch, C.J.—We are of opinion that a special appeal does not lie in this case. Section 27 Act XXIII of 1861 provides that a special appeal shall not lie in a suit of the nature cognizable in the Courts of Small Causes under Act XLII of 1860, when the debt, damage, or demand for which the original suit was instituted does not exceed 500 rupees. The suits which are cognizable by Courts of Small Causes are now defined by Section 6 of Act XI of 1865 to which, by Section 50, the Act XXIII of 1861 is made applicable, and amongst them are claims for money due on bond or other contract.

The claim in this suit is to recover money which the plaintiff says the defendant has received, and which the plaintiff is entitled to a share of. In fact, the claim is founded upon this, that the defendant, with regard to portion of the money which belonged to the plaintiff, received it for and on behalf of the plaintiff, and the right to recover it is founded upon what has always been regarded as an implied contract to pay it over to the person for whom it was received. We think the word "contract," in Section 6 was intended to include such cases. That it was, is apparent from the exceptions in the proviso to the Section, one of which is an action on a balance of partnership account unless the balance shall have been struck by the parties, or their agents. A right to recover a balance of a partnership account by one partner against another is founded upon one partner acting as agent for the others, and receiving money as such agent and being bound to pay the others their shares. If the words of Section 6 are large enough to include a claim of the kind, certainly they would include such a claim as the present.

Again, it seems to have been supposed that, if it had not been otherwise provided, there would have been a right to recover a share or part of a share under an intestacy; which must be on the ground that the party

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who had the share was under an implied contract to pay it over. These instances show that "contract" in Section 6 was intended to have a very extensive meaning, for there are no other words in the Section which would include such cases. They would not come within the term damages. It has been held by this Court in a case which is reported in the Special (Small Cause Court) Number of the Weekly Reporter, page 23, and is quoted in Mr. Broughton's note to Section 6, that a Small Cause Court has jurisdiction in a suit brought by one of several joint owners of property against his co-sharer for his share of the profits.

The next question to be considered is, what was the effect of the defendant (the suit being one of the nature cognizable by the Small Cause Court) raising the question of title. It seems to have been held in one case in this Court, reported in Wyman's Reports, page 6, and IV Weekly Reporter, page 60, that where issues are raised which affect the question of title, a special appeal is not barred *quoad* those issues. The learned Judges say that *decision* or *order* in Section 27 is confined to those decrees which, if made in the Small Cause Court itself, would be conclusively binding on the parties. We do not see the reason of this. There is but one decision or order in the suit; and according to decisions of this Court, the finding of the Small Cause Court upon such issues is not conclusive, because the Court only goes into the question of title incidentally. That has been decided by a Full Bench, Sutherland's Full Bench Rulings, 127. There is, therefore, no reason why the special appeal should be allowed *quoad* the issues of title. We do not agree in the view which the learned Judges of the Bombay High Court took of this matter in the case reported in II Bombay High Court reports, page 4, where it does not seem to have been considered that the decision on the question of title was not conclusive. We think that, when the suit is one of the nature cognizable in a Court of Small Causes, there is no right of special appeal, although a question of title is incidentally raised, as the finding of the Small Cause Court is not conclusive and is only for the purpose of determining the suit brought in that Court.

The appeal will be dismissed with costs.

The 22nd May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Honble W. Ainslie, *Judge*.

Evidence (Time for Objections to, as not being best)—Special Appeal—Admission—Return to Collector (stating Amount of Rent.)

Case No. 963 of 1871.

Special Appeal from a decision passed by the Judge of Sarun, dated the 23rd May 1871, reversing a decision of the Moonsiff of that district, dated the 10th December 1870.

Avudh Beharee Singh (Defendant), *Appellant*,

versus

Ram Raj Tewaree and others (Plaintiffs), *Respondents*.

Baboo Bama Churn Banerjee for Appellant.

Baboo Unoda Pershad Banerjee and *Moonshee Mahomed Yusooff* for Respondents.

Objections to evidence as not being the best evidence should not be allowed to be taken on special appeal. They should be taken at the time when it is offered in evidence, for, if then taken, the objections might be renewed by the production of the best evidence.

A return made to a Collector by an occupant of land, stating the amount of the rent, is an admission as to the amount of rent, binding upon the occupant and all who claim under him.

Couch, C.J.—As to the first point, the paper produced was a return given by the Collector which stated the contents of the return which was made to him. The objection which is now taken, that that was not the best evidence and that the original return ought to have been produced, ought to have been taken at the time it was offered in evidence; it was an objection which, if taken at that time, might have been removed by the original return being produced. It cannot be allowed that parties shall lie by until the case has been determined on appeal, and when it comes up to this Court in special appeal, take an objection of that kind, which, if taken at the proper time, might have been removed. It cannot be said that the decision of the case on the merits has been affected by an error of this kind. It could never be allowed that these objections to evidence as not being the best evidence should be taken on special appeal when the parties may, by the way in which they conducted the case, have waived the objection. That disposes of the first point.

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Then with regard to the second point, the evidence appears to be this :—We must take it that although the defendant is stated in the return to be the occupant of the land, the real occupant was the father, because the defendant by his answer in effect says that. He claims to be now entitled as succeeding to his father in the occupation, and that must be taken as showing that the statement in the return was not a statement of the real fact. What the reason may have been does not appear ; but, for some reason or other, the son's name was put in instead of the father's who was the actual occupant.

Then it is a paper which is signed by the occupant of the land and by the *ticcadar* in which the amount of the rent is stated, and that is an admission by the occupant of the land of the amount of the rent. That would be very good evidence against the present defendant who claims under the occupant and good evidence also against other persons, being an admission by a deceased person against his interest that he was liable to pay that amount of rent. We think it is clear that it was admissible as evidence. Whether it was so strong as that it ought to prevail against the decree, is a question which ought not to be considered in special appeal : that is a question for the Judge sitting in regular appeal to determine. The question for us to determine is, whether there is any error in law in his treating it as evidence and allowing it to be considered by him in the decision of the case. We think there was not.

The appeal must be dismissed with costs.

The 22nd May 1872.

Present :

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Sale in Execution of Decree—Effect of not specifying Share to be sold — Irregularity—Onus Probandi—Special Appeal.

Case No. 990 of 1871.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 30th May 1871, affirming a decision of the Subordinate Judge of that district, dated the 30th May 1870.

Suroop Narain Singh (one of the Defendants), *Appellant*,

versus

Ram Tobul Misser and others (Plaintiffs), *Respondents*,

Baboo Taruck Nath Sen for Appellant.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondents.

Although a decree-holder, when seeking really only to have a 4-anna share in a *mouzah* attached and sold, did not specify his share, but made his application in such a general way as to include the entire *mouzah*, yet inasmuch as he never claimed to have more than a 4-anna share, nor to be entitled to more, the irregularity was held not material in this case, it being clear that what was intended to be sold and what defendant, objector to the sale claiming to be the purchaser of a 8-anna 10-gundah share under a *kobalah*, understood was going to be sold was the right, title, and interest of the judgment-debtor, whether it might be 4 annas or only 10 gundahs according as defendant succeeded in establishing his *kobalah* or not.

The mere putting what is perhaps a greater burden of proof upon one party than upon the other, though it may not be strictly correct, is no ground for reversing a decree in appeal, where the decision of the case on the merits has not been affected by anything which has been done as to the *onus* of proof.

Couch, C.J.—THE main objection taken in special appeal is, that the plaintiffs in fact, only became the purchasers of 10 gundahs in the property on the ground that the 10 gundahs only were attached, and that the subsequent proceedings must be considered with reference to what was attached, and the right, title, and interest of the judgment-debtor, which was purchased by the plaintiffs, was only in the 10 gundahs.

The same objection was taken in both the Lower Courts.

Now it is best to see what was the finding of the Lower Appellate Court upon this matter. The Judge says that "with reference "to the transaction," that is, the purchase by the plaintiff at the auction, I find that the "Court of Wards on the 12th of February "1869, as decree-holders, filed a schedule of "the debtor's property in which several vil-"lages were entered ; a list of the same was "given together with the debtor's share in "each," and in Mouzah Lowawan, the one now in question, the share was stated to be 10 gundahs, and a notice was served on the 24th of February in accordance with that application. But, then, it appears from the findings of both the Lower Courts that the Court of Wards, the plaintiff in that suit, petitioned the Court for the amendment of the schedule, they having, as it seems, ascertained that the right of the defendant in that suit was more than the 10 gundahs, and that, in point of fact, he was entitled to a share of 4 annas. That application did not specify the

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4-anna share, but was general, asking that the attachment should be of the right, title, and interest of the judgment-debtor in the mouzahs.

The proceedings were sent to the Deputy Collector; and before him the present special appellants objected to the sale proceeding, on the ground that they had purchased 3 annas and 10 gundahs of the judgment-debtor's property, and they founded their objection, as appears by the petition, on the fact that the *kobalah* of the 20th March 1867 entitled them to that portion of the property.

This certainly shows, as has been observed by the Lower Courts, that the present special appellant understood that at that time a change had been made in the proceedings, and that what was attached and sought to be sold was no longer the 10 gundahs. As it seems to us when the parties went before the Collector, they understood it to be the 4-anna share, although the application was general and it might have been said to include the whole mouzah: and we find that Mr. Justice Norman, in one of the cases that have been referred to, in IV Bengal Law Reports, page 183,* takes this view as to the effect of an attachment where no share is mentioned, and says he thinks that, in such a case as that, the attachment is to be treated as the attachment of the entire property. They understood it as an attachment of the 4-anna, and that that was about to be sold, and would be sold.

Then the Deputy Collector having the question raised before him, whether the *kobalah* upon which the defendants rested their claim was fraudulent or not, appears to have thought, and probably very wisely, that he had better not decide that question, and determine that the sale should be of the right, title, and interest of the judgment-debtors, leaving the matter as to whether that was in a 10-gundah or in a 4-anna share, to be afterwards determined by the parties litigating the matter, as has been done in the present suit.

We think, then, that although there might have been an irregularity in the Court of Wards, when they really only sought to have a 4-anna share in the mouzah attached and sold, not specifying that and making their application in such a way as to include the entire mouzah, yet, inasmuch as they have never claimed to sell more than a 4-anna share, nor ever claimed to be entitled to more, the irregularity is not material in the present case, and that it is clear that what was intended to be sold on that occasion, and what the present special appellant understood was going to be sold, was the right, title, and interest of the judgment-debtors in the mouzah which might turn out to be 4 annas or only 10 gundahs, according as the defendants succeeded in establishing their *kobalah* or not. We think that the Lower Courts have not fallen into any error in treating this, as it really was, as a purchase of that description by the plaintiff.

Then the other question which has been raised is, upon whom was the *onus* of proof? Now, the plaintiff claimed and sought to be declared entitled to the 4-anna share; and it was for him in a suit to recover possession, to give some evidence of his title to the 4-anna. The cases as to upon whom the *onus* of proof is in claims under Section 246 Act VIII of 1849, which have been referred to, do not apply in this case which is a suit to recover possession or to be declared entitled to the property. But then we must see what the defendants had done; they had, in the proceedings before the Deputy Collector, stated, in their petition, that the judgment-debtor had been entitled to the 4-anna share, and their case was that they had had a conveyance of the 3-anna and 10-gundah share to them. As to the plaintiff, it was enough for him to make use of this petition as showing that at one time, according to the defendant's own case, the judgment-debtor was entitled to the 4-anna. It threw upon the defendants the burden of showing that they had really obtained by the *kobalah* the 3-anna and 10-gundah, and they attempted to do that by proving that conveyance to have been a *bonâ fide* one.

The case appears to have been fully gone into; and, upon such evidence as was adduced by both parties, the Lower Courts have come to the conclusion that it was not a *bonâ fide* conveyance and that it did not pass the property to the defendants. The decision of the case on the merits has not been affected by anything which has been done as to the *onus* of proof. The case appears to have been properly dealt with; and it is a mistake to suppose that a mere putting what is perhaps a greater burden of proof upon one party than upon the other, though it may not be strictly correct, is a ground for reversing the decree in special appeal. The question is, whether both sides having been allowed to go fully into evidence, the Court has come to a proper

* 13 W. R., Full Bench, 68; see page 67.

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conclusion. There may be some cases in which, where the evidence being nicely balanced, it becomes necessary to consider upon whom the burden lies. The plaintiff had given sufficient evidence to throw upon the defendants the *onus* of showing that their *kobalah* was a genuine instrument, an instrument which passed the property to them.

We see no ground for saying that there has been anything erroneous in the decision of the Lower Appellate Court, and the appeal must be dismissed with costs.

The 22nd May 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Case No. 54 of 1872.

Land for Public Purposes (under Act VI of 1857*) —Claims to Money deposited with Collector (how to be enforced) — Proceedings in Execution (Correspondence between Judge and Collector) —Appeal.*

Miscellaneous Appeal from an order passed by the Judge of Twenty-four Pergunnahs, dated the 2nd September 1871, *reversing an order of the first Subordinate Judge of that district, dated the* 23rd *June* 1871.

The Collector of Twenty-four Pergunnahs (Judgment-debtor) *Appellant,*

versus

Grish Chunder Chatterjee (Decree-holder), *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Woomesh Chunder Banerjee for Respondent.

One of several claimants to money deposited with the Collector for payment on account of land taken for public purposes under Act VI of 1867, sued those who opposed his claim and the Collector. The Collector put in a written statement declaring his willingness to comply with any order of the Court and that he had been unnecessarily made a defendant, and asking for his costs, whereupon a decree was made against all the defendants and the Collector adjudged entitled to his costs. Upon application for execution, a correspondence passed between the Subordinate Judge and the Collector, resulting in an order by the former, directing the Collector to pay plaintiff only so much as remained in the Collector's hands after payment of certain other claims. The Judge on appeal set aside the Subordinate Judge's order, and remanded the case to him for enforcement of execution. HELD that no appeal lay to the Judge from the order of the Subordinate Judge, the correspondence in question not being proceedings in execution; and, that the proper course would have been not to have brought a suit against the Collector but against the party who opposed plaintiff's claim, and after obtaining an order for the payment of the money due to him, to have taken the order to the Collector for his money, the effect of such order being to protect the Collector from the consequence of paying to one party money to which another was entitled.

Jackson, J.—A considerable sum of money payable to parties entitled on account of land taken up for public purposes at Muneerampore in the twenty-four Pergunnahs has been in deposit in the hands of the Collector of that district.

Claims were made by various parties, and amongst others by the respondent before us, Grish Chunder Chatterjee; and Grish Chunder Chatterjee, by way of enforcing his claim, brought a suit in which, in addition to the persons who opposed his claim, the Collector was sued as a defendant.

The Collector, it seems, put in a written statement declaring that he had been unnecessarily made a defendant; that he was willing to comply with any order which the Court might make; and he asked for his costs. Thereupon a decree was made against the defendants, including the Collector, for the payment of certain monies to the plaintiff: but the Collector was adjudged entitled to his costs.

The plaintiff, being desirous of obtaining the fruits of his decree, appears to have applied to the Subordinate Judge for execution, and thereupon a kind of correspondence took place between the Subordinate Judge and the Collector; in the course of which the Collector submitted that out of the funds which were originally in his hands, he had made certain payments to certain parties, and a certain balance remained in his hands; that he found an order for the payment of a certain sum to the plaintiff in this suit, and also another order by which a different party was entitled to receive a separate sum; and he represented that, if the amount for the payment of which application had been first made were paid to the receiver of the estate of Pran Kishen Biswas, sufficent money would not remain in his hands to satisfy the plaintiff's claim.

Thereupon the Subordinate Judge recorded a *roobakaree* or proceeding, and made the following order:—"That a copy of this "*roobakaree* be sent to the Collector requesting that the receiver of the estate of Pran "Kishen Biswas, the superior proprietor, be "first paid out of the Rs. 1,448-8-5, the remaining amount of the deposit in the Collectorate, as mentioned in his *roobakaree*

"dated the 27th April last, and that this "judgment-creditor be held entitled to the "remaining sum from which Rs. 113-13-5 be "paid to the Government pleader under a "previous order, and the remaining sum be "duly paid to this judgment-creditor." That is to say, he decided that the Collector was to pay to the judgment-creditor only so much of the original funds as remained in his the Collector's hands after payment of the receiver's claims.

Against that order, the plaintiff, the judgment-creditor, appealed to the District Judge, and the District Judge observes as follows:—

"The Collector objects to pay on the ground "that the money which would have been ex-"pended in the satisfaction of this decree has "been spent in the satisfaction of other decrees. "The Court cannot listen to an excuse of this "nature. Goverment is bound to satisfy the "decree, and the Collector must be required to "pay the amount. The Court will not con-"sider whence the money will be obtained for "the satisfaction of the decree, nor can it look "in execution at the grounds of judgment. "The decree must be satisfied, and the Sub-"ordinate Judge is bound to execute it. His "order is set aside, and the case will go back "to him that the execution may be enforced."

If the strictly proper course had been taken in this case, the plaintiff would have brought his suit, not against the Collector, but against the party who had withstood his claim, and after adjudication would have applied to the Court, for an order for the payment of such anount as was found to be due to him; and he would take the order to the Collector, and ask him for his money; and on such consideration as we can give to the words of Section 29 of Act VI of 1857, it would be for the Collector to consider what effect he was bound to give to the order. For we consider that such order would be more in the nature of a direction than of a decision of a claim, and the effect of that order would, as my learned brother Markby observes, protect the Collector from the consequences of paying to one party a sum to which another party was entitled.

In this case we have a complication, inasmuch as the Collector is a party to the suit. We should have thought that the Collector, when he was made a defendant, would have come before the Court, and would have objected that he should not have been made a party to the suit, and that no decree could be given against him; and he would have been absolved from liability in the matter. Unfortunately, however, he has in the present instance consented to be a party; he has put in a written statement, and has claimed and obtained his costs.

If these were properly proceedings in execution against the Collector, we should have felt some embarrassment as to what we ought to do.

But these were not proceedings in execution, but merely a correspondence by means of *roobakaries* between the Collector and the Subordinate Judge, in which the Subordinate Judge has stated his opinion. That not being proceedings in execution, an appeal did not lie to the Court, and, therefore, the Judge was in error in setting aside the order of the Subordinate Judge. We accordingly reverse his order without prejudice to the rights of the parties.

Under the circumstances, and considering the error committed by the Collector, we do not think that we ought to give him costs.

The 23rd May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Act VII of 1870—*Computation of Value of Subject-matter of Suit—Court Fees—Jurisdiction.*

Case No. 1027 of 1871.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Patna, dated the 25th April 1871, *reversing a decision of the Sudder Moonsiff of that district, dated the 9th January* 1871.

Jeebraj Singh (Defendant), *Appellant*,

versus

Inderjeet Mahton (Plaintiff), *Respondent*.

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondent.

The mode of computing the value of the subject-matter of a suit as provided by Act VII of 1870 was intended to be applicable only to determining the amount of Court fees to be paid, but not to other purposes, *e. g.*, to the question of the jurisdiction of the Court.

Couch, C.J.—THE Subordinate Judge has held that the decision of the Moonsiff upon the question as to what was the value of the subject-matter in dispute with reference to the jurisdiction of the Court is final under Section 12 of the Court Fees Act. Now, it is admitted by Mr. Gregory that

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that is not so, and that would at once dispose of this special appeal, because it shows that his decision is erroneous, and it would be necessary that the case should go down to him again. But upon the other question, namely, whether the value for the purpose of jurisdiction is to be computed according to the Court Fees Act, we think there is nothing to show that it was the intention of the Legislature that that mode of computing the value was to be applicable to the question of the jurisdiction of the Court and was to be used in ascertaining what was the value of the subject-matter in dispute.

Act VII of 1870 is an Act for making the Court fees payable, and after providing in Section 6 that the fees shall be paid, there followed a series of provisions with regard to the way in which the Court fees shall be estimated. In suits for lands, houses, and gardens it is according to the value of the subject-matter, and such value shall be deemed to be as provided by the Act. We think that this must mean that the value is to be deemed to be such for the purposes of the Court fees only, and not for other purposes. And Section 12 appears to support this view, because it treats this as being a question relating to valuation for the purpose of determining the amount of any fee, and it makes the decision upon this question final. We can see nothing in this Act which would lead us to suppose that the Legislative Council intended that these rules shoud be applied to the determining what was the value for the purpose of jurisdiction.

Therefore, the decree of the Lower Appellate Court must be reversed and the case must be remanded for the Appellate Court to determine what is the value of the subject-matter in dispute. The appellant must have the costs of this appeal.

The 23rd May 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Special Appeal—Evidence (Bad reason for believing).

Case No. 1021 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 10th May 1871, affirming a decision of the Moonsiff of Chuprah, dated the 11th December 1870.

Sheo Golam Sahoy (one of the Defendants), *Appellant,*

versus

Mohadeo Lall Sahoo (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Hem Chunder Banerjee* for Appellant.

Baboos Mohesh Chunder Chowdhry and *Chunder Madhub Ghose* for Respondents.

Where it is manifest that the Lower Appellate Court has dealt with the evidence adduced on both sides, has weighed it, and come to the conclusion that the plaintiff's witnesses ought to be believed, the giving in the course of its observations a reason which may not be considered a good one is not a ground of special appeal.

Couch, C.J.—As to the first point, we think that all that the Subordinate Judge meant was that he was considering which set of witnesses was entitled to credit, the plaintiff's or the defendant's, and he makes the remark that, on the former occasion when the same witnesses had given evidence, the witnesses for the plaintiff had been thought by the Court to be more entitled to credit than the witnesses for the defence. That is not using the decision in the former suit as evidence in this or doing anything contrary to the order of remand.

With regard to the other part of his judgment, he goes into a consideration of the reasons for not believing the defendant's witnesses. Now, even supposing that in the course of his observations upon the evidence of the defendant's witnesses he has not in every instance given a reason that will bear examination, but has in one respect given what may be considered a bad reason, that will not vitiate the whole of the judgment. If we can see that he had dealt with the evidence adduced on both sides, and there is enough to show that he had weighed it and come to the conclusion that the plaintiff's witnesses ought to be believed, the giving in the course of his observations a reason which may not be considered a good one is not a ground of special appeal.

I was rather surprised by being told that I had in one case held that the giving a bad reason was itself a ground for reversing the judgment of the Lower Appellate Court. The case referred to was of a different character; there the bad reason given went to the root of the matter. The Judge had taken an erroneous view of what was necessary to constitute a partnership; and as to the other part of the judgment, we seem to have guarded ourselves against its being supposed that the giving a bad reason alone was an

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error in law such as would constitute a ground of special appeal, because we say—"This might not be such an error in law as would afford sufficient ground for special appeal, but it is not at all the right way to deal with the evidence in the case."

We intended that it did not follow, from the reasoning of the Judge not bearing a thorough examination, that a special appeal would lie and that his decision must be reversed.

This appeal must be dismissed with costs.

The 23rd May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Construction—Arbitration Award—Instalments—Interest.

Case No. 112 of 1872.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 23rd December 1871, *modifying an order of the Moonsiff of Bancoorah, dated the 6th September* 1871.

Anuck Chunder Odhicarry and others (Judgment-debtors) *Appellants,*

versus

Pudmo Lochun Mookerjee (Decree-holder) *Respondent*

Baboo Tarruck Nath Dutt for Appellant.

Where a sum found due under an arbitration award was to be paid in 23 annual instalments and the award provided that, if any one *kist* was in default, the judgment-creditor, without reference to the remaining *kists*, would be entitled to recover upon the whole sum at the rate of 1 per cent. interest per mensem from the date of the award instead of 6 annas per mensem as provided for in case of no default, and a default took place after the annual *kists* were paid for several years,—HELD that the judgment-debtor was bound to pay interest on the balance due at the time of the default at the rate of one per cent. from the date of the award instead of 6 annas per cent. per mensem.

Kemp, J.—THE only question before us in this appeal is whether the Judge has put a right construction upon the award of the arbitrators. It appears that under that award a sum of Rs. 1,021 was found to be due to the judgment-creditor and that sum was to be paid by the judgment-debtors in 23 annual instalments of 71 rupees per annum. There is a provision in the award to this effect, that if any one *kist* was in default, then the judgment-creditor, without reference to the remaining *kists*, would be entitled to recover upon the whole sum at the rate of one per cent. interest per mensem from the date of the award instead of 6 annas per mensem as provided for in case of no default. It appears that the annual *kists* were paid for several years up to 1271, the whole amount paid being 455 rupees, and it appears that a balance of Rs. 566 was still due when the default took place. Therefore we hold that under the terms of the award the judgment-debtor was bound to pay interest on the balance remaining due at the time of the default at the rate of one per cent. from the date of the award instead of 6 annas per cent. per mensem. The decision of the Moonsiff appears, therefore, to be correct and the decision of the Judge wrong. We reverse that decision and decree the special appeal but without costs.

The 23rd May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Costs— Inconsistency between Judgment and Decree.

Case No. 116 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 9th January 1872.

Chowdhry Goluck Chunder Massunt and others (Judgment-debtors) *Appellants,*

versus

Chowdhry Gunga Narain Massunt and others (Decree-holders) *Respondents.*

Boboo Doorga Mohun Doss for Appellants.

Baboo Ashootosh Dhur for Respondents.

Where a judgment contained a remark to the effect that two persons had been improperly made defendants and ought to have their costs from the plaintiff, but the decree contained no such recital but merely gave the plaintiff costs as against all the defendants, the Court, on the general principle of the inadvisability of incorporating anything into a decree or of attaching to it a meaning which the words of the decretal order did not properly and clearly express, declined to allow execution for costs to issue in favor of the two defendants in question.

Glover, J.—THE judgment-debtor is the appellant in the case; he sued a certain number of defendants amongst whom are

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the present judgment-creditors. The case was decided in favor of the plaintiff against certain defendants and as against Gunga Narain Massunt and Urdhub Narain the judgment was that they had been improperly made defendants and that the plaintiff should pay their costs. The case was appealed to the High Court, and the judgment of the Court below was affirmed. The former defendants who thus became judgment-creditors applied to take out execution and to get their costs, when it was objected that they were barred by limitation, more than three years having elapsed from the date of the decree. The Judge considered that the time should count from the date of the decree of the High Court, and that therefore their application for execution was in time. Without going into the question whether or not the Judge was right on that point, although as a matter of fact we are inclined to think that he was right, we think there is a *primâ facie* objection to the judgment-creditor's claim. They say that the judgment of the Court below awarded them costs as against the party who brought the suit. Now, as a matter of fact, although there is a remark in the judgment to the effect that these two persons have been improperly made defendants and that they ought to have their costs from the plaintiff, still in the decree there is no such recital, it merely gives the plaintiff costs as against all the defendants.

It is contended by Baboo Ashootosh Dhur for these defendants that we ought to read the judgment and decree together; and if we can be reasonably certain that it was the intention of the Judge to award costs to the respondents, that we ought to give them such costs.

In the first place, it is an extremely dangerous principle to allow any interpolation to be made in the wording of a decree, or to attach any meaning to the words of a decree which cannot be fairly and plainly attached to them, and in this case there can be no doubt that no costs are mentioned as being due to the present judgment-creditors. It was the easiest thing in the world for them, on seeing the mistake or omission of the Judge in the decretal order, to have applied to have that omission rectified. It is said that in the Schedule at the foot of the decree there is a mention of Gunga Narain's costs, but it is not said in that Schedule that they are to be paid by the plaintiff, and they are merely entered in the general list of the costs of the defendants without saying by whom they are to be borne. It is clear at all events that the Schedule proves nothing, and the decretal order itself, as already observed, is silent. On the general principle, therefore, of the inadvisability of incorporating anything into a decree or of attaching to it a meaning which the words of the decretal order do not properly and clearly express, we think that we ought not to allow this execution for costs to issue. The creditors are still within time, and they can, if so advised, apply to the Judge to amend his original decree and to give these defendants the costs which he considers due to them. We may observe that the Judge who passed the decree of 1868 is the same Judge who now presides in the Midnapore Civil Court and therefore presumably well acquainted with the circumstances of the case.

We reverse the order of the Lower Court and decree this appeal with costs.

The 23rd May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Special Appeal—Act VIII of 1859 *s.* 73—*Intervenor—Party to Suit—Evidence—Depositions of Witnesses—Notes of Evidence—Irregularity.*

Case No. 994 of 1871.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Sarun, dated the 31*st May* 1871, *reversing a decision of the Moonsiff of that district, dated the* 28*th January* 1871.

Shaikh Lall Mahomed and others (Plaintiffs) *Appellants,*

versus

Shaikh Peer Nuzur and others (Defendants) *Respondents.*

Mr. R. E. Twidale for Appellants.

Moonshee Mahomed Yusoof for Respondents.

A plaintiff cannot object in special appeal to an intervenor having been improperly made a party under Section 73 Act VIII of 1859, when he neither took this objection in the first Court where he obtained a decree against the intervenor, nor in the Lower Appellate Court where the decree was against him.

Nor is the objection that the deposition of the witnesses were not taken in the manner prescribed by the Code of Civil Procedure, but only notes of the evidence, one which can be taken in special appeal.

Couch, C. J.—WITH regard to the first point raised in this case, that the intervenor was improperly allowed to come in under

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Section 73, the facts appear to be that he having been allowed by the Moonsiff to come in and having been made a party to the suit, the Moonsiff passed a decree against him in favor of the plaintiff, and he appealed to the District Court.

Now, if the plaintiff meant to contend that the intervenor was improperly made a party under Section 73, he ought then to have taken the objection; but he did not do so, and allowed the appeal to be heard between the intervenor and himself, taking his chance of getting a decree in his favor from the Appellate Court; and the decree being against him, he comes in special appeal to this Court to raise the objection that the intervenor was improperly made a party by the Moonsiff. We think he cannot be allowed to do that. It is not open to him in this stage of the suit to take the objection.

The other point is that the depositions of the witnesses were not taken in the manner prescribed by the Code of Civil Procedure, but only notes of the evidence were taken.

That applies to the evidence of the witnesses on both sides; so that the evidence of each class, if affected at all, would be affected by this. It has not been pointed out to us, and we do not understand that it is suggested, that there is any omission in the notes of material parts of the evidence of the witnesses, and the substance of their evidence has been given. No doubt, there was an irregularity in the first Court; and if the objection had been taken in the appeal to the District Court, the proper course would have been to have remanded the suit in order that the evidence might be properly recorded. But the objection was not taken; the present appellant allowed the case to be decided by the Appellate Court upon the notes which were before it, and it would seem that the way in which it was taken notice of was that the Judge thought it right in his judgment to point it out for the guidance or correction of the Moonsiff to prevent anything of that kind occurring again.

We do not think this is an objection which can be taken in special appeal; it is not an irregularity which can have affected the decision of the suit on the merits. So that both grounds of appeal taken before us fail, and the appeal must be dismissed with costs.

The 25th May 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Robert Phillimore, and Sir Montague E. Smith.

Alluvion—(Review of the Law of, in Bengal)—Regulation XI of 1825.

*On Appeal from the High Court at Calcutta.**

Nogender Chunder Ghose and another,

versus

Mahomed Esoff, the Collector of Chittagong, and others.

Suit in respect of a portion of *chur* land thrown up by a navigable and tidal river. The appellants who were seeking to disturb the respondents' possession of nearly seven years' duration, and on whom the *onus* lay to show a good title to the land in dispute, claimed the land as and proved it to be a re-formation on a site identified with that of lands originally included in their zemindary and afterwards swept away by the river, and were held to have a better title to it than the respondents who claimed it as an accretion to their settled *chur* but failed to prove that it was such a gradual and imperceptible accretion or *incrementum latens* as the Civil Law contemplates.

Review of the Law of Alluvion which obtains in Bengal, as declared by Regulation XI of 1825 and decided cases.

THE subject-matter in dispute on this appeal is a portion of *chur* land thrown up by the Kurnafoolee, a navigable and tidal river in the district of Chittagong.

The appellants are the representatives of one Anundonarain Ghose, and, as such, are the zemindars of Turruff Tej Sing, situate on the eastern shore of the river. Their estate appears to have been, in 1837, the subject of a careful Government revenue survey, and, as then surveyed and settled, comprehended three mouzahs, named Kolagaon, Chakra, and Larka, of which the *chittahs* or measurement papers made on the occasion of that survey are set forth in the record.

The respondents, other than the Collector—so far as it is necessary to notice them—are the co-sharers in an estate known as Talook Koreban Ally, and situate on the western shore or bank of the river. That estate was also surveyed and measured in or about the year 1839, and the *chittas* of one of the villages included in it, Bakolea, is set forth in the record.

These parties, though made respondents, have not appeared on the appeal, which has

* From the judgment of Kemp and Seton-Karr, JJ., dated 1st December 1865.

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been therefore heard against them *ex parte*. Their title, however, has been fully and ably supported by the learned Counsel for the Government, which is in the same interest with them.

From what has been stated, it appears that the estates of the appellants, and these talookdars, whom it will be convenient to call the respondents, speaking of the Government, whenever it is necessary to do so, as the Government, were, as originally measured and settled, bounded and separated by the Kurnafoolee.

Some time before 1847 that river threw up in its main and navigable channel certain islands or *churs*, of which it is only necessary to specify two, *viz.*, Chur Durmeean and Chur Dukhin. A settlement of these was made by Government with the respondents in 1847; the revenue assessed on Chur Dukhin being Rs. 200-6-6. Anundonarain Ghose is said to have presented at least one petition complaining of this proceeding; but, for the purposes of this litigation, it must be assumed that the *churs* in question were the property of Government, and were duly granted to and settled with the respondents. And it appears from some of the proceedings, that they were treated as appurtenant to Mouzah Bakolea.

Before the end of 1852 the river had swept away the whole of Chur Durmeean, but had formed another low *chur* in the vicinity of its site. Nor is there now, if there ever was, any question that this, which was known as Lami or Lamcha Chur, was settled by Government with the respondents in lieu of Chur Durmeean in December 1852.

Besides this latter *chur*, however, the river had before 1854 thrown up a considerable quantity of other *chur* land towards its eastern shore. This included the land now in dispute, or so much of it as was then above water. The record shows that Government determined to make no claim to this under Act IX of 1847 as an island thrown up in a large and navigable river, but that, having been claimed by several of the proprietors in the neighbourhood, it was, in order to prevent affrays, attached by the Collector until the right of possession should be determined, and thereupon became the subject of a proceeding under Act IV of 1840 before the Magistrate, who had to adjudicate on the *primâ facie* right to possession between no less than sixteen different claimants. That officer began by directing the darogah to make a local investigation, and cause a map to be prepared. The result of this was the darogah's map, No. 43, which is in evidence, and his report of the record. This map shows four principal *churs* on the eastern side of the then main channel of the river, A, B, C, and D. Of these A and B are colored green and represent the land then in dispute. C and D are colored yellow, and are treated as *churs* not in dispute, which had been settled with the respondents. D, their Lordships believe, is admitted to be the Lamchi Chur. Whether C is or is not the Dukhin Chur, or whatever remained of that *chur*, is still matter of dispute. But it is perfectly clear that it was, in 1854, treated as *chur* land which had been settled with the respondents, and was then in their undisputed possession.

A was divided into several portions, and the result of the Magistrate's proceeding was to award possession of these to different claimants; Grindochunder Ghose and Sreemutty Noberungeny Dossee, who then as managers or otherwise represented the estate of Anundonarain Ghose, getting part, and the respondents getting the larger portion lying to the west of the old channel of the river which was adherent to their settled *chur* D. It is, however, unnecessary to pursue this part of the case, since the title to no part of A is now in dispute. B was claimed by those who then represented the appellants' estate as a reformation on the site of that part of their Mouzah Kolagaon, which had been previously diluviated, or washed away by the river. It was claimed by the respondents as formed by "alluvion on the east of the Dukhin *chur*, within the Chuckbund recorded in their decree of the Appellate Court." The darogah found that *chur* B was an accretion to the *chur* marked C, which had been settled with the respondents. But he also found that it had been formed by alluvion in the place where the lands of Mouzah Kolagaon, belonging to the appellants' zemindary were formerly broken; and that during the ebb-tide men could walk on foot from the said mouzah to the said *chur*. The Magistrate's proceeding shows how that officer dealt with the question of possession. He seems to have considered that the disputed *chur*, being still under water at flood-tide, could not have been effectually in the possession of any of the parties; that claims founded on re-formation upon a site capable of identification could not be tried in any but a regular Civil suit, and that the adherence of the lands in dispute constituted a *primâ facie* title by accretion, on which he ought to award possession. He accordingly did award possession of

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B to the respondents as the holders of the settled *chur* C, and left those who represented the estate of Anundonarain Ghose to their remedy by Civil suit. The date of this proceeding was the 22nd of December 1854.

The present suit was accordingly brought by Mr. Fagan, who had been appointed receiver of Anundonarain Ghose's estate by the late Supreme Court of Calcutta. It was not, however, commenced until the 3rd of May 1861, *i. e.*, more than six years after the date of the Magistrate's award. The appellants seek to account for this delay by attributing it to circumstances connected with the administration of Anundonarain's estate. However that may be, it is obvious that the consequences of this delay, in so far as it may have occasioned any difficulty in the determination of the questions between the parties by means of the loss of evidence, or the intermediate changes caused by the action of the river, ought to fall upon the appellants. The suit, as originally brought, was to recover possession of 71 drones of alluvial land; the defendants to it were not only the co-sharers in Talook Koreban Ally, but also Horo Lal Mohunt, another of the sixteen claimants before the Magistrate; and the lands appear to have been claimed partly as a re-formation on sites forming part of the wholly or in part diluviated villages of Mouzahs Kolagaon, Chakra, and Lakra; and partly as an accretion to such re-formed lands. The Collector, as representing Government, was afterwards made a party to the suit; Government having an interest adverse to the claim of the appellants, inasmuch as it was entitled to the additional revenue assessable on the lands in dispute, if they were an accretion to the *chur* land of the respondents; whereas it was not entitled to any additional revenue upon them, if they were a re-formation on the appellants' lands, and therefore included within the limits of his formerly settled zemindary.

The first proceeding in the suit, which it is material to notice, is the local enquiry made under the order of the Court by the Ameen Moonshee Ashanoollah. His report bears date the 28th of December 1861; and the map accompanying it is No. 7.

The report and the map showed, among other things, that of the 71 drones of land claimed, between 8 and 9 drones composed or formed part of a *chuck* marked in the map with the Bengali letter (kha); and were in the possession of the defendant, Horo Lal Mohunt, though claimed adversely to him in another suit by one Abdool Mujeed. A compromise was afterwards effected by Mr. Fagan, as Receiver, with this person, who admitted the appellants' title, and there is no longer any question touching this portion of the land claimed, or with the mohunt as defendant.

The report and map also proved that between 44 and 45 drones, forming other part of the land claimed, composed the *chuck* marked in the map with the Bengali letter (kha); and that they were held by the defendants, the co-sharers in Talook Koreban Ally on the strength of the Magistrate's award. The son and representative of Abdool Ally, one of these defendants, afterwards made a compromise with the Receiver (admitting the title of the appellants) in respect of his share which comprised between 4 or 5 drones of the disputed land. It is not easy, if possible, to distinguish these 4 or 5 drones on map No. 7; but they are indicated on map No. 20 which will be afterwards mentioned.

The result of this Ameen's investigation and his report was altogether in the appellants' favor. He found that all the land in the two *chucks* was a re-formation on sites which, upon local inquiry and measurement, he succeeded in identifying with the *dags* appertaining to the diluviated mouzahs of appellants' zemindary; and in paragraph 5 of this report he seems to intimate that no part of Chur Dukhin was to be found in the disputed land; and that the latter could not be identified by any *dags* as formed on the site of any part of the respondents' Mouzah Bakolea. The last sentence of this paragraph, however, suggests a doubt whether he clearly apprehended the respondents' case; and did not make some confusion between Mouzah Bakolea, as originally settled, and the Chur Dukhin, to which, as they alleged, the land in dispute had accreted. This map did not give in detail the *dags* by which the identification of the site was said to have been established.

The suit, at this stage of it, was transferred from the Principal Sudder Ameen to the Zillah Judge, who caused a second local investigation to be made by another Ameen, named Guggun Chunder Dutt. His report and the map made by him is that numbered 20. This report and map purporting to be founded on local survey, the comparison of *dags*, and the examination of witnesses, go to establish these facts:—1st, that the whole of the *chur* marked A in that map, being all the land that now remains in dispute, was a re-formation on the site of the appellants' diluviated mouzahs; 2nd, that

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the *chur* marked B was a similar re-formation, but comprised the lands in respect of which the compromises with the Mohunt and the heir of Abdool Ali had been effected; and, 3rd, that the Chur Dukhin settled with the respondents in 1847 had then been diluviated, no part of it being included in *chur* A, and its site being assumed to be identical with that of a sandy *chur* in process of re-formation near the western shore of the river. These conclusions were supported by, and in a great measure founded on, the supposed tracing and identification of the *dags* contained in the measurement papers of the appellants' estate as measured and surveyed in 1837. No attempt seems to have been made by this Ameen to trace in the disputed land the *dags* of the respondents' Mouzah Bakolea, or Kismut Dukhin Chur. His view of the formation of the *chur* in dispute is thus stated in the 5th paragraph of his report:—" The disputed *chur* has arisen on the site of the diluviated lands of the plaintiffs at first on the eastern part of the river, and gradually increasing, has accreted on the southern and eastern parts to the plaintiffs' original land. It is not seen that the alluvion began as accretion to the Kismut Dukhin Chur alleged by the defendants to be settled with them.

The suit was after this heard by the Judge, who erroneously dismissed it on the ground that it was barred by limitation. This was set right by a decree of the High Court dated the 22nd of June 1863, which remanded the cause, directing the Judge to enquire and decide whether the whole or any portion of the land claimed was in the possession of the defendants for more than twelve years prior to the suit, and, if not, to try it on its merits and with reference to the provisions of Regulation XI of 1825.

The form of this remand seems to have led to another local investigation by a third Ameen, named Gour Mohun Biswas, whose report is dated the 10th of March 1865, and whose map is numbered 29. The object of this investigation was to trace, in the disputed land, if possible, land which had been settled with the respondents in 1847, or at all events more than twelve years before the commencement of the suit. The report speaks of Mouzah Bakolea, but their Lordships conceive that the attempt really was to trace the *dags* of Chur Dukhin, which, after the settlement and survey of 1247, seems to have been treated as appurtenant to Mouzah Bakolea. This report was altogether adverse to the contention of the respondents. The investigation occupied fourteen days, and its result was to show that the boundaries of the respondents' settled land would fall within the then main channel of the river, and considerably to the west of the disputed *chur*. This report, therefore, by negativing the case of the respondents, went to confirm that made in favor of the appellants by the reports of the two other Ameens.

The cause then came on for a second hearing before the Judge, who tried it on the following issues:—1st, whether the suit was barred by limitation; and, 2ndly, whether the land in suit was a formation on or an accretion to the original site of land in plaintiffs' estate; or whether it formed a portion of or an accretion to the land settled with the defendants. He found both these issues in favor of the appellants. He seems to have held that the first was determined by the result of the last local investigation, which showed conclusively that the disputed *chur* contained no part of the land settled with the respondents in 1847. On the second issue he found, in conformity with all the Ameens' reports, that the land in suit was clearly a formation on the original site of the plaintiffs' estate, and was connected with it, and that the plaintiff was, therefore, entitled to be placed in possession of it.

This decision was reversed, and the suit dismissed on appeal to the High Court, by a decree dated the 1st of December 1865, which, on a re-hearing on review before the same Judges, was confirmed by an order dated the 1st of April 1867. The present appeal is against that decree, and that order on review.

Their Lordships cannot say that either judgment of the High Court affords satisfactory grounds for the dismissal of the appellants' suit.

The first deals only with the latest Ameen's report, and explains away the effect of that by assuming that, in making his measurements, he may not have taken a correct starting point. The Zillah Judge, however, in his judgment, expressly states twice that no objection was taken before him to the Ameen's starting point. The investigation was carefully conducted in the presence of the respondents' agents, and it is difficult to suppose that the objection would not have been taken if there was any foundation for it. Again, the learned Judges of the High Court proceeded on the assumed incompatibility of the case thus made by the appellants with the state of things which existed in 1854 at the date of the Magistrate's

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proceeding. They came to the conclusion that Chur Dukhin was the *chur* marked C in the darogah's map; that the Magistrate had carefully decided against the title set up by the appellants and in favor of the respondents; that the disputed chur, B, was an accretion to Chur Dukhin; and that the latter had never been diluviated.

But if, for the sake of argument, it be admitted that C in the darogah's map correctly represented what then remained of Chur Dukhin, it would by no means follow that what constituted C in 1854 had not afterwards been washed away, and the conclusion that it still existed as part of the land in dispute seems to be incompatible with the reports of all the Ameens, and notably with that of the last. Moreover, as their Lordships have already observed, the Magistrate by his proceeding seems expressly to have declined to decide on the rights resulting from an identification of site, and merely to have held that the land in dispute, being adherent to C, was *primâ facie* to be treated as an accretion to it. Again, the judgments under appeal do not seem to their Lordships effectually to distinguish or deal with the questions raised in the cause.

It undoubtedly lay on the appellants, who were seeking to disturb the respondents' possession of nearly seven years' duration, to show a good title to the land in dispute. They seem to have set up an alternative title, claiming the land either as a re-formation on a site identified with that of their diluviated mouzahs; or as an accretion to their estate by reason of its being a formation opposite to their lands, and only separated from them by a small channel, fordable at low water. This latter was the question chiefly discussed on the review, and if it had been the only ground on which the appellants could recover, their Lordships would have great difficulty in saying that they had made out a good title, or had shown that the Magistrate was wrong in treating the land in question as an accretion to the respondents' settled land represented by C, and in awarding possession of it accordingly. But it seems to their Lordships that, inasmuch as the result of all the local investigations, including that of the darogah, was in favor of the assertion that the land now in dispute was a re-formation upon the site of the appellants' diluviated mouzahs, the Zillah Judge was right in finding that fact to be proved. The question then arises, what is the legal result of such a finding? Is the *primâ facie* title to the land thus shown capable of being displaced by any better title existing in the respondents? According to their Lordships' view of the evidence, no part of Chur Dukhin, at the date of the decree, formed part of the disputed land, which may be assumed to be correctly indicated by Chur A, in the map No. 20 of Guggun Chunder Ameen. They are, however, not so clear that Chur C, in the darogah's map, did not correctly indicate what remained of Chur Dukhin in 1854. This supposition is, no doubt inconsistent with the report of the last-named Ameen, confirmed in some measure by the map of a Deputy Collector made in November 1852 (No. 30), which also assigns a different site to the now diluviated Chur Dukhin.

On the other hand, it is difficult to see how the award of the Magistrate ever came to be made, if C in the Darogah's map did not correctly indicate land settled with the respondents, and then in their possession. And this latter map is on that point consistent with the Collector's map, No. 46.

Whilst, therefore, their Lordships think that the appellants have established the identity of the site of the land in dispute with that of lands originally included in their zemindary, and afterwards washed away by the river, they will, for the determination of this appeal, take as also proved, that the chur marked C on the Darogah's map, though it has since been swept away, existed in 1854 as a chur settled with and in the possession of the respondents, and that the land in dispute was then adherent to it. They here advisedly use the term "adherent," because it appears to them that there is an important distinction between mere physical adhesion and that "accretion" or *incrementum latens*, which, by reason of its gradual and imperceptible formation, is recognized by the law as belonging to the persons to whose land it is adjacent. In the present case, the evidence touching the manner in which the chur in question was formed, is extremely scanty; and their Lordships are by no means satisfied that it was such as would make the land an "accretion" according to the strict legal definition of the term.

Their Lordships have now to consider what is the law applicable to the facts thus found, and what are the rights of the parties thereunder. And the long and able arguments addressed to them on this subject, render it desirable to review the law of alluvion which obtains in Bengal as declared by the positive provisions of Regulation XI of

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1825, or by the decided cases, which the learned Counsel for the respondents have contended cannot easily, if at all, be reconciled with each other.

The first Section of the Regulation after specifying as the subjects which called for legislation the following cases, *viz.*, 1st, the throwing of churs or small islands in the midst of the stream or near one of its banks; 2ndly, the carrying away of portions of land by an encroachment of the river on one side, and an accession of land at the same time or in subsequent years, gained by the dereliction of the water on the opposite side ; and, 3rdly, similar instances of alluvion encroachment and dereliction on the sea coast bordering the southern and south-eastern limits of Bengal—enacts that the rules declared by the following Sections shall have force of law throughout the Presidency of Fort William. The second Section provides that local usage, whenever it exists, shall prevail. The third, that when there is no local usage, the general rules declared in the fourth Section shall be applied to the determination of all claims and disputes relative to lands gained by alluvion or by dereliction either of a river or the sea.

This 4th Section is divided into five Clauses.

The first deals with land gained by gradual accession (*i. e.*, alluvion in the proper sense of the word), and provides that it shall be considered an increment to the tenure of the person to whose land or estate it is annexed, subject to the right of Government to assess additional revenue upon it.

The second provides that the former rule shall not be applicable to cases of sudden avulsion, where the identity of land is not destroyed, preserving in that case the rights of the original owner.

The third makes a *chur* or island thrown up in a large navigable river (the bed of which is not the property of an individual) or in the sea the property of the Government, if the channel between it and the shore be not fordable, but provides that if such channel be fordable at any season of the year the *chur* shall be considered an increment by alluvion to the tenure of the person whose estate is most contiguous to it, and shall be subject to the provisions of the first Clause.

The 4th Clause deals with *churs* in small rivers, the beds of which have been recognized as the property of individuals ; giving them to the proprietor of the bed of the river. And the 5th Clause provides that, in all cases of claims and disputes respecting lands gained by alluvion, or by dereliction of a river or the sea, which are not specially provided for by the foregoing rules, the Courts shall be guided by local usage, if any be established as applicable to the case ; and, if not, by general principles of equity and justice.

Two observations arise on this statute.

1. There is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of "alluvion," *viz.*, land gained by gradual and imperceptible accretion the *incrementum latens* of the Civil law.

2. No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, re-appears on the recession of the sea or river. But, on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case ; which must, therefore, be determined by "the general principles of equity or justice" under the 5th rule.

That the right of the proprietor in the case last put exists and is recognized by law in India is established by at least two cases decided at this Board, and therefore binding on their Lordships, *viz.*, the case of Mussamut Imam Bandi and another *v.* Hurgobind Ghose (4 Moore's I. A.),* and the recent case of Lopez *v.* Muddunmohun Thakoor and others, decided on the 11th July, 1870.†

The former is a clear authority that the identity of the site may be established by maps and ancient documents ; although by the long submergence of the land all external marks and means of identification have been obliterated. It is not, however, very clear in that case whether the question between the parties was one of boundaries of the original estates, or of dispute between one party claiming the land as a re-formation on his original land, and the other claiming it as an accretion under the first Clause of the 4th Section of the Regulation.

The latter, however, was clearly the issue between the parties in Lopez's case. It may, however, be said that that case is distinguishable from the present by its peculiar circumstances, inasmuch as in the former the encroachment of the river had in the first instance swept away the surface of the plaintiff's mouzah, and made the defendant who

* 7 W. R., P. C., 67 ; Suth. P. C. Cases, 208.

† 14 W. R., P. C., 11.

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held lands behind those so swept away for the first time a riparian proprietor; and because the plaintiff had, by the preparation of the Tannabundee map and otherwise, taken peculiar precautions to preserve and protect his right in the soil against his neighbour as well as the Government.

It was, moreover, contended that some at least of the principles laid down in Lopez's case are in conflict with the previous decision of this Board in the case of Eckowrie Sing and Heeraloll Seal (12 Moore's I. A., 136).* That case had not been reported when that of Lopez was decided, and does not appear to have been cited in the argument. Their Lordships cannot, however, perceive any inconsistency between the two judgments. The decision in the 12th Moore seems to have proceeded on two grounds, namely, 1st, that it was not competent to the plaintiffs, who had alleged a title to the land as an accretion to their estate, to raise at the hearing of their appeal a different case, *viz.*, one simply of original ownership of the site of the lands re-formed; and, 2ndly, that, had such a title been properly pleaded, the evidence failed to establish the identification of the site. The case of Imam Bandi is cited in the judgment, which throws no doubt upon the validity of such a title if properly pleaded and proved.

Again, the learned Counsel for the respondents, and in particular Mr. Pontifex, argued broadly that by diluviation into *navigable* river, land is permanently lost to the original proprietor, and becomes the property of the State; and, in support of this proposition, they relied much on an American work, "Houk on Navigable Rivers," which they argued was the more deserving of attention, by reason of the similarity which exists between the great rivers of America and those of India in their conditions and mode of action. This authority, however, does not appear to their Lordships to assist the respondent's case. The law of alluvion in America seems to be less favorable to riparian proprietors than that of India or of England. For Mr. Houk draws a distinction between estates consisting of a given quantity of land, and defined a mathematical line, though by one on the margin of a river, and those of which the river is the nominal boundary. He holds that in the former case alluvion, however small, and however gradually and imperceptibly formed, is the property of the State. And after dealing with this question, he says in Section 258, "Nevertheless, it is possible that by the action of the sea, or a change of the channel of a river, the land so granted may be partly lost. No doubt in case afterwards the land should be washed up again, it would belong to the former owner of the estate originally purchased, and no further. While, however, the land is submerged in the river, the title is in the State." This is consistent with the Civil Law, Dig. Lib. XLI, tit. I, s. XXX, and with the law of England as declared in the passage cited in Lopez's case, from Hale "De Jure Maris."

In India the point thus taken seems to be concluded by the authority of the decided cases. The learned Counsel did not contend for a distinction between a tidal river and a navigable river, which has ceased to be tidal. Their Lordships have no reason to suppose that in India there is any such distinction as regards the proprietorship of the bed of the river, though in respect of the mode of accretion there must be some difference between the effects produced by the daily flux and reflux of the tide, and the changes which are mainly consequent on the annual floods. Now, if there is no such distinction, it is clear that the Ganges at Bhagulpore, as in Lopez's case, and at Patna, as in the case on the 4th Moore, is a navigable, though no longer a tidal, river; and, consequently, that these cases are direct authorities against Mr. Pontifex's proposition. Their Lordships accede to what is said in Lopez's case, to the effect that a proprietor may in certain cases be taken to have abandoned his rights in the diluviated soil. It is unnecessary to consider whether this might not be the result of a successful application for remission of revenue under Act IX of 1847, sec. 5. For in the present case there is nothing from which such abandonment can be inferred. If an application for remission of revenue was made, that application was refused.

The appellants having then established a *primâ facie* title to the land in dispute as a re-formation, the question is whether the respondents have a superior title to it as an accretion to their settled chur. It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site, unless it be that, where the accretion is so gradual as to be latent and imperceptible during its progress, the law, on grounds of convenience, presumes incontrovertibly that no other ownership can be shown to exist, and so bars enquiry.

* 11 W. R., P. C., 11.

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In the present case it appears to their Lordships that such a gradual and imperceptible accretion as the law contemplates is not proved, and that there are peculiar reasons why the title of the plaintiffs should be preferred to that of the defendants. The latter do not claim the land as an accretion to their original estate. They claim it as an accretion to the chur cast up by the river, and settled with them by Government. Let it be granted that the first effect of the retrocession of the river was to leave bare this chur in the midst of the stream and that the land then cast up was beyond the confines of the plaintiffs' estate. The river continues to recede, more land appears, and the new land, though adherent to that first discovered, is really a deposit on the ancient site of the plaintiffs' land. Why should the ownership of that which is thus regained be altered by the fact that, from some accidental cause, land forming the outer edge of it first emerged as an island? The Darogah's map seems to show that this must have been the course of the river's action. Nor, as their Lordships have already observed, is there any trustworthy evidence which traces the history of the disputed land, or shows that by gradual and imperceptible accretion it became adherent to the chur, which upon the whole evidence must be taken to have now ceased to exist. Such a case as the present is very distinguishable from the ordinary case contemplated by the regulation in which a river, gradually shifting its channel in one direction, continually eats into one bank, and leaves the other, never ceasing to flow between the competing estates.

Their Lordships are not insensible to the difficulties of identification, and to the danger of encouraging claims of this kind on insufficient evidence. They lay down no rule as to the strictness of proof which the Courts in India may require in such cases.

They also consider that a title founded on the original ownership and identification of site is to be confined *primâ facie* to the reformation on that site. And if, in the present case, it had appeared that some part of the land in dispute had been thrown up beyond the original boundaries of the appellants' estate, a question might fairly have arisen between the appellants and the respondents whether that was to be taken to be an accretion to the estate of the former, or to the settled chur of the latter. But upon the evidence they are satisfied that the whole of the land which continues to be the subject of the suit is a re-formation within the limits of the appellants' original estate. This being so, their Lordships are of opinion that the Zillah Judge was right in decreeing the whole to the appellants. And they will humbly advise Her Majesty to allow the appeal, to reverse the decree of the High Court, and to order that, in lieu thereof, a decree be made dismissing the appeal to that Court and affirming the decree of the Zillah Judge. The appellants must have from the respondents, the defendants in the suit, the costs of the litigation in India, and those of this appeal. There will be no order as to the costs of Government on this appeal.

The 25th May 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Mode of Decision—Assumed Probabilities and not Evidence.

*On Appeal from the High Court at Calcutta.**

Rughoobur Dutt Chowdry and another,

versus

Futteh Narain Chowdry and another.

In this case which turned upon the validity of the bond on which plaintiffs sued, the decision of the High Court in favor of defendant was reversed, as based upon the assumed probabilities of the case instead of the evidence before them, and in forgetfulness of the most startling improbability of all, *viz.*, that the defendant should, if his case of fraud and forgery were true, have failed to attempt to substantiate it by his own testimony and that of his brother.

THEIR Lordships are of opinion that the decree of the High Court cannot be supported.

The only question in the cause was, whether the defendant Keerut Narain Chowdry, having borrowed Rs. 10,000 from the plaintiffs, had executed to them the bond on which they sued; or whether, as he alleged, there had been no such transaction of loan, no money having been received by him from them, and the bond being a forgery.

The plaintiffs, in support of their case, produced and examined the five attesting witnesses to the bond, and were themselves examined as witnesses. The evidence, if true, established the advance of the money and the

* From the judgment of Bayley and S. N. Pundit, dated 21st April 1866.

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execution of the bond; and was, on the latter point, corroborated by a comparison of the defendant's alleged signature on the bond, with his admitted signature of the *vakalatnamah* filed by him in the cause. Against this evidence, and in support of the case of fraud and forgery set up by him, the defendant produced only certain witnesses, who, some of them speaking on hearsay, and all giving evidence of an untrustworthy character, endeavored to make out that the plaintiffs' case had been fraudulently got up by one Bunseedhur Chowdry, against whom the defendant had recovered judgment in another suit. None of them gave any evidence which directly contradicted that of the plaintiffs' witnesses. Neither the defendant himself, nor his brother, whose name appeared on the back of the stamped paper on which the bond was written, and who took an active part in the defence of the suit, ventured to put himself in the witness-box; the one to deny on oath his signature of the bond, and his reception of the money; the other to deny his purchase of the stamp, or his knowledge of and participation in the transaction. In these circumstances the Principal Sudder Ameen (the Judge of first instance) naturally found for the plaintiffs; but on appeal, a Division Bench of the High Court, proceeding on certain circumstances of suspicion, which, as they conceived, the case of the plaintiffs presented, reversed the decree of the Lower Court, and dismissed the suit against the strong *primâ facie* case made by the plaintiffs, in fact, against all the direct evidence in the cause; and in the absence of the evidence which the defendant might have given, and, if his case were true, would naturally have given.

It is unnecessary to examine particularly the grounds of this judgment, because, whatever weight might fairly have been given to them, if there had been a conflict of evidence, it appears to their Lordships that they were entitled to no weight in a case in which the evidence was all one way. In truth the learned Judges, in thus deciding the case upon its assumed improbabilities, instead of the evidence before them, have overlooked the most startling improbability of all, *viz.* that the defendant should, if his case of fraud and forgery were true, have failed to attempt to substantiate it by his own testimony and that of his brother. Their Lordships therefore feel that they would be sanctioning a mode of decision which would be productive of the worst consequences in the administration of justice, if they were not to advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and to order, in lieu thereof, that the appeal to that Court from the decree of the Principal Sudder Ameen be dismissed with costs. The appellants will also be entitled to the costs of this appeal. The decree of the Principal Sudder Ameen for the sum sued for, and the costs in that Court, will, of course, be against the original defendant, Keerut Narain Chowdry, and be recoverable out of his estate. But the present respondent, who appeared to the appeal to England, but lodged no printed case, will be personally liable for the costs incurred here and in the High Court, and to refund any costs which may have been paid to him, or on his account by the appellants under the decree of the High Court. Their Lordships desire to add that they see no ground for the censure cast by one paragraph of the judgment of the High Court upon the Principal Sudder Ameen, who seems to their Lordships, in a well-reasoned judgment, to have come to the only conclusion to which, upon the evidence before him, he ought to have come.

The 27th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Bond by Hindoo Widow—Suit against reversionary Heirs—Contribution—Necessity—Binding Promise by Reversioners' Father—Proof of Consideration.

Application for the admission of a Special Appeal from a decision passed by the Judge of Tirhoot, dated the 29th February 1872, *affirming a decision of the Subordinate Judge of that district, dated the 25th September* 1871.

Roy Mukhun Lall (Plaintiff) *Appellant*,

versus

Mr. W. Stewart and others (Defendants) *Respondents*.

Mr. C. Gregory for Appellant.

No one for Respondents.

A suit to recover the principal and interest on a bond executed by a Hindoo widow whilst possessed of her late husband's property cannot be brought at her death against his reversionary heirs on the ground of some supposed equity arising out of the possession of the estate by the defendants, obliging them to pay a portion of the money which was expended in recovering it.

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The institution of a suit by the widow may have been beneficial to her as well as those who would succeed her in the property, and yet not a *necessity*.

There is no necessity for a widow to borrow money when she has an income more than sufficient to pay the expenses of litigation.

In order to establish a binding promise by the defendants' father to pay the bond, there must be proof of a consideration for such a promise.

Couch, C.J.—THE suit was brought to recover the principal and interest due on a bond executed by a Hindoo widow whilst she was possessed of the property of her late husband, to which the defendants succeeded on her death as his heirs, and the case must be considered with regard to that claim. Supposing the case now put forward founded upon some supposed equity arising out of the possession of the estate by the defendants obliging them to pay a portion of the money which was expended in recovering it to be well founded, it is a different case from the present, and ought to be enforced in another suit. It is a liability of a different nature to which there may be defences which have not been put forward in the Lower Courts in this suit. We are not to be understood as expressly any opinion that such a suit would be successful; we have not all the facts before us which might be proved in such a suit.

With regard to the case upon the bond, the Judge says that he thinks there was such a pressing necessity as justified the execution of the bond. But what follows shows what he meant by pressing necessity, and that there was no necessity at all, for he says that the lady, in taking the part she did in the suits instituted by the plaintiff and herself, was acting for the benefit of the estate of which she then held possession, and looking to the size of the estate, the amount of the charges and of the bond, and the number of years over which these charges were spread, her conduct in incurring this expenditure was proper and reasonable and such as any life-tenant or manager of the estate would have had a fair right to incur. That is what he means by pressing necessity; but that is not a necessity at all, because there was no necessity to institute the suits, though it may have been a proper thing for her to do, as being beneficial to her as well as to those who would succeed her in the property. What he means is, that it was a right thing for her to bring the suits, and that the charges incurred were for the benefit of the estate to which the defendants had succeeded.

Then he goes on to deal with the case and determines that the present defendants are not liable upon the bond because the lady had an income abundantly sufficient to pay the expenses of litigation, that those expenses were comparatively small, compared with her income, and that there was no necessity to borrow the money, and he decides the case upon that ground, and we think rightly. It was the proper view to take off the case.

With regard to the point which has been raised that there was an acquiescence by the father of the defendants, and that by reason of that they became liable to pay the bond, we think there was nothing to show that there had been a binding promise by the father to pay the bond. Acquiescence is a very vague term to use. What is necessary is that the father, for a consideration, promised to pay the bond, made a promise which was legally binding, but nothing is shown which would be a consideration for such a promise. It may be that he was willing to pay a portion of the money, but that would not be a promise, binding the defendants and entitling the plaintiff to recover in the present suit. We reject the application.

The 28th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Mesne Profits—Decree—Act XXIII of 1861 *s.* 11.

No 69 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Gya, dated the 22nd November 1871, *modifying an order of the Sudder Moonsiff of that district, dated the 5th August* 1871.

Syud Shah Ameer Ahmud (Decree-holder) *Appellant*,

versus

Syed Shah Zameer Ahmud (Judgment-debtor) *Respondent*.

Baboo Bhowanee Churn Dutt for Appellant.

Moonshee Mahomed Yusoof for Respondent.

The right of a plaintiff to mesne profits in execution of a decree depends upon the terms of the decree. Thus, where a plaintiff awarded mesne profits up to the time of his decree, and the Lower Appellate Court dismissed the appeal from that decree without being asked to provide

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for the mesne profits subsequent to that time, *Held* that, there being no decree for those mesne profits, plaintiff could not recover them in the proceedings under s. 11 Act XXIII of 1861.

Semble.—He may bring a separate suit for them.

Couch C. J.—THE right of the plaintiff to recover mesne profits in execution of a decree depends upon what are its terms with regard to the mesne profits.

In this case, the decree for mesne profits was a decree by the Moonsiff, which awarded mesne profits from the date of the institution of the suit until the pronouncing of the judgment by him, or the making his decree. No doubt, that was all he intended to give; he did not at that time contemplate that there would be an appeal from his decision, and then a special appeal, and prolonged litigation.

The appeal from his decree was dismissed. We think we must take it that the judgment of a Court dismissing an appeal is in reality an informal mode of confirming the decree appealed against. The Appellate Court is empowered to modify, reverse, or confirm the decree appealed against, and the expression "appeal dismissed" is in effect saying that the decree appealed against is right, and that the Court confirms it.

Then what is it that is confirmed here. It is the decree of the Moonsiff, the decree which awarded mesne profits up to the time of the judgment by him. The Appellate Courts ought to have been asked to provide for the mesne profits subsequent to that time. They not having been asked so to do, there is no decree for those mesne profits, and the plaintiff cannot recover them in the proceedings under Section 11 Act XXIII of 1861.

It does not follow that the plaintiff is without remedy for those future mesne profits, because the Moonsiff not having provided for them, and not having intended to do so, a separate suit may be brought for them. But that is not the question here. We have to determine whether they can be recovered in execution of the Moonsiff's decree which does not provide for them.

Therefore the decree of the Lower Appellate Court is a right decree, and the order of this Court, to be strictly accurate, should be that it be confirmed with costs, the pleader's fees being fixed at 16 rupees.

The 28th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Small Cause Court—Jurisdiction—Execution of Decree (against moveable Property beyond Court's Jurisdiction.)

Reference to the High Court by the Judge by the Small Cause Court at Hooghly, dated the 2nd April 1872.

Grish Chunder Kur

versus

Kristo Chunder Ghose and another.

Execution of a decree of a Small Cause Court cannot be issued against the moveable property of debtors which lies beyond the jurisdiction of the Court, even where the suit had been tried, with the authority of the High Court obtained under Act XXIII of 1861 s. 4, against two defendants, one of whom resided at the commencement of the suit within, and the other beyond, the local limits of the jurisdiction of the Court.

Case.—A QUESTION of law having arisen in this execution case, I have the honor, on the application of the judgment-creditor, to draw up a statement of the case, and to refer it under Section 1 Act X of 1867, with my own opinion thereon, for the decision of the High Court.

The plaintiff in the suit had brought this action against two defendants; one of whom resided within, and another beyond, the jurisdiction of the Court, and the case was heard and determined by me under the authority of the High Court previously obtained under Section 4 Act XXIII of 1861, and a decree was passed in favor of the plaintiff. The judgment-creditor now applies for execution of the decree against the moveable property belonging to both of the said defendants which may be found within and without the local limits of the jurisdiction of my Court. Under Section 13 of Act XXIII of 1861, and Section 19 Act XI of 1865, execution of decree of a Small Cause Court may be issued against any moveable property belonging to the judgment-debtor which may be found within the jurisdiction of the Court, but there does not appear to exist any provision for execution against the moveable property of the debtor which lies beyond the jurisdiction of the Court.

The pleader of the judgment-creditor urges that, since the suit has been tried by this Court under the authority of the High Court against both defendants, one of whom resided at the commencement of the suit within and another without the local limits of the jurisdiction of the Court, the Court is bound to issue out the execution against the moveable property of the debtor residing without my jurisdiction, which may be indicated by the decree-holder beyond the local

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limits of the jurisdiction of the Court, in the same manner as that which may be found within the jurisdiction of the Court. Section 4 Act XXIII of 1861 provides for the hearing of the suit in which all the defendants do not reside within the jurisdiction of the Court, but there does not appear to be any law for taking out execution in such cases against the property or person of the defendant when he resides or his property lies beyond the jurisdiction of the Court passing the decree.

I am, therefore, of opinion that no execution can be issued by this Court against the moveable property of the judgment-debtor which may be found out of the jurisdiction of my Court, and that a certificate under Section 284 of Act VIII of 1859 be granted to the decree-holder to proceed with the execution thereof. I would accordingly order that warrant of attachment against the property of the defendant No. 1 which may be found within the jurisdiction of my Court be issued, and the execution against the property lying without the jurisdiction be stayed until receipt of order from the High Court to which the case is referred for decision.

The judgment of the High Court was delivered as follows by—

Ainslie, J.—The view taken by the Judge of the Court of Small Causes is, in our opinion, correct and in accordance with the Full Bench decision to be found at IX Weekly Reporter, 175.

The 28th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Salaries of Telegraph Officers—Attachment of, for Debt.

Reference to the High Court by the Judge of the Small Cause Court at Barrackpore, dated the 26th January 1872.

Hussen Bhamjee (Plaintiff) *Decree-holder,*

versus

Mr. W. Hicks (Defendant) *Judgment-debtor.*

The salary of a Telegraph Officer which is due for past services is a debt which may be attached under Section 236 Act VIII of 1859.

Case.—I HAVE the honor to request that the following matter may be laid before the Honorable Judges of the Court for such instructions as they may think fit to issue on the subject: A decree was passed in this case by this Court against the judgment-debtor, Mr. Hicks of the Telegraph Department, and in execution of decree the Court directed the judgment-debtor's official superior to attach and remit a certain portion of the debtor's salary, but in reply that official stated that he was precluded from doing as directed by *para.* 138 *of Chapter D. of the Telegraph Code.** Now, it appears to me that, by Section 205 of Act VIII of 1859, the salary of a person can be attached when it becomes due, *i. e.*, on the 1st day of the month succeeding that for which the salary is due. Such practice prevails in cases against Military Officers, and I cannot see why it should not be so in the case of a Telegraph employé, and beg that I may be favored with an expression of the Honorable Judges' opinion on this point.

The judgment of the High Court was delivered as follows by—

Couch, C. J.—We are of opinion that the salary may be attached. A salary which is due for past services is a debt which may be attached under Section 236 of Act VIII of 1859. It is not necessary to determine in what mode it might be recovered from the Government if not paid, but it would seem that an action would lie against the Secretary of State in Council for it. 21 and 22 Vic., c. 106, s. 65 (P. and O. S. N. Co. *v.* Secretary of State for India, V Bombay H. C. Rep. Appendix 15). Notwithstanding the doubt expressed in the case in Fulton, page 82, we are informed that it has been and is the practice on the Original Side of the Court to attach the salary of an officer of the Government after it has become due. By Act VI of 1849 there is an exemption from attachment in certain cases, and where the Act is not applicable a pension may be attached. (*Ex parte* Nithalra Eshwaut Rao, IV Bombay H. C. Rep. A. C., 65).

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*138. No portion of the salary of any person employed by Government should be paid to any other person in satisfaction of the decree of any Civil Court. The person's salary is not legally his property until it is actually received by him, and is therefore not subject to attachment while unpaid (Advocate-General's opinion, received with Comptroller General's No. 2005, dated 17th July 1869). If the Judge of a Court orders any deduction from salaries, on account of private claims, to be made and paid to the Court, this paragraph should be shown to him. If after seeing it he still orders the deduction, it should be made, leaving it to the person from whom made to appeal to the proper authorities if he thinks proper.

When such deductions are made, the person from whom deducted may sign acquittances for salary less such deductions, the Courts' receipts being voucher for the remainder.

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The 28th May 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit on Hat-Chitta Bond—Allegation of Benamee.

Case No. 1269 of 1871.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 17th July 1871, affirming a decision of the Moonsiff of that district, dated the 24th January 1871.

Shaikh Nubee Buksh (Plaintiff) *Appellant,*

versus

Hazee Tumeezooddeen and others (Defendants) *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Doorga Mohun Doss for Respondents.

In a suit against T on a *hat-chitta* bond, T having pleaded that plaintiff was only the *benamdar* for J who had advanced the whole money, J was made a defendant and supported T's statement. Subsequently R intervened and was made a defendant on the allegation that the money was half his and half J's. As the bond was not denied, plaintiff ought to have had a decree, leaving others interested to proceed against him. But the case was tried on the issue whether the money was plaintiff's or J's, and plaintiff having failed to prove that the money was his, HELD that the Judge was right on refusing to give him a decree although he might have had some doubts as to whether the whole of the money belonged to J or not.

Glover, J.—THIS was a suit brought by the plaintiff against one Hazee Tumeezuddeen on a *hat-chittah* bond for 601 rupees. The defendant Tumeezooddeen alleged that the plaintiff was only the *benamdar* for his brother Jehan Bux, and that Jehan Bux advanced the whole of the money. On this Jehan Bux was made a defendant, and he supported the defendant Tumeezoodden's statements. In the course of this suit a third brother Ruheem Bux intervened and was also made a defendant; his allegation was that the money was half his and half Jehan Bux's. Both the Lower Courts agreed in holding that the plaintiff had no interest at all in the suit, and both dismissed it, the Moonsiff holding that as between the plaintiff and Jehan Bux, which issue, it seems, was the only one he tried, the money belonged entirely to the latter. The Judge on appeal took up the same point; and although he does not say distinctly that the money belonged to Jehan Bux, but on the contrary thinks it unnecessary to come to any conclusion upon that point, he does say that the plaintiff had not proved that the money belonged to him, and he therefore refused to interfere.

It is contended in special appeal that the Judge was bound to have gone into the whole question between the parties, and if he found the plaintiff to have some share in the subject-matter of his bond, he ought to have decided what that share was and to have given him a decree accordingly.

We think, however, that as the case was presented to the Judge, he could hardly have given any other decision than that which he gave. There is no doubt that the first issue was not properly tried by the first Court, because, inasmuch as the bond was not denied, the plaintiff ought to have had a decree, and if any body else were interested, such person might have taken measures to recover the money from the plaintiff; but as the case was tried in the Court below on the issue whether the money was the plaintiff's or Jehan Bux's, the Judge was not wrong when he found that the plaintiff had failed to prove that the money was his, in refusing to give him a decree, although he may have had some doubts as to whether the whole of the money belonged to the defendant Jehan Bux.

There seems to be no error in law in the decision of the Lower Appellate Court, and we therefore dismiss the special appeal with costs.

The 28th May 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction (of Revenue Courts)—Benamee Tenants—Beneficial Owner.

Case No 1355 of 1871.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 4th September 1871, affirming a decision of the Moonsiff of Bhulpore, dated the 17th March 1871.

Hurish Chunder Roy (Defendant) *Appellant,*

versus

Purna Soondurce Debia (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Rash Beharee Ghose for Respondent.

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A Revenue Court cannot take cognizance of a suit under Act X of 1859 to recover rent from the defendant on the ground that he was the beneficial owner and that the parties who were the ostensible tenants were mere *benamdars.*

Kemp, J.—THIS is a suit under Act X to recover rent from the defendant on the ground that he was the beneficial owner and that the parties who were the ostensible tenants were mere *benamdars.*

The suit was brought in the Court of the Deputy Collector who held, and we think very properly held, that he had no jurisdiction to try a question of this kind. The plaintiff, however, appealed to the Judge who held that the question could be gone into, but instead of remanding the case to the Deputy Collector under Section 2 Act III of 1870 (B. C.), he sent it to the Moonsiff's Court to be tried upon the issues laid down by him.

We have held recently in special appeal No. 1310 of 1871* that a Revenue Court is not competent to enter into and decide a question of this kind.

We, therefore, reverse the decision of the Judge, dismiss the plaintiff's suit, and decree the special appeal with costs.

The 28th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1869 *B. C. s.* 31—*Notice of Deposit—Informality.*

Case No. 1356 of 1871.

Special Appeal from a decision passed by the Judge of Dacca, dated the 1*st September* 1871, *affirming a decision of the Moonsiff of that district, dated the* 30*th June* 1871.

Kanchun Malla Dossia and others (Defendants) *Appellants,*

versus

Rajendro Chunder Roy Chowdhry (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Respondent.

The omission of the words "you must institute a suit in Court for the establishment of such claim or demand within six calendar months from this date, otherwise your claim will be for ever barred" from a notice of deposit under s. 31 Act VIII of 1869 B. C., was held fatal to the defendant's claim to the benefit of his having paid his rent into the Collectorate.

Glover, J.—THIS was a suit for arrears of rent from Bysack to Falgoon 1276 amounting to Rs. 674-9 annas 16 gundas. The plaintiff claimed to receive that amount in eleven instalments, and to calculate interest upon every one of those eleven instalments directly a default of payment took place. The defendant, who, before the suit, had deposited the amount of his rent with the Collector on four different occasions in 1277, denied that he was bound to pay in eleven kists, and contended that he had paid, as he was bound to pay, in four kists. The Moonsiff gave the defendant credit for the sums paid to the Collector, but held that, as he was bound to pay his rent in eleven kists, the plaintiff was entitled to interst on balances from the date of each of these eleven kists, his (plaintiff's) suit for the principal was dismissed with costs; the result being a decree in favor of the plaintiff for 14 rupees 2 annas only.

Both the plaintiff and defendant appealed to the Judge, the plaintiff against the credit which the defendant had got for his payments into the Collectorate, the defendant against the plaintiff's claim for interest. The Judge held that the plaintiff was entitled to all he asked, and he refused to give credit to the defendant for the money deposited by him in the Collectorate. The defendant's appeal was dismissed.

In special appeal, the first point taken is that the notice to the plaintiff under Section 31 Act VIII of 1869 B. C., even supposing it to have been slightly incorrect, was sufficiently formal, and that the omission objected to by the plaintiff was not sufficient to authorize the Judge to throw it altogether aside, and refuse the plaintiff defendant the benefit of his having paid his rent into the Collectorate. The form of notice is to be found in Schedule B. of the Appendix to the Rent Law, and the last two lines, which are admittedly wanting, are "you must institute a suit in Court for the estab-"lishment of such claim or demand within "six calendar months from this date, other-"wise your claim will be for ever barred." The Judge has considered this omission to be fatal to the defendant's contention; and as this is a special appeal, no doubt we must hold the same thing. The law directs the notice to be framed in a particular manner; and if the defendant fails so to frame it, he must take the consequences of his own neglect.

* *Ante*, p. 35.

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The second objection is that the Judge, although he has found that "the plaintiff has failed to prove that he was entitled to recover rent from the defendants in eleven kists," has still given a decree to the plaintiff for all he asked. No doubt, if the Judge had found that, there would have been an end of the case as it would have been impossible to give the plaintiff a decree if he had failed to prove that the rent was payable in eleven kists; but on turning to the original judgment of the Judge, we find that the words "the plaintiff has failed to prove that he is entitled to receive rent by eleven kists" refer to a judgment of the Moonsiff of Bhanga, and these words are an extract from that judgment. In fact, as pointed out by the learned Counsel for the plaintiff, respondent, it would have been impossible for the Judge to have decreed the plaintiff's appeal and to have held at the same time that he was not entitled to receive his rents in eleven kists. The Judge has upheld on this point the judgment of the first Court, in which it was found as a fact, on the evidence, that the rent was payable in eleven kists. It may be that the evidence is of a flimsy nature; but still both the Lower Courts have relied upon it, and we cannot interfere in special appeal with the finding. Then it has been said that this is a most vexatious and frivolous suit, and that the plaintiff has really had all the money due to him for rent by the defendant deposited in the Collectorate treasury. That may very well be, but still if it was found that the plaintiff was entitled to receive his rent in eleven kists, and that the notice of deposit was informal, it is impossible for us in special appeal to say that the Judge was wrong in carrying that finding to its legitimate conclusion, and in refusing to give the defendant credit for the deposits which he made in improper form in the Collectorate. There is nothing wrong in law in the decision of the Lower Appellate Court, and we cannot interfere.

The appeal is dismssed with costs.

The 28th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Remand.

Case No, 252 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 14th July 1871.

Ram Runjun Chuckerbutty (Plaintiff) *Appellant,*

versus

Gopee Bullub Chuckerbutty and another (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Nil Madhub Sen for Respondents.

It appearing that the Lower Court, though requested by the plaintiff to send for the records of a former suit the decree in which, it was alleged, afforded important evidence in support of the case, had not sent for the papers or considered them, the case was remanded at that late stage for the Lower Court to take that decree into consideration and pass a decision in the case.

Glover, J.—THIS was a suit by the plaintiff, against a number of defendants, for contribution. The present appeal, however, is brought by the plaintiff against two only of these defendants, Gopeebullub Chuckerbutty and Chuckowree Chunder Chuckerbutty, the sons of Ramkrishto Chuckerbutty. These defendants hold admittedly a 2 as. 6 g. 2 c. 2 kr. share of one-fourth of a certain Tuppeh called Kundooeet Koorayah, and the question between these parties is what is the amount of sudder jummah payable on that share, Rs. 250 as the defendants say, or Rs. 258, pies 7, as the plaintiff alleges, the share of these defendants being 11 gs. 2 c. 2 krs. of the entire lot, the sudder jummah of which is Rs. 6,864-15.

The Subordinate Judge decided in favor of the defendants,—namely, that the sudder jummah was Rs. 250 only.

For the appellant it is urged, that the Subordinate Judge had taken an improper view of the evidence; that the roobocarry of the Collector, dated the 19th of May 1870, was no evidence against the plaintiff as to the amount of the shares in the Government revenue, and that the kubooleut, which showed distinctly that the defendants were bound to pay the sum claimed, had not been properly considered by the Lower Court.

It seems to us unnecessary to go at any length into this particular evidence, or into the reasons for which the Subordinate Judge decided as he did, because we find that there is (we will not say on the record because there is no certainty that the paper was ever filed) evidence which, if true, most distinctly proves the plaintiff's case. This evidence is the record of a contribution suit decided on the 23rd of September 1863, between the

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father of the present plaintiff and Ramkrishto, the father of the present defendants, in which it was decided, as between these parties, that the rent of the defendants' share was Rs. 258, pies 7. Of course, if this evidence could be shown to be properly on the record, *cadet quæstio*, the point would be settled in favor of the plaintiff, but although there is a petition by the plaintiff to the Subordinate Judge, dated the 11th of June 1871, in which the Subordinate Judge is requested to send for the papers of that case which were at that time in the mohafezkhanah of his own Court, we do not find in the Subordinate Judge's decision any notice that he either sent for the papers or considered them; the decision is dated nearly a month later, or the 14th July 1871, but it no where proceeds upon the evidence afforded by this decree. It appears to us that, considering the very great importance of this piece of evidence to the plaintiff, and inasmuch as he did all he could in the first instance to have that evidence considered by the Subordinate Judge, the case should be reconsidered even at this late stage of the case. This litigation has been very much protracted, and the suit has already been remanded once before by this Court, but we should not be doing our duty, in the face of evidence like this, if we prevented the plaintiff's having the advantage of it. It is not as if he were now bringing it forward for the first time, or as if it was a newly discovered document, in which case he would have had to proceed by way of review in the Lower Court; but it is clear that he asked that this document might be sent for and considered before the decision of the case, and we have no doubt whatever that he has a right to its production. It may be said of course that the rather sudden production of this paper now in the appellate stage, even although that late production is not the fault of the plaintiff but that of the Court below, is calculated to take the defendants by surprise, and to prevent all possibility of their rebutting that evidence, if it be possible for them to rebut it; and, therefore, on the whole, we are of opinion that however undesirable it may be that this litigation should be further protracted, and although, judging from the wording of this decree of 1863 the amount of the sudder jummah has already been settled by a competent Court, we think it but fair that the defendants should have an opportunity of giving their own version of this decree, and of showing, if possible, that it has since become null and void, that it has been reversed by a competent Court, or that, for some reason or other, it does not affect the plaintiff's case now. The case will go back to the Subordinate Judge, in order that he may take this document into consideration, and after giving the defendants an opportunity of making any objections they can with reference to it, to pass a fresh decision in the case. Costs to follow the result.

The 28th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Small Cause Court—Jurisdiction—Damages—Payment under Fraudulent Concealment and Misrepresentation.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Moorshedabad, dated the 8th April 1872.

Fatima Begum (Plaintiff)

versus

Syed Moosa (Defendant.)

A suit to recover Rs. 300 paid by plaintiff to defendant under a fraudulent concealment of the fact that defendant was engaged as mookhtear for another party who had brought a suit against plaintiff, and upon a fraudulent misrepresentation by defendant that he was conducting plaintiff's case when in fact he was acting for the opposite party, was held to be substantially a suit to recover damages for the injury sustained by plaintiff by reason of the fraudulent concealment and misrepresentation, and to be cognizable by a Small Cause Court.

Case.—UNDER the provisions of Section 22 of Act XI of 1865, I have the honor to refer the following point of law which has arisen in the trial of the above case for the decision of the High Court:—

One Wahed Ali instituted a suit against Fatima Begum in the Court of the Subordinate Judge of this place, and employed Syed Moosa as his mookhtear to look after the case. Fatima Begum, who is a respectable Mahomedan lady, not knowing that Syed Moosa was the mookhtear of Wahed Ali, appointed him her general agent (*ammookhtear*) to conduct that case and other cases, and Syed Moosa, falsely representing to her that he was conducting the case in her favor while he was actually doing the business of the opposite party, accepted from Fatima Begum's servant the sum of Rs. 300

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as his fees, she having ordered payment of the amount under a mistake. On these allegations, Fatima Begum now sues Syed Moosa to have a refund of the said Rs. 300.

As the point on which the opinion of the High Court is solicited directly bears on the nature of the suit as laid down in the plaint, in order to avoid any possible misconception, it is necessary that a *verbatim* translation of the plaint should here be given :—

"Fatima Begum, widow of Nawab Syed
"Golam Moorteja, &c., &c. *Plaintiff.*
"Syed Moosa, mookhtear, &c., &c.
Defendant.

"Suit to recover Rs. 300, being the "amount fraudulently accepted.

"The defendant, having concealed the fact "that he was engaged as a mookhtear for "Wahed Ali in Case No. 87 of 1870 which "the latter had instituted against me in the "Court of the Subordinate Judge of this "district, was appointed my *Am-mookhtear* "to conduct that case and other cases in my "behalf, and giving me to understand that "he was conducting the case for me, he, "the defendant, by such false representa-"tions, fraudulently accepted Rs. 300 on the "28th April 1871 from my *karpurdaz*, and "granted a receipt, but the defendant was "actually the mookhtear of my opposite "party in that case, and, being present in "Court and at other places, has done and has "yet been doing acts hostile to me, and none "in my favor. The facts being brought to "my knowledge on the 3rd of May last, I "have dismissed the defendant from my "service on the 4th May, by presenting a "petition in the Court of the Judge. I "institute this suit to recover the Rs. 300 "which the defendant has fraudulently "taken."

The point on which the reference has become necessary is, whether the suit, as laid down in the plaint, is cognizable by the Small Cause Court. In other words, whether it comes under any of the classes of suits enumerated in Section 6 of Act XI of 1865.

It is obvious that, if it is at all a suit under Section 6, it can only be so because it comes under the category of "claims for money due on bond or other contract."

The question, therefore, is reduced to this, whether the suit is from its nature a suit based on contract.

The gist of the action, as far as it can be gathered from the plaint, is fraud and misrepresentation on the part of the defendant, and mistake on the part of the plaintiff. This case is perfectly distinct and clearly distinguishable from the case where one sues to recover money from his servant who had accepted it on the agreement to work, but has not worked. Here the law would imply a contract on the part of the servant to return the money. In the present case, the plaintiff perhaps would not like to have her work done through the defendant even if he were ready to serve her and to resign the service of Wahed Ali, as she has now no confidence in the defendant.

If the defendant were absolutely to neglect his duty to the plaintiff and were not the mookhtear of Wahed Ali, perhaps the plaintiff would not have sued to recover the Rs. 300. The suit has been instituted because the defendant, at the time of accepting the service of the plaintiff, did not tell her that he was the mookhtear of the opposite party, and because the defendant *fraudulently* took the Rs. 300, and then *acted for the opposite party.*

If the plaintiff is entitled to get a refund of the money, she will be so entitled on the broad principle of justice and equity, and not because there was an implied contract.

There is a vast difference between tacit or implied contracts and *quasi*-contracts. The distinction is so clearly explained by Sir Barnes Peacock in his judgment in the well known case of Ram Bux Chitlangee *vs.* Modhoo Suddun Paul Chowdhry (VII Weekly Reporter, 377) by happy quotations from standard works that it is perfectly needless on my part to dwell on it.

It is settled in that case that the contracts spoken of in Section 6 of Act XI refer only to contracts properly so called, and to implied contracts, but not to *quasi*-contracts, which are no contracts at all. Here I will quote a portion of the quotation appearing at page 383 of the Weekly Reporter, Volume VII :—

"But a *quasi*-contract is not a contract at all. "The commonest sample of the class is the "relation subsisting between two persons, "one of whom has paid money to the other "through mistake. The law consulting the "interests of morality imposes an obligation "on the receiver to refund, but the very "nature of the transaction indicates that it is "not a contract, inasmuch as the convention, "the most essential ingredient of contracts, "is wanting."

The present suit is a suit on *quasi*-contract. A defendant in a suit of the present nature would, under the Civil Law, be compelled to restore the money by a *condictio indebiti*, and the plaintiff in this case ought

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in my opinion to go to the ordinary Civil Court for redress.

Although the question in the case above noticed was whether a suit for contribution was cognizable by the Small Cause Court, it was broadly laid down that all suits based on the general principles of equity, and not on contract, were not cognizable by the Small Cause Court.

As the result of the case will affect the defendant professionally, in order that there may not be any defect of jurisdiction; and as the Court, where the plaint will be filed, not being bound by a judgment of this Court, may take a different view of the case on the point, I have thought it proper to refer the matter to the High Court for an authoritative decision.

As the case has been pending since August last, I humbly request that, if convenient, you will kindly cause an early date to be fixed for the disposal of this matter by the Court.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—The ground of action stated in the plaint is that the defendant, by fraudulently concealing from the plaintiff the fact that he was engaged as mookhtear for Wahed Ali, the opposite party in the case in which the plaintiff was defendant in the Court of the Subordinate Judge, induced her to appoint the defendant her mookhtear to conduct that case and other cases, and that by, it is said, giving her to understand that he was conducting the case for her, he fraudulently obtained Rs. 300 from her *karpurdaz*. The word "accepted" in the plaint obviously means "obtained." Then it is alleged that the representation that he was conducting the case for her was false; that, in fact, he was actually the mookhtear of the opposite party; and that, instead of doing anything in her favor, and conducting her case, he had done and was doing acts hostile to her. The plaint then states that he had been dismissed from her service by presenting a petition in the Court of the Judge, and claims to recover the Rs. 300 which he had fraudulently taken.

Now, that is substantially a suit to recover damages for the injury that she had sustained by reason of the fraudulent concealment of the fact that he was the mookhtear of the opposite party in the other suit, and fraudulent misrepresentation that he was conducting her case when, in fact, he was doing nothing of the kind, but was in reality acting for the party who had instituted the suit against her. That appears to us to be a suit which was cognizable by the Court of Small Causes, not as founded upon any implied contract, but as a suit for damages occasioned by the false representation or fraudulent concealment by the defendant. Whether she had sustained more damages than Rs. 300 is not material. She claims Rs. 300 as damages, and (if her statements be true) those damages she is clearly entitled to, as that sum was entirely lost to her, and she got no advantage whatever from it. The question before us is not what amount of damages she is entitled to recover, but whether the suit is of the nature cognizable by the Small Cause Court.

The plaintiff will have a certificate of the costs incurred by him in this Court which we fix at Rs. 16.

The 28th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ghatwalee Land—Fraud by Zemindar—Grant of Mokurruree—Right of Suit (by Government)—Limitation.

Case No. 1275 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Manbhoom, dated the 20th July 1871, affirming a decision of the Moonsiff of that district, dated the 16th December 1870.

Petumbur Dey (one of the Defendants) *Appellant,*

versus

Juggunnath Roy Ghatwal (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where a zemindar sold a ghatwalee mehal as a *mál* mehal, and not merely his right to receive the quit-rent from the ghatwal, and the vendee in collusion with the former ghatwal granted him a mokurruree tenure, thus changing the nature of the tenure from a ghatwalee into a *mál* tenure, HELD that the Government had a right to sue so as to maintain its own nominee in possession of the land as ghatwal, and that the limitation of sixty years was applicable to such a suit.

Kemp, J.—ONE of the defendants, Petumbur, is the appellant before the Court. The plaintiff's case was that the whole of the Mouzah Beejpore was a ghatwalee tenure,

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and as such the plaintiff was in possession of it, and that the defendant having instituted a suit against him for misappropriation of some wood, obtained a decree, and thereby dispossessed him. He, therefore, now brings this suit for possession. Originally, the Government were arrayed amongst the defendants, but the Moonsiff very properly made the Government co-plaintiffs, inasmuch as the Government were materially affected by the result of the suit.

The defendant Petumbur urged that the suit was barred by lapse of time, and on the merits that Mouzah Beejpore was not a ghatwalee mouzah but a *mâl* mouzah, and that they, the defendants, had always been in possession by virtue of a deed of sale executed by the zemindar of Chatna on the 26th of Kartick 1238 B.S.

The Moonsiff gave the plaintiff a decree, holding that the suit was not barred, and that as the plaintiff had proved that he was in possession as ghatwal, he was entitled to such decree.

Petumbur alone appealed to the Judge. He contended in appeal that the Government had improperly been made a plaintiff, that no possession by the original plaintiff had been proved within twelve years, and that the plaintiff's ancestors were only in possession of the mouzah as his, the defendant's ryots, and not as ghatwals, and that the ishumnuvisees filed were fictitious and had been declared invalid by a decision of the Court.

On the main question, whether the mouzah was mâl or ghatwalee, the Judge found that it was ghatwalee. He observed that the zemindar of Chatna filed two ishumnovisees, one of the year 1804 and the other of the year 1808; that in the latter ishumnovisee Mouzah Beejpore was a ghatwalee mouzah, and that in a decision passed by the Court of Sudder Dewanee, dated the 7th November 1858, in which case Raj Anund Lall Singh's widow was appellant, and Gunee Lall Roy respondent, it was held that the list of 1804 was a spurious one and that of 1808 genuine. The Judge, therefore, held on the evidence that Mouzah Beejpore was a ghatwalee and not a mâl mouzah. He then goes on to observe that the defendant, appellant, Petumbur, bases his claim on a deed of sale dated the 26th of Kartick 1238, executed in favor of the defendant's father by the Rajah of Chatna, and urges that the respondent, the plaintiff, was his ryot; that he fell into arrears, and that his tenure, a mokurruree one, was sold and purchased by him, the defendant, Petumbur, when he obtained khas possession; that as the plaintiff cut some wood in the jungle appertaining to the mouzah, he sued him and got a decree, when the respondent, the plaintiff, on pretence that he had been thereby dispossessed of his ghatwalee tenure, brought this suit against him, nominally to recover possession of the jungle, but in reality to deprive him of the whole of the mouzah by getting it declared to be wholly ghatwalee. The Judge, on this contention, finds that there can be no doubt that the mouzah was ghatwalee up to the year 1831, and that all that the zemindar could sell was his right to receive the ghatwalee quit-rent, amounting to Rs. 19-8, and not the whole of Mouzah Beejpore as a mâl mouzah. With reference to the contention that the ancestor of the plaintiff acknowledged the right of the defendant's father in the mouzah as his mâl estate by taking from him a mokurruree pottah and thus becoming his ryot, the Judge found that a ghatwalee tenure is not a transferable holding but one which is held in lieu of salary for the performance of certain services, in default of which he is liable to be turned out by Government. On the question of the mokurruree, the Judge held that there could be no doubt that the respondent's predecessor by accepting a mokurruree pottah from the defendant's father did collude with him to change the nature of the tenure from that of a ghatwalee tenure and convert it into a mâl tenure; that although the evidence adduced by the respondent as to the performance of services is not very strong, yet it was urged that other ishumnovisees had been filed, and that so much was admitted by the pleader for the appellant, but that such ishumnovisees were most probably filed by the late ghatwal for the purpose of making it appear that he still held the mouzah as ghatwal, and that they were, the Judge considered, quite insufficient to prove actual performance of services. The Judge, then, on the question of limitation, observes that although Juggunnath Roy's claim may be barred by lapse of time, and that his assertion of being in possession of the mouzah at the time the suit against him for cutting wood was brought, has not been proved, the limitation of 60 years applies as regards Government, and therefore that the Government had a right to sue as a public right would be destroyed by the dispossession of the ghatwal. The appeal of Petumbur was, therefore, dismissed, and the decision of the Moonsiff affirmed.

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The grounds of special appeal are, that the Judge was wrong in extending the period of limitation simply because the original plaintiff and the Government chose to make common cause; that the right of the Government, if any, was to the performance of certain services and cannot under any circumstances extend to the possession of the land; that the decision of the Judge, with reference to the alleged collusion between the former ghatwal and the zemindar is based entirely upon conjecture; and that the plaintiffs have not been able to prove the precise nature of the alleged ghatwal tenure.

With reference to the first point, the decision of the Privy Council to be found in Volume VII of the Weekly Reporter, page 21, has been referred to, *viz.*, the case of Gunga Gobind Mondul, and others *versus* the Collector of the 24-Pergunnahs, Prince Golam Mahomed, and others. In that case, the only right of the Government was to receive its rent, and the Privy Council held that as between private owners contesting *inter se* the title to lands, the law has established a limitation of 12 years, and that the Government had no title to intervene in such contests as its title to its rent in the nature of jumma is unaffected by the transfer simply of the proprietary right in the land. There can be no doubt that that was a correct decision; one ryot transferring to another would not affect the rights of the Government or the liability of the land to rent, and therefore the action of the Government in that case was wholly uncalled for. This case is a very different one. The Government seek to maintain their nominee in possession of these lands as ghatwal: the Court below has found on the evidence that this is a ghatwalee mehal and not a mâl mehal; the Court has also found collusion between the former ghatwal and the zemindar, and there can, we think, be no doubt that that is true. The zemindar had no right to sell anything but his right to receive the quit-rent from the ghatwal, amounting to Rs. 19-8, and the vendee had no right to create a mokurruree tenure, as all that he purchased was the right to these Rs. 19-8.

It appears also that the Government in 1867 did assert its right, which we may observe was never lost, of appointing a ghatwal, and a ghatwal was accordingly appointed. It was not shown to us in the argument how the original character of this tenure as a ghatwalee tenure has been in any way changed or altered.

We think, therefore, that the judgment of the Lower Appellate Court is a correct one, and we dismiss the special appeal with costs.

The 28th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Benamee Lease—Liability of Beneficial Lessees — Rent — Use and Occupancy — Limitation (Act XIV of 1859 *s.* 1 *cl.* 16*) — Laches — Interest.*

Regular Appeals from a decision passed by the First Subordinate Judge of Hooghly, dated the 12*th June* 1871.

Case No. 209 of 1871.

Debnath Roy Chowdhry and others (Plaintiffs) *Appellants,*

versus

Gudadhur Dey and others (Defendants) *Respondents.*

Messrs. G. C. Paul and *R. T. Allan* and *Baboos Ashootosh Dhur, Obhoy Churn Bose,* and *Taruck Nath Sen* for Apellants.

Baboos Bhowanee Churn Dutt and *Bykunt Nath Paul* for Respondents.

Case No. 222 of 1871.

Pitambur Sen (one of the Defendants) *Appellant,*

versus

Debnath Roy Chowdhry and others (Plaintiffs) *Respondents.*

Baboos Unnoda Pershad Banerjee, Kalee Mohun Doss, Bhowanee Churn Dutt, and *Bykunt Nath Paul* for Appellant.

Mr. R. T. Allan and *Baboo Obhoy Churn Bose* for Respondents.

Where the ostensible lessees stood in the position of wives to the alleged beneficial lessees, and it was improbable that three ladies (one of whom was in no way connected with, but was a perfect stranger to, the other two) should enter into a transaction involving the payment of a bonus amounting to Rs. 12,000; and applying the crucial test in such cases, *viz.* the source from which the consideration money came, and finding that the money had not been supplied by the ostensible lessees, and looking to the fact that there was no proof beyond the vague and unsatisfactory statements of two of the husbands that the ladies had any separate funds of their own from which they could have paid this large bonus, as well as to the very unsatisfactory explanation given by the two husbands for not producing their account-books, which would have shown at once how and by whom the consideration-money was paid, and to the nature of the dealings with the property by the three husbands,—HELD that the case was *benamee;* and that though the lessees had all along received the rent from

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the ostensible lessees, yet when the tenure had passed away by sale in execution of a decree to a third party, and the lessor was unable to recover from them any longer, he was entitled in equity to claim the rent from the beneficial lessees.

HELD, also, that this not being a suit for rent, but for compensation for the use and occupancy of the lands demised, the limitation which governed the case was that of six years prescribed by cl. 16 s. 1 Act XIV of 1859.

The lessor having known that the ladies were the nominal and the husband the beneficial lessees, were held disentitled to interest.

Kemp, J.—In appeal No 222, Pitambur Sen, one of the defendants, is the appellant. In appeal No 209, the plaintiffs are the appellants. As the appeal of Pitambur Sen opens out the main question in issue in this case, that appeal was taken up first. The plaintiffs, who are the zemindars, sue various defendants, some of whom have not appealed. The defendants may be divided into three classes, namely—1st, the female defendants, (No. 2) Sabitra Soonduree Dossee, (No. 4) Nubo Coomaree Dossee, and (No. 6) Rughoo Mohinee Dossee. The 2nd class are the defendants (No. 1) Gudadhur Dey, (No. 3) Gunesh Chunder Dey, and (No. 5) Pitambur Sen, the appellant before us. Class No. 3 includes Nubo Kristo Mookerjee, who has purchased from some of the defendants.

The suit of the plaintiffs is briefly to this effect, that a 7-anna 10-gundah share of lot Tripoorapore is their zemindaree right; that the three defendants, Gudadhur Dey, Gonesh Chunder Dey, and Pitambur Sen, took a mowrosee ijara lease from the plaintiffs in the names of their wives, the defendants Nos. 2, 4, and 6, the date of the lease being the 29th Srabun 1271, and their allegation is that the beneficial lessees were the male defendants Nos. 1, 3, and 5, and that the names only of the female defendants Nos. 2, 4, and 6 were used. The plaint then goes on to state that a share amounting to one-third of the said lease, standing in the name of Nubo Coomaree, has been purchased by the defendant, Nubo Kristo, and that the same defendant has purchased also the one-third share standing in the name of Sabitra Soonduree. The plaintiffs then go on to state that, not being well aware that the male defendants were the beneficial lessees, and as no registration of their names had been made in their zemindaree serishtah, they proceeded for the rent of the lease as against the female defendants, who were the ostensible lessees, that they obtained decrees in separate numbers under the provisions of Act X of 1859 against the ostensible lessees on account of the rent of the said lease; that out of the decrees so obtained they have realized the whole amount of the decree No. 16, and Rs. 4,800 out of the sum due under the decree No. 75, and Rs. 4,500 out of the amount due under the decree No. 1, but that the decree which they obtained for Rs. 15,212-11-15 under No. 992 is still wholly unsatisfied; that in execution of the decree No. 1 the property in arrear was put up for sale, and that a party of the name of Panch Cowree Rukheet put in a claim on the 15th of December 1868, alleging that he had purchased the property in execution of a decree obtained by the 2-anna 10-gundah sharer of the zemindaree, and that he was in possession under that sale of the whole 16-anna of the rights and benefits of the ijarah of the mehal; that in 1868 the Deputy Collector of Howrah, on the ground that the property in arrear could not again be sold by auction in satisfaction of the plaintiff's claim under the decree No. 992, allowed Panch Cowree Rukheet's claim, and therefore the plaintiffs were unable to bring the tenure to sale; that upon this the plaintiffs invoked the aid of the High Court under the 15th Section of the Charter by way of motion to set aside the order of the Deputy Collector of Howrah, but that the High Court refused to interfere; that, as there was no other property of the ladies defendants, who are the ostensible but *benamee* holders of the lease, from which the plaintiffs can recover the amount due to them for rent and which has been decreed to them under the decree No. 992, they proceed in this suit to recover the amount due from the beneficial lessees, namely, the defendants Gudadhur Dey, Gunesh Chunder Dey, and Pitambur Sen, and their vendee Nubo Kristo Mookerjee. The plaintiffs state that their cause of action arose on the date on which their motion under Section 15 of the Charter was rejected by the High Court, namely, on the 16th July 1869. The claim is from the year 1273 to the year 1275. Attached to the plaint is an account setting forth a statement of the claim of the plaintiffs. It appears that the sum claimed in this suit, namely, Rs. 17,241, is thus divided, namely, principal Rs. 12,700 and interest Rs. 4,541. The principal is for arrears from Falgoon to Choitro 1273, Rs. 2,500; for the whole of the year 1274, Rs. 8,000; and from Bysack to Kartick 1275, Rs. 2,200,—total principal Rs. 12,700. The plaint does not appear to have been verified by the plaintiffs themselves but by Hara Chand Roy, their general Mookhtear and Tuhsildar.

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It is not necessary for us to notice the written statements of any of the defendants, with the exception of the defendant before us in appeal, namely, Pitambur Sen. There are several pleas in bar raised by this defendant which we shall notice in a subsequent portion of our decision. The main plea, namely, whether his wife Rughoo Mohinee, was the lessee of the property in dispute in her own right, or whether she was *benamee* for her husband, is raised in the following way by the defendant Pitambur Sen in his written statement, *viz.*, "That he did not take any ijarah of the said lot Tripoorapore in his wife's name, and that he was not in the enjoyment of the rights and benefits of that lease."

The Subordinate Judge of Hooghly, Baboo Grish Chunder Ghose, raised the following issues in bar:—1st, Whether the plaint discloses any cause of action; 2nd, whether the provisions of Section 2 of the Code of Civil Procedure bar the hearing of this suit; 3rd, whether the provisions of the rent-law operate as a bar to the admission of this suit; 4th, whether there is a misjoinder of causes of action; and, 5th, whether the suit is barred by the law of limitation. On the facts the following issues were raised:—1st, whether the defendants Nos. 1, 3, and 5, that is to say, the male defendants Gudadhur Dey, Gunesh Chunder Dey, and Pitambur Sen are the real lessees, and whether the ijarah was a *benamee* transaction in the names of their respective wives, the defendants Nos. 2, 4, and 6; 2nd, whether the amount claimed is recoverable from the defendants, and if so, which of them are liable, how and to what extent? Then there is an issue with reference to Nubo Kristo which we do not think necessary to refer to, inasmuch as Nubo Kristo is not before the Court. Mr. Paul appeared for him, but eventually we were informed, and this appears to admit of no doubt, that no cross-appeal has been preferred by Nubo Kristo, who, from what we can see, appears to have gone over to the plaintiff's side; and a 4th issue was, who is to be made liable for the costs of the defendants who were unnecessarily brought before the Court.

The Subordinate Judge, after giving in detail the allegations of the plaint, and briefly though sufficiently the pleas raised in the written statements of the various defendants, proceeds to dispose of the issues in bar; but, as already stated, we shall remark upon this part of the case in the latter part of our judgment.

We think that in this case, as the real point in issue is whether the defendants Gudadhur Dey, Gunesh Chunder Dey, and Pitambur Sen are the beneficial lessees and as if that issue be found against the plaintiffs, it is clear that the whole of the plaintiff's case must fail, we ought in the first instance to decide that question.

The case has been tried very carefully by the Subordinate Judge, Baboo Grish Chunder Ghose. He has taken considerable pains in this case to arrive at a proper conclusion on this question. He commences by observing that the *onus* is on the plaintiffs; and that it is so, has not been disputed before us, the plaintiffs having through their pleader clearly admitted that the *onus* of proving that the female defendants are merely nominal lessees and that their husbands were the beneficial lessees, is on the plaintiffs. The Subordinate Judge then says that the main test to be applied to a case of this kind is to ascertain from what source the consideration-money came, and then to ascertain who really enjoyed the rents and profits of the lease. The Subordinate Judge remarks that it is admitted on all sides that 12,000 rupees were paid as the bonus for this lease, and it is further admitted that the ostensible lessees, the female defendants, are the wives of the male defendants, Nos. 1, 3, and 5, and the relationship between the *cestui que* trust and trustee being that of husband and wife furnishes a strong presumption as to the truthfulness of the plaintiff's contention that the husbands are the real lessees and that the wives are only the benamdars of their husbands. On the question as to who supplied the consideration-money, namely, the 12,000 rupees paid as bonus for the lease, the Subordinate Judge observes that, considering all the circumstances of the case and weighing the whole of the evidence adduced, it is clear that Gudadhur, Pitambur, and Gunnesh were the real parties who paid the consideration, that it appeared to him upon the evidence adduced that the ladies had no joint funds or joint dealings from which the money was supplied, and on the contrary it was proved that their husbands had joint dealings and that the plaintiff's witnesses proved that the consideration-money was paid by the husbands and with their joint funds. The Subordinate Judge then proceeds to dispose of the plea which was raised in his Court, namely, that these ladies had received large sums of money in gift from their respective fathers and their respective husbands. The Subordinate Judge states that these allegations might have com-

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mended themselves to him had they been in any way corroborated by the production of account books, and that the female and male defendants had both failed to produce any account books, and that their excuses for the non-production of these accounts were very unsatisfactory, and that there was nothing on the record in the shape of evidence to show the existence of any *streedhun* of these female defendants from which they could have supplied the consideration-money; that in order to remove any doubts on this point, he, the Subordinate Judge, ordered the female defendants to be examined under commission, that summons were served and a commission issued, but that the female defendants would not give their evidence or show any good cause for non-compliance with the Court's order on the subject of their examination. The Subordinate Judge considers the recusancy of the female defendants to be a very suspicious circumstance, or, as he observes, a fact "pregnant with serious doubts." He seems to think that they were afraid to come forward and give their evidence, inasmuch as they probably could not declare on oath that they commanded large funds in the shape of *streedhun* from which they could have supplied the funds for obtaining the lease in question; that if they had such separate funds they must have kept account books, and that if they had kept those books, why had they shrunk from producing them; that although Pitambur Sen had deposed that his wife had separate funds, the Subordinate Judge did not credit his averment; that the male defendants had given no satisfactory account, although they were examined in Court on this point as to why they could not file their accounts; that the excuse which they made for not producing these accounts, namely, that they were in a state of disarrangement "বেসি জিন" was a frivolous and unsatisfactory excuse, and that therefore on the whole of the evidence it appeared clear to the Subordinate Judge that the money paid as bonus for this lease came from the defendants Gudadhur Dey, Gunesh Chunder Dey, and Pitambur Sen, and that their wives had nothing whatever to do with it; and then with reference to the question of possession and enjoyment of the rents that it appeared that whatever was collected from the ijarah mehal was remitted to the male defendants who made either personally or through their agents all settlements in connection with the ijarah; that all law suits were personally conducted by them and all moneys drawn from Court by them; that there are two letters dated respectively the 27th Chyet 1274 and 29th Chyet 1274, written by Pitambur, which were admitted by Pitambur and which prove to a certain extent that Pitambur, and not his wife, is the beneficial lessee; that these letters were written at a time when Pitambur could have had no real motive for concealing the real facts from Nubo Kristo to whom the letters were addressed; and that therefore it is evident and clear that the possession of the ijarah was with the male defendants and not with the female defendants.

With reference to the first plea in bar, the Subordinate Judge was of opinion that it was very clear that the beneficial lessees, and not their trustees or benamdars, must be called upon to show why they should not pay to the plaintiffs the rent due from the mehal they have held possession of; and as the plaintiffs cannot recover what is due to them from the male defendants who were in possession of the property, without resorting to the Civil Court which alone is competent to grant the equitable relief which the plaintiffs ask, they have therefore a right to come into the Civil Court.

On the second plea in bar, namely, whether the suit is barred under the provisions of Section 2 of Act VIII of 1859, the Court was of opinion that the parties to this suit being different from those who were sued in the Court of the Collector for rent, and that as the plaintiffs seek to establish their present claim as against the beneficial lessees, the defendants Nos. 1, 3, and 5, and as the women have been brought into the suit more as *pro formâ* defendants than for any other purpose, this suit is therefore not barred under Section 2.

Then on the third issue in bar, the Subordinate Judge found that the provisions of the rent-law do not operate as a bar to the admission of this suit; that, under the rent-law, the question of who was the beneficial lessee could not be decided by the Revenue Court, and therefore that this suit has been properly brought in the Civil Court to determine that question.

On the question whether there was any misjoinder of causes of action, the Subordinate Judge found that there was no such misjoinder, and we may observe that this question has not been pressed in any way before us.

On the fifth issue in bar, namely, whether the suit is barred by the law of limitation, the Subordinate Judge found that a portion

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of the suit is barred. He is of opinion that the plaintiff's cause of action did not arise on the rejection of their motion by the High Court under Section 15 of the Charter, but from the date when the rent claimed became due; that as the plaintiffs have asked for rent from Falgoon 1273 to Kartick 1275, and as the plaint was not filed till the 3rd of Pous 1277, it is evident that more than three years have elapsed from Falgoon 1273 to Pous 1277, and on this account the plaintiffs could not recover in an Equity Court the rent due for a period beyond three years, and therefore all kists due before the 3rd of Pous 1274 must be considered as barred under the statute of limitation, applying the three years' rule.

The decree of the Lower Court, therefore, was to the following effect: that Rupees 7,700 only out of principal claimed, namely, Rupees 12,700, be decreed with costs in proportion against Pitambur and Nubo Kristo Mookerjee in the following proportion, namely, one-third from Pitambur and two-thirds from Nubo Kristo. The Subordinate Judge held that the plaintiffs were not entitled to a joint decree, but that they were only entitled to a separate decree, and that the liability of each of the beneficial lessees must be regulated *per capita*; and, applying this rule, the Subordinate Judge found that Pitambur represented one-third of the lease and that Nubo Kristo, who has purchased from Gudadhur Dey and Nubo Comaree Dossee, represents two-thirds of the lease. Gudadhur Dey and Gunesh Chunder Dey were absolved, inasmuch as they had no possession from Pous 1274 to Kartick 1275, on the ground, apparently, that their right and title in the ijarah had passed to their vendee Nubo Kristo Mookerjee. The ladies defendants were to be not liable, inasmuch as they were merely the ostensible lessees, but they were not allowed their costs inasmuch as they wilfully disobeyed, as the Subordinate Judge holds, the orders of the Court by refusing to give evidence, and he therefore applies the provisions of Section 170 of the Code of Civil Procedure to their case; and against this part of this judgment of the Lower Court with reference to the costs of these ladies, no appeal has been preferred.

With reference to the question of interest, the Subordinate Judge held that the plaintiffs were not entitled to claim interest, which we may observe amounts to the sum of Rupees 4,541, and the reasons given by the Subordinate Judge for not allowing interest are that the plaintiffs had full knowledge of the fact that the male defendants were the beneficial lessees and not their wives, and as they neglected to avail themselves of the equitable relief to which they are entitled, and as the delay was attributable to the laches of the plaintiffs, the defendants, who are now made liable for the first time for the rent, cannot be called upon to pay interest.

Gudadhur Dey and Gunesh Chunder Dey, although their liability was not declared, and they were exempted, were not considered entitled to their costs, because they were necessary parties to the suit.

Taking the appeal of Pitambur Sen first, we think it proper to decide the main question first, namely, whether the lease admittedly taken from the plaintiffs on the 29th of Srabun 1271, was taken by the male defendants, Gudadhur Dey, Gunesh Chunder Dey, and Pitambur Sen, in the names of their wives, they being the beneficial lessees, or whether the apparent state of things, namely, that the ladies are the lessees, is the true state of things. In deciding this question, we are very sensible of the necessity of not being too apt, as their Lordships in the Privy Council have considered Judges in India to be, to see fraud every where. We are also not unmindful of the remarks which have been made by their Lordships in the case of Moonshee Buzul Ruheem *versus* Shumsoonissa Begum, to be found in Volume VIII, Weekly Reporter, Privy Council Decisions, page 11, namely, that "the habit of holding land benamee is inveterate in India, but that that does not justify a Court in making every presumption against apparent ownership;" and we are also sensible that there may be circumstances in a case which throw considerable suspicions over the case, but that such suspicions are not proof. We, therefore, in deciding this question, think that we ought to look to the peculiar circumstances of this case, and, in coming to a decision upon the whole case, we ought to consider these circumstances and the probabilities, guided to our judgment by the cautionary remarks which have been already alluded to. In the first place, there can be no doubt that the ostensible lessees stand in the position of wives to the defendants who are now said to be the beneficial lessees; that alone, of course, would not be sufficient to raise a presumption that the wives were only holding this lease as trustees for their husbands, but the close of relationship of the parties is a point which must not be altogether lost sight of in deciding upon the probabilities of the case. The next point which has had considerable

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influence over us in arriving at the opinion which we have formed on this question, is that these ostensible lessees are three ladies, not all of them connected with each other, but only two of them, namely, Sabitra Soonduree Dossee, the defendant No. 2, and Nubo Coomaree Dossee, the defendant No. 4, who appear to be sisters-in-law. Rughoo Mohun Dossee, the defendant No. 6, who is the wife of the appellant before us, Pitambur Sen, defendant No. 5, is in no way connected with her so-called co-lessees. Pitambur Sen is not of the same caste as Gudadhur Dey and Gunesh Chunder Dey, and it is therefore in our opinion highly improbable that three ladies, one of whom is in no way connected with the other two, and a perfect stranger to them, should enter with them into a transaction of this description in which the payment of a bonus amounting to a very large sum, namely, Rs, 12,000, is involved. Then applying the test, which no doubt is the crucial test in cases of this description, namely, the source from which the consideration-money came, we find on a consideration of the whole evidence that there can be no doubt that this money was not supplied by the ostensible lessees, the aforesaid three ladies. In this case, the defendants Gudadhur Dey and Pitambur Sen have been examined in Court. We take first the evidence of Gudadhur which is printed at page 20 of the Paper-Book. He says that his wife did not inform him of her having taken the ijarah until the terms had been finally settled, although he admits that at the time when the overtures were made he went to the house of the zemindar at Cossipore for the purpose of bringing about the lease; then, with reference to his wife possessing any separate estate of her own, his deposition is, to say the least of it, very unsatisfactory and vague. He says, "my wife received money from her father as *jowtook*, and I have also presented her with Rs. 2,000 or 4,000;" and then he says,—"I do not exactly recollect how much money I have given her." He states that he is not aware how much there was in his wife's tubbil or existed at the time when the ijarah was taken; that, at the request of his wife and of his wife's sisters he and Gunesh Chunder Dey gave them advice that the property was good, and that they ought to take it; that he does not know why they asked him for his advice; he admits that he used to manage the mehal; that he used to take from his wife and sister-in-law the costs of the suits carried on on their behalf, and that if they had no money he used to pay for them and advance it as a loan; that that advance was not entered in his books; that he is unable to say whether any portion of the consideration-money was paid by a bank-note belonging to his twist business, although he had in a previous portion of his deposition stated that the whole of the consideration-money was paid in cash; that he was unable to produce his account books, although called upon by the Court to do so, because they were disarranged; the witness was unable to state how they had become disarranged although asked by the Subordinate Judge to explain that.

The defendant Pitambur Sen, the husband of Rughoo Mohinee, who was also examined, admits that he was a witness to the kabooleut executed by these ladies. He says that his wife paid Rs. 4,000, or one-third of the bonus; that she had a separate tubbil; that she kept her money in a separate box, of which the key was in her custody; that his wife only kept rough accounts, which we may observe are not produced in Court, that he keeps no khatta books, and that his khatta books in connection with the twist business are disarranged "বেসি জিল," and that he heard that they were disarranged from his son. Then, with reference to his wife having separate funds of her own, all that he states is that his wife's mother gave her Rs. 5,000 and that he heard of this many years ago from his mother.

Now, there can be no doubt, as observed by the Subordinate Judge, that the *onus* is upon the plaintiffs in this case, but it appears to us that the plaintiffs have done all in their power to discharge themselves of that *onus*. They have cited the ladies defendants as witnesses; they have called upon them to produce their books, and they have called upon the male defendants, who have been examined, to produce their account books; in short, they have endeavoured, to the very best of their power, to prove their case from the books kept by the defendants.

Looking, therefore, to the fact that there is no proof beyond the vague and unsatisfactory statements of the two husbands, Gudadhur Dey and Pitambur Sen, that these ladies had any separate funds of their own from which they could have paid this large bonus; taking into consideration the near relationship of the ostensible lessees to the male defendants, who are alleged to be the beneficial lessees; looking to the very unsatisfactory explanation given by the defendants for not producing their account books, which would

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have at once shown how and by whom this consideration-money was paid; and also looking to the whole of the evidence as to the dealings with this property on the part of the defendants, the husbands, we can come to no other conclusion than that at which the Subordinate Judge has arrived.

We may observe that in a case of this description, which involves a question of fact, we ought not to disturb the finding of the Lower Court unless it was clearly shown that the decision of the Subordinate Judge,—who, we may observe, is a Hindoo Judge of great experience and ability, and who had the witnesses before him, and was fully competent to arrive at a proper conclusion in a case of this description,—was a wrong decision.

Much stress has been laid upon the conduct of the plaintiffs in this case. It is said, and truly said, that they have all along treated these ladies defendants as the real lessees; that they have sued them for rent; that they have obtained decrees for rent as against them on various occasions; that they have proceeded to recover from them the amount due under the decrees; that they have sold properties in satisfaction, said to belong to these ladies, and that it is only when the means of the ladies have been entirely exhausted that they have brought this suit in the Civil Court to fix the liability upon the husband defendants on an averment that they, and not the ladies, are the beneficial lessees. It is also said that the statement in the plaint that the plaintiffs were not well aware of the benamee rights of the defendants is contradicted by the evidence of the two plaintiffs who have been examined. We observe that the plaint is not verified by the plaintiffs, and one of the plaintiffs who has been examined appears to know very little about the case; but he admits that he did know at the time the lease was taken that the names only of the ladies were used, and that the husbands were the beneficial lessees. We think, however, that there is nothing in the conduct of the plaintiffs which would prevent them in any way from raising this question, namely, whether the male defendants were the beneficial lessees or not. It may be admitted, we think, that a person may be responsible in equity to pay rent although not the legal tenant and not legally responsible for the rent; the equity against the cestui que trusts results from the fact of their entering into possession and enjoyment of the property. Of course, the plaintiffs sued under the rent law the ostensible lessees, for under that law the question of who were the beneficial lessees could not be raised, and as long as the plaintiffs secured their rent from the ostensible lsssees they were contented to do so; but when the tenure passed away by sale in execution of a decree to a third party, and after the plaintiffs had recovered all they could from the ostensible lessees, we think that they were entitled in equity to claim the rent from the parties who were really in possession and enjoyment of the profits during the period for which the rent is claimed. Therefore, on the question whether this lease was taken benamee in the names of these three ladies, the beneficial lessees being the male defendants, Gudadhur Dey, Gunesh Chunder Dey, and Pitambur Sen, we entirely concur with the Subordinate Judge in the view which he has taken.

Having disposed of the main question between the parties, we proceed to consider briefly the pleas in bar raised by the defendant. The plaint discloses a clear and distinct cause of action; the plaintiffs seek to make the defendants liable for compensation for the use and occupation of the land the profits of which they have enjoyed,

In the course of the argument, it was contended that under the terms of the kubooleut, admitting that the defendant Pitambur Sen, appellant in this Court, is the beneficial lessee, he is not liable and that the plaintiff's only remedy under the kubooleut is to proceed under Section 78 Act X of 1859, in ejectment. With reference to this contention, which was not raised in the Court below, we may observe that the properties demised have passed by sale at auction in execution of a decree to a third party, that third party not being liable for the period during which the plaintiffs claim compensation. Pitambur Sen in his evidence admits that the whole or 16 annas of the tenure has been sold; the only remedy, therefore, left to the plaintiffs is to proceed as they have done, namely, to have it declared that the male defendants are the beneficial lessees, and are therefore in equity bound to pay a fair and proper compensation for the lands of the plaintiffs for the period during which they have enjoyed the rents. The limitation question will be considered on the appeal of the plaintiffs. The plea of *res adjudicata*, which was not seriously pressed, is also overruled for the reasons given by the Subordinate Judge. The parties to this suit are not the same as in the previous rent suit, and the subject-matter of the present suit and that of the rent suit are entirely distinct. We dismiss the appeal of Pitambur Sen with costs.

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We now proceed to deal with the appeal of the plaintiffs.

The points taken are—

1st,—That the Subordinate Judge was wrong in applying limitation to any portion of the plaintiff's claim.

2nd,—That interest ought to have been awarded.

3rd,—As to the question of costs.

4th,—That the decree ought to have been a joint one.

We think that the Subordinate Judge has improperly applied the statute of limitations to a portion of the plaintiffs' claim. It is clear that this is not a suit for rent, but for compensation for the use and occupancy of the lands demised. The suit has been properly brought in the Civil Court. It may be that, in estimating the damages, the plaintiffs have taken the rent payable by the lessees as representing an equitable scale whereby to measure the damages; and we are of opinion that this is a very fair basis upon which to calculate the compensation which the defendants, who have been found to be the beneficial lessees, are bound to pay to their lessors, the plaintiffs, for it must not be lost sight of that the difference between the rent payable to the plaintiffs, the lessors, and the rents enjoyed by the lessees must have been considerable looking to the large amount of bonus paid. To a suit of this description the provisions of Clause 16, Section 1, Act XIV of 1859, or six years, which governs the case, apply, and it is clear that applying that Clause no portion of the claim is beyond time. We, therefore, modify the decision of the Subordinate Judge in this respect and declare that no portion of the claim is barred.

On the second point, namely, the question of interest, we think that the Subordinate Judge was right in not awarding any interest. The plaintiffs admit that they were aware at the time the properties were demised that the lady defendants were nominal lessees, and that their husbands, the male defendants, were the beneficial lessees. The plaintiffs, with this knowledge of the true state of affairs, took no timely steps to have the liability of the beneficial lessees declared and determined; they cannot, looking to their laches, be entitled to interest.

On the question of costs, a matter in the discretion of the Court, we are not inclined to interfere with the order of the Subordinate Judge in this matter.

On the last point, after hearing the argument, we are of opinion that the view taken by the Subordinate Judge is an equitable one. He has made each lessee liable to the extent of their enjoyment of the rents. It is clear that the lessees did, as amongst themselves, collect and enjoy the rents in distinct shares. To pass a joint-decree would be making Pitambur Sen liable at the option of the plaintiffs for the whole of the compensation claimed, although he admittedly only enjoyed one-third of the rents. Nubo Kristo, who has been declared liable for two-thirds, has apparently gone over to the plaintiffs, and we cannot permit the plaintiffs who are seeking equity to recover the whole claim from Pitambur Sen, leaving him to further litigation in the shape of a contribution suit against his co-defendant Nubo Kristo. Moreover, we find that the appeal of the plaintiff is not valued at Rs. 17,241, but at Rs. 9,541. It is clear that if the plaintiffs wished to raise the question of joint-liability, they ought to have appealed on a stamp covering the full amount claimed.

With reference to the defendant Gudadhur, who has not formally appealed, but who is represented by a pleader, we are of opinion that as we have held that no portion of the plaintiff's claim is barred, he, Gudadhur, is liable inasmuch as although he has parted with his interests to Nubo Kristo, such alienation was made without the consent of the lessors, the plaintiffs, and cannot be binding upon them. If Nubo Kristo has, as we are told, entered into an agreement to indemnify Gudadhur, so much the better for him; but that is a matter between Gudadhur and his vendee Nubo Kristo; the plaintiffs have no concern whatever with any such arrangement.

The result is that the appeal of Pitambur Sen, No. 222, is dismissed with all costs, and the appeal of the plaintiffs, No. 209, decreed in the modified form mentioned above, namely, as regards limitation alone.

We think that the plaintiffs should pay the costs of their appeal in this Court.

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The 3rd May 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Montague E. Smith and Sir Robert P. Collier.

Sale of Property (not in Possession)—Champerty.

*On Appeal from the High Court at Calcutta.**

Ranee Bhobosoonduree Dossee

versus

Issur Chunder Dutt and others.

A, who was entitled to certain property, but had not the means to institute a suit for the recovery of the same, agreed by deed to sell B a moiety thereof in consideration of a sum of money which B was to pay for the purpose of carrying on the suit in the names of A and B as plaintiffs. Shortly afterwards A entered into a deed of compromise with C, who was the claimant and in actual possession of the greater part of the property in question, by which a portion of the property was divided between them. HELD, in a suit brought by B against A and C, that the first deed did not operate as a present transfer of the property, but only as an agreement to transfer it upon certain contingencies which had not happened.

THIS suit was based upon a deed executed by Jogessur Ghose, in favor of the plaintiff, in August 1866. The effect of that deed, as far as it is material, may be thus stated: it recites that Jogessur Ghose was entitled to certain properties from his maternal grandmother, that he had been dispossessed of the whole of those properties, and thus proceeds:—"It is now necessary to institute a "suit in Court for the recovery of possession "of the whole of the properties consisting of "the aforesaid jote jummah talook, &c., and "mesne profits, and as I have not the means "to institute a suit at my own expense, I "have determined to sell you a moiety or 8 "annas share of the 12 annas 6 gundas 2 "cowrees 2 krants of the above jote jummah, "being the share left by my maternal grand-"mother, to which I am entitled, an 8-anna "share of the talook aforesaid, and an 8-anna "share of the mesne profits during the period "of dispossession, and having fixed the con-"sideration for the same at Rs. 3,000, and re-"ceived the purchase money in cash, I sell "the same to you and execute this deed of "sale. The said amount is deposited with "Dwarkanath Lahory, mookhtar, the agent "on your behalf, and all the expenses of the "suit for dispossession and my lodging ex-"penses shall be paid out of that sum. In "the event of the suit being decided in my "favor we shall each of us take the costs, "mesne profits, jote jummah, and the talook "in the shares mentioned above. We will "both of us institute the said suit in Court "as plaintiffs. Neither of us shall be able "without the consent of the other to com-"promise, settle, or make any adjustment "whatever of the case."

It appears that a short time after, in September 1866, Jogessur Ghose entered into a deed, which may be termed one of compromise, with Issur Chundur Dutt, who was the claimant and in actual possession of the greater part of the property referred to in the previous deed, and that by this deed of compromise a portion of the property was divided between them. Thereupon this suit was brought by the plaintiff. It is material to observe that it is not a suit claiming specific performance of or damages for breach of the contract entered into with the plaintiff by Jogessur Ghose, but that it is in the nature of an action of ejectment. It is a suit to recover possession of the property mentioned in the first deed brought not only against Jogessur Ghose, but against Issur Chundur Dutt, the plaintiff seeking to recover possession of the property by virtue of the title acquired under that deed, not only against Jogessur Ghose, but also against Issur Chundur Dutt, whom he alleged to have obtained possession of the property under forged conveyances.

The Court below dismissed the suit upon a technical ground, namely, that the plaintiff could not sue Issur Chundur without joining Jogesssur Ghose as a co-plaintiff. The High Court decided, in their Lordships' opinion, rightly that this was not a proper ground for dismissing the suit, and, hearing it upon its merits, determined it in favor of the defendants.

The principal question is the effect of the first deed, whether it operated as a present transfer of the property, or only as an agreement to transfer it upon certain contingencies which did not happen. In support of the latter contention the case was referred to of *Rajah Sahib Perhlad Sein v. Baboo Budhoo Singh* (12th Moore's Indian Appeals, page 275).* Without referring at length to that case, the circumstances of which are in many respects similar to those of the present, it may be enough to quote a passage from page 306,† wherein their Lordships say,—"The Court below seem to have ruled

* From the judgment of Loch and Mitter, JJ., dated 10th June 1869.

* 12 W. R., P. C., 6.
† *Ibid* 9.

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"that the effect of the execution of a bill "of sale by a Hindoo vendor is, to use "the phraseology of English law, to pass "an estate irrespective of actual delivery "of possession, giving to the instrument "the effect of a conveyance operating by "the statute of uses. Whether such a con-"clusion would be warranted in any case is "in their Lordships' opinion very question-"able. It is certainly not supported by the "two cases cited in the judgment under "review" (which are there referred to), "in "both of which actual possession seems to "have passed from the vendor to the pur-"chaser. To support it, the execution of the "bill of sale must be treated as a constructive "transfer of possession. But how can there "be any such transfer, actual or constructive, "upon a contract under which the vendor "sells that of which he has not possession, "and to which he may never establish a title. "The bill of sale in such a case can only be "evidence of a contract to be performed *in* "*futuro* and upon the happening of a con-"tingency of which the purchaser may claim "a specific performance if he comes into "Court showing that he has himself done all "that he was bound to do."

Having regard to this case and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both Jogessur Ghose and the plaintiff were to be parties.

This construction of the deed disposes of the case, for even if the plaintiff be entitled to complain of breach of contract by Jogessur, she cannot recover under it possession of the property against Jogessur, *a fortiori* she cannot recover against Issur Chundur Dutt, who was no party to the deed. It may be observed that even if this were a suit for specific performance of the contract, or damages for the breach of it, it would have been necessary for the plaintiff to have alleged either performance of her part of the contract, which was the payment of Rs. 3,000 to Dwarkanath Lahory, and such further sums as might have been necessary to the maintenance of the action, or at all events that she was ready and willing to perform this condition but was prevented by the wrongful act of the defendant. There are no such allegations; and if there had been, it does not appear that they would have been sustained by evidence, for the case set up on the part of the plaintiff was not performance of this condition but something very different, namely, the payment to the defendant himself of this sum of money,—a statement which is disbelieved by the High Court, in which disbelief their Lordships concur.

On these grounds their Lordships are of opinion that the judgment of the High Court is right, and they will humbly advise Her Majesty that this appeal be dismissed with costs.

The 29th May 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Act VIII of 1859 *s.* 113—*Appearance of Defendant—Time to produce Evidence.*

Case No. 1147 of 1871.

Special Appeal from a decision passed by the Additional Judge of Patna, dated the 24*th July* 1871, *affirming a decision of the Moonsiff of that district, dated the* 4*th May* 1871.

Shaikh Awlad (Defendant), *Appellant*,

versus

Shaikh Abdool Kureem (Plaintiff), *Respondent*.

Mr. C. Gregory for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

Where, if defendant had not appeared, the Court would have been bound under s. 113 Act VIII of 1859 to adjourn the hearing to a future day on the ground that sufficient time had not been given to him to appear and answer to the suit, it was held that his appearing ought not to put him in a worse position, and that it was a reasonable request made on his behalf by his vakeel that time should be given to him to produce such evidence as he could in support of his case.

Couch, C. J.—In this case the summons to the defendant to appear was served at 10 o'clock in the morning of the 2nd of May, and he was to appear at 12 o'clock on the 3rd. Now, if instead of appearing, he had stayed away, the case would have come under Section 113 Act VIII of 1859, which says that, if the plaintiff shall appear and the defendant shall not appear, and it shall be proved to the satisfaction of the Court that the summons was served on the defendant, but not in sufficient time to enable the defendant to appear and answer to the suit on the day fixed in the summons, the Court shall

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postpone the hearing of the suit to a future day to be fixed by the Court, and may direct notice of such day to be given to the defendant.

In this case, we think that if the defendant, instead of appearing as he did, had not appeared, the Court would have been bound to adjourn the hearing to a future day, because sufficient time had not been given him to appear and answer to the suit. That being the case, his appearing ought not to put him in a worse position; and it was a reasonable request, which was made on his behalf by his vakeel, that time should be given to him to produce such evidence as he could in support of the case that he put forward. We say nothing as to what that case is, or as to the mode in which he had stated it in his written statement; but it was too much to require him on so short a notice to produce his evidence in support of any defence that he might have.

Looking at this Section, and seeing that, in fact, if he had not come at all, the Court would have been bound to postpone the hearing, we think there is nothing in his appearing which ought to make any difference, and it was a case in which it was really proper that the hearing should be adjourned. Therefore, the suit must be remanded to the first Court to be re-heard.

The 1st June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Solehnamah—Construction—Right of Zemindar (to collect Tolls and Cesses)—Erection of Khuttees or Fish Market or Exchange)—Damnum Absque Injuriâ.

Case No. 1381 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 14th September 1871, reversing a decision of the Moonsiff of Namal, dated the 31st January 1870.

Bhooyah Okhoy Narain Doss Mohapattur (one of the Defendants), *Appellant,*

versus

Rajah Gujendro Narain Roy (Plaintiff), *Respondent.*

Baboos Sreenath Doss, Kalee Mohun Doss, and *Grija Sunkur Mojoomdar* for Appellant.

Mr. M. M. Ghose, and *Baboos Ashootosh Dhur, Mohesh Chunder Chowdhry,* and *Kumla Kant Sen,* for Respondent.

Where, by a *solehnamah* entered into about 100 years ago between plaintiff's and defendant's predecessors, the collection of certain tolls and cesses were reserved to the zemindar (the plaintiff), and certain *julkur* rights to the defendants the ijaradars. HELD, that the re-building of a *khuttees* or fish-market or exchange by the plaintiff upon his own land (the former one having been destroyed during his minority) was not in excess of his rights, or in contravention of the stipulations of the *rufanamah*, and that though the establishment of the *khuttees* would divert profit from the defendants to the plaintiff, yet the loss was a *damnum absque injuriâ.*

Glover, J.—THE plaintiff in this case sued to have his right declared to collect certain descriptions of tolls or cesses within certain boundaries, and to erect a *khuttees* on his adjacent zemindaree land for the purpose of collecting these tolls. He alleges that this right had been regularly exercised by his predecessors under the provisions of a *solehnamah* entered into between them and the predecessors of the defendants, whereby the defendants were restricted to the *julkur* rights in the *mohana.* Plaintiff goes on to say that, during his minority, the Court of Wards neglected the right of erecting *khuttees,* and taking tolls therein in consequence of which the defendants interfered and prevented plaintiff from erecting the *khuttees* when he attained majority, and so dispossessed him of his right.

It is admitted that in 1849 there was an Act IV of 1840 award made between the parties and in favor of the defendants, and also that a proceeding under Section 318 of the Criminal Procedure Code has resulted unfavorably to defendants.

The defendants admit plaintiff's title to the land on which he seeks to erect the *khuttees,* but deny his right to erect such a building, or to interfere in any way with the defendant's right of *julkur.* They also plead that the plaintiff has never exercised the right he now claims, and is barred by both special and general limitation.

I understand the word *khuttees,* as used throughout these pleadings, to mean a sort of mart or exchange to which fishermen resort for the purpose of selling their fish, and where intending purchasers congregate. It is a sort of small bazar, in fact, where buyers and sellers of fish may meet and arrange their respective transactions.

The Moonsiff held that, as neither plaintiff nor his predecessors had exercised the right now sought to be declared for upwards of 60 years, his claim was barred by limitation. He went on, however, to decide the merits of

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the plaintiff's claim, and thought that he (plaintiff) had no right under the *solehnamah* to erect the *khuttees* or to take tolls, inasmuch as that was a direct interference with the *julleas*, and with the defendant's rights of *julkur*.

The Subordinate Judge, on appeal, reversed this decision. He found on the evidence that the plaintiff had been in possession of the right claimed within 12 years of the institution of suit, and that his erecting *khuttees* and taking tolls or cesses from parties frequenting it, was not an interference with the *julleas*, as provided against by the 13th para. of the *solehnamah*. He decided that the plaintiff had the right of using what was admittedly his own land in the way he conceived to be most advantageous, and that he ought not to be prevented from erecting the *khuttees* in question.

The substantial objection taken to this finding is that the plaintiff never asked for permission to erect a *khuttees* on his own land, and that the Subordinate Judge has misunderstood the plaint. There is a further objection as to the way in which the Subordinate Judge has treated the question of limitation.

The first objection has a very plausible air, and I was at first inclined to think it fatal to the plaintiff's decree. On further consideration, however, it appears to me that the plaintiff's claim was really to collect certain tolls or cesses, and that in order to do this effectually, he claimed to be permitted to erect a *khuttees*. Of course, as the land was his own, he had no occasion to ask for this permission, except with reference to the use he meant to make of the building when erected; for without the *khuttees* there would be no place for people to congregate in, and no tolls could be collected.

I understand his plaint to mean this. Under a *solehnamah* entered into between my predecessors and the defendant's predecessors nearly 100 years ago, certain rights as to the collection of tolls and cesses were reserved to the zemindar, and certain *julkur* rights were reserved to the defendants, the ijaradars. To carry out my right, it is necessary that I should have a place to which boatmen and fishermen may resort, and this place I wish now to re-build, it having been destroyed during the time of my minority. Without a *khuttees* I cannot collect what under the *solehnamah* I am undoubtedly entitled to collect, and therefore I include in my plaint a prayer for permission to erect such a building.

This was in my opinion the view of the plaint taken by the Subordinate Judge, and on that view the judgment, though apparently confined to the giving authority for building a *khuttees*, is in reality a decree for all that the plaintiff asked.

The facts appear to be these:—The plaintiff is the zemindar, and within his estate lies an estuary, or perhaps a small arm of the sea, which is by the terms of the *solehnamah* held by the defendants on a perpetual lease at a yearly rent of Rs. 30. The defendants give permits to fishermen, and they have also, it would seem, a *khuttees* or mart within the limits of their own property where these fishermen, and probably other boatmen have been in the habit of resorting. A rival *khuttees*, and one probably better situated, would, of course, diminish the defendant's influence and profits, and they accordingly denounce it as in interference with their rights under the *solehnamah*.

Article 13 of the *solehnamah* is to the following effect:—Beer Narain (ancestor of plaintiff) is the owner of the *mohana* (mouth of river estuary) and he shall take all profits that come from the sea (meaning flotsam, jetsam, slip-dues, and the like). There is no *mohasool* tax in the *mohana*; but if there be, Beer Narain shall take it. The *julkur* shall remain in *ijara* with Modhoo Soodun (defendant's ancestor) at a yearly *jumma* of Rs. 30, and Beer Narain shall have no power to interfere with the fishermen.

Now this document gives the plaintiff power to collect all cesses that may at any time be leviable in the *mohana* or estuary, so long as he does not interfere with the defendant's fishermen. He might, for instance, tax all boats going and coming so long as he let the fishermen's boats alone, and this protection for their tenants was the sole privilege accorded to the defendants by the *solehnamah*? In all other respects the zemindar's rights were acknowledged and specified.

What then does the plaintiff ask which is contrary to the stipulations of the *solehnamah*; He does not interfere with the fishermen, that is clear. He does not force any of them, or indeed any one else to frequent his *khuttees*, he merely establishes such a place in a convenient situation close to the *mohana*, but upon his own land, and announces his intention of taxing those who make use of it. In asking for permission to do this, I do not see that he in any way exceeds his rights or contravenes the stipulations of the *ruffanamah*. If the fishermen prefer his *khuttees* to the *khuttees* of the defendants,

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the latter cannot complain; and if the general public of those parts would rather attend his mart than the defendants, the plaintiff is surely not to blame. I have no doubt that the establishment of this *khuttees* will divert profit from the defendants to the plaintiff, but the loss is a *damnum absque injuriâ.* It appears to me that the decision of the Subordinate Judge on this part of the case, though somewhat clumsily worded, is substantially right, and should be upheld.

Then as to limitation. On the general question the Subordinate Judge has found on the evidence that the plaintiff has proved possession within 12 years, and his finding cannot be questioned in special appeal.

It is objected that he has come to no decision on the issue of special limitation, but I do not find that the point was at all pressed before him. And the non-reversal of the Act IV award cannot prejudice the plaintiff's title if he has one. Granting that the Act IV award stands for ever, the effect would be absolutely *null* as against a finding by a Civil Court on the title.

On the whole, therefore, I am of opinion that the Subordinate Judge's decision is not wrong on any point of law, and that this special appeal should be dismissed with costs.

Kemp, J.—I concur in dismissing the special appeal. The plaint is not very explicit as to the relief asked for, but, after hearing the argument, and considering the whole case, I think that the decree of the Lower Appellate Court is correct. The relief which has been afforded, is not on the whole inconsistent with the case made out by the plaintiff.

The 3rd June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Case No 1192 of 1871.

Notice of Enhancement—Conveyance of Rent (by Purchase or Lease)—Act X of 1859 *s.* 13.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 22*nd May* 1871, *reversing a decision of the Moonsiff of Durbhangah, dated the* 22*nd February* 1871.

Khaskee Roy and others (Plaintiffs), *Appellants,*

versus

Furzund Ali Khan (Defendant), *Respondent.*

Mr. Lingham for Appellants.

Mr. C. Gregory for Respondent.

A person by whom notice of enhancement was served at the time when the rent was payable to him, is entitled either entirely by a sale, or partially by a lease, to convey to the purchaser or lessee the rent with the incident of its being liable to enhancement under that notice. The purchaser or lessee is not obliged to serve fresh notice of enhancement.

Couch, C. J.—In this case, the notice of enhancement was served by the person to whom at the time of the service of the notice the rent was payable, and that appears to be what is required by the Act. The question, indeed, which is raised here is, whether the notice having been served by the person to whom the rent was then payable, that person can, either entirely by a sale, or partially by a lease, convey to the purchaser, or lessee, the rent, with the incident of its being liable to be enhanced under that notice. We do not see any reason that he should not be at liberty to do so: there is nothing in the Act which prohibits it. The enhancement is an incident to the rent which he conveys away, and it would cause the greatest inconvenience, and might sometimes cause considerable injustice, if it was not possible for the zemindar, who had given notice of enhancement, to make any disposition of his property, without the whole of the notices falling to the ground, and the person who took from him, whether as purchaser or lessee, being obliged to serve fresh notices before any steps could be taken to enhance the rent. We cannot think that that was intended by the Legislature, and there are no words in the Act which would lead us to suppose that it was.

With regard to the case in the VIII Weekly Reporter, page 72,* we cannot help thinking that it must be in some way misreported, and that the learned Judges did not decide what they are reported to have done. Mr. Justice Glover say:—When the notice "was served, the zemindar was in possession "and in receipt of rent. No farm had been "given, and the farmer did not exist. The "wording of Section 13 is imperative and "makes it absolutely necessary that the "party to whom the rent is payable should "be the one to issue notice." So far that is exactly what the Section does say, and "when that notice was served, the farmer was not that party." No doubt, the farmer was not that party then, and was not the party to serve the notice; the zemindar was the party then,

* The report has again been compared with the original judgment and found to be perfectly correct.

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and the party to serve the notice. The Judges seem to think that the notice must be served not by the party to whom the rent was payable, but by the party to whom the enhanced rent would be payable. Then they say: A ruling of this Court (III Weekly Reporter, p. 157) supports this view of the question; but really it does not, and this makes us think there is some mistake in the report, and that it cannot be treated as a decision on this point in favor of the present respondent.*

We think that here the notice was a good notice at the time it was given, and that the lessee is entitled to the benefit of it, and may bring the suit for enhancement. Any defence which the tenant might have against the zemindar would be good against the lessee. The tenant is not in any way injured by the lessee being allowed to bring the suit upon the notice which was given by the zemindar.

The decree of the Court below must be reversed, and the suit remanded for re-trial. The appellant will have the costs of this appeal.

The 3rd June 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Evidence (Court referring to, inadmissible).

Case No 668 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 17th March 1871, affirming a decision of the Moonsiff of Lushkurpore, dated the 17th September 1869.

Goluck Chunder Doss (one of the Defendants), *Appellant,*

versus

Chunder Pershad Doss and another (Plaintiffs), *Respondents.*

Mr. M. M. Ghose for Appellant.

Baboo Kumla Kant Sen for Respondents.

In this case the Lower Appellate Court was held justified in referring to a written statement which was not admissible in evidence.

Mitter, J.—In this case we are not prepared to say that there was no legal evidence on the record on which the Lower Courts could have come to the conclusion at which they have arrived after the remand. There is the evidence of two witnesses at least which goes to prove plaintiff's previous possession as well as his right in the bheels in dispute. It has been said that the Lower Appellate Court has committed an error in law in treating the written statement of Dole Gobind Koybutto, who is a defendant in this case, as evidence as against the special appellant. But the Lower Appellate Court distinctly states in its judgment that that statement is not admissible in evidence, and it merely refers to it for the purpose of remarking that the allegations contained in that written statement were fully borne out by the testimony on oath of the witness Juggurnath Doss.

For the above reasons, we dismiss this special appeal but without costs, as no one appears for the opposite party.

* See 3 W. R., Act X Rulings, and not Civil Rulings, p. 157.

The 4th June 1872.

Present:

The Hon'ble H. V. Bayley and the Hon'ble W. Markby, *Judges.*

Small Cause Courts (References by)—Act XI of 1865 s. 22—Inferences of fact—Privity of Contract.

Reference to the High Court by the Judge of the Small Cause Court of Sealdah and Howrah, dated the 28th March 1872.

Gujendro Mohun Shaha, *Plaintiff,*

versus

The Eastern Bengal Railway Company, *Defendants.*

Baboo Sreenath Doss for Plaintiff.

Mr. Fergusson for Defendant.

What a Small Cause Court Judge is required to submit under Section 22 Act XI of 1865, is not whether, upon the evidence given in the case which the Judge has sent up, he is right in the conclusion which he has come to, but some question of law or usage having the force of law, or some question as to the construction of a document which construction may affect the merits of the decision.

Held in this case, upon the facts stated, that the Judge was capable under the law of drawing the inference which he has drawn that there was no privity of contract between the plaintiff and the defendants.

Case.—This case has been remanded* to me by the Honorable Judges of the High Court by their letter No. 374, dated the 23rd of February last, in order that I might receive evidence as to the liability of the defendant Company. I have accordingly examined Messrs. Prestage, Agent; Brander, Traffic Superintendent; Calder, Chief Accountant; Stewart, in charge of Enquiry Office of the Eastern Bengal Railway Company, and Cap-

* 17 W. R., 240.

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tain Scott, Manager of I. G. S. N. Company, and notes of their evidence and the document produced by them are forwarded herewith for the Court's information. My former reference described the course of dealing between the two Companies, and nothing very material has now been elicited in addition to what is stated in that reference with regard to the relation in which the two Companies stood towards each other. One fact has now been ascertained which I did not consider it necessary to enquire into before, *viz.*, that the loss of the goods occurred while in the hands of the defendants. This appears from the evidence of Mr. Stewart, an officer of the Company, whose duty it was to enquire into such cases, and who wrote the letter to plaintiff inviting an amicable settlement.

I am still of opinion that the defendant Company is not liable notwithstanding that the loss took place while the goods were in their custody, on the ground that there was no privity of contract between them and the plaintiff. The goods were delivered by the latter to the I. G. S. N. Company as per bill of lading, and that Company undertook to deliver them to Sealdah. The relation in which the two Companies stood to each other seems wholly inmaterial as far as plaintiff is concerned. The forwarding note and the invoice show that the Railway Company took the goods over from the I. G. S. N. Company at Kooshtea, and undertook to deliver them, not to the plaintiff or his consignee, but to the I. G. S. N. Company itself at Sealdah. It appears that the latter Company had sheds of their own on the premises of the Railway Company at Sealdah, and a man in charge of them, and this man, assisted by the Railway Company's clerks, used to deliver the goods on arrival to the person (in this case the plaintiff) who produced the bill of lading. In the present case, the drums of jute which plaintiff did get delivery of were delivered to him by the Railway Company's servants: it appears, however, from Captain Scott's evidence that plaintiff had also applied for delivery to the I. G. S. N. Company, but I do not think that the part delivery made by the defendants clothe them with any liability, as far as plaintiff is concerned, to deliver the remainder.

There is a passage in Addison on Contracts a few pages further on than the extract quoted in my former reference, which seem decisive of the point, under the heading *Parties to be made Defendants, Carriage of Passengers and Goods over distinct lines of Railway.* 5th edition, pp 504-5.

There is this difference between the present case and those there quoted, that then the whole of the freight was paid to the Company to whom the goods were originally delivered, and not to the Company who was to carry them to their ultimate destination. I at first felt some doubt whether acceptance of freight would not clothe the second Company with liability, and it was the difficulty I felt on this point which induced me to make the former reference; but, on consideration, I do not think that this really makes any difference in the position of the parties. If the I. G. S. N. Company, the original contractees, choose to assign to a third party the freight primarily due to themselves, this surely will not make the assignee liable on the original contract to which he was an entire stranger. As, therefore, I am still of opinion that there is nothing in the circumstances of the case to make it an exception to the general rule, that when there is no privity of contract between the plaintiff and the defendant no action can lie for its breach, I have again dismissed the case subject to the decision of the High Court on the question submitted.

The Judgment of the High Court was delivered as follows by—

Markby, J.—When this case was before this Court on the former occasion, we thought that the Judge of the Small Cause Court was wrong in declining to go into the case simply on the ground that the contract was originally made with the India General Steam Navigation Company, and there was no privity of contract between the plaintiff and the defendant. We thought that, if the evidence had been gone into, it was possible the plaintiff might be able to establish that there was notwithstanding a contract between him and the Eastern Bengal Railway Company in which the Railway Company were liable if the goods were lost while in their custody. The case was accordingly sent back to be tried. It has now come again to us with the finding that the goods were lost while in the custody of the Railway Company, but the Judge says that there was no privity of contract between the plaintiff and the Railway Company. He has, therefore, again dismissed the case subject to the decision of the High Court on the question submitted; but, though the Judge speaks of the "question submitted," there is in fact no question submitted for the opinion of this Court. It has been suggested by the vakeel who appears for the plaintiff that the question which is intended to be submitted is whether, upon

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the evidence given in the case which the Judge has *sent* up, he was right in coming to the conclusion which he has come to. Now, it was only the other day held in a similar case, referred by a Judge of the Small Cause Court in Calcutta, that this is not the proper form in which a case has to be submitted.

What the Judge was required to submit under Section 22, Act XI of 1865, was some question of law or usage having the force of law or some question as to the construction of a document which construction may affect the merits of the decision. The only question which we can consider in the case now before us is, whether upon the facts stated the Judge of the Small Cause Court was capable, under the law, of drawing the inference which he has drawn, *viz.*, that there was no privity of contract between the plaintiff and the defendant. The propriety of the inference is a question of fact, not a question which we can deal with in a reference like this. It seems to us that it was quite open to the Judge to find, if he thought proper, upon the evidence that there was no privity of contract between the plaintiff and and the defendant. The evidence of that fact, and the only evidence as far as we can see, was that the freight was paid by the plaintiff to the defendant, but it has been explained by one of the witnesses, the agent of the Eastern Railway Company, Mr. Prestage, that this was an exceptional arrangement adopted only in two or three cases. The ordinary practice is stated to be that the freight is paid into the office of the I. G. S. N. Company and the remuneration which has to be paid by them to the Railway Company is a matter of subsequent arrangement, and the reason why that arrangement was departed from in the few cases referred to was that the Railway Company had a large claim against the Navigation Company, which the latter was desirous of liquidating. The interpretation which the Judge has put upon this is that the freight was in this case, as in all other cases, payable to the I. G. S. N. Company, and it was only paid to the Railway Company under what may be called a special assignment. We think, therefore, that the Judge of the Small Cause Court was quite at liberty to put the interpretation on the facts and to draw the inference of fact which he has done in this case, *viz.*, that no privity of contract has been established between the plaintiff and the defendant. Therefore, our decision is that the decision of the Judge of the Small Cause Court should stand.

The plaintiff should pay to the defendant two gold mohurs as costs in this Court.

The 5th June 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Jurisdiction of Civil Courts—Partition under Regulation XIX. 1814 (*Meaning of*).

Case No. 1156 of 1871,

Special Appeal from a decision passed by the Subordinate Judge of Bhangulpore, dated the 21st June 1871, *affirming a decision of the Moonsiff of Soorujgurh, dated the* 31st *August* 1870.

Mussamut Bhurtun Koeree (Defendant), *Appellant,*

versus

Tangore Singh (Plaintiff) *Respondent.*

Mr. J. S. Rochfort for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

It is beyond the power of the Civil Courts to make a partition under Regulation XIX of 1814, which means an apportionment by the Revenue Authorities of lands into shares and an assignment of the fair and proportionate jummas and areas according to those shares.

Bayley, J.—We think this special appeal must be dismissed with costs.

It is admitted that the question of the right of the sister's son to inherit under the Hindoo Law need not be adjudicated, as that point has been settled by a decision of the Full Bench in the case reported at page 49, Full Bench Rulings, Volume XIII, Weekly Reporter.

The only point pressed upon us is that involved in the second issue of the judgment of the first Court which it is contended has not been specifically adjudicated upon, and it is urged that the Lower Appellate Court should have specifically partitioned the 8 annas share of the property and given a specific decree accordingly.

Now this partition was beyond the power of the Court to make. Partition under Regulation XIX of 1814 means an apportionment by the Revenue Authorities of lands into shares and an assignment of the fair and proportionate jummas and areas according to those shares. It is quite open to plaintiff having obtained a decree for the 8 annas to go to the Collector and apply for a partition under the provisions of Regulation XIX of 1814.

The special appeal is dismissed with costs.

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The 5th June 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Ijmalee Estate — Distinct Share (as between Sharer and Lessee) — Ejectment — Notice— Tenant holding over—Indigo Cultivation—Special Appeal.

Case No. 1051 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 16th June 1871, affirming a decision of the Subordinate Judge of that district, dated the 11th August 1870.

L. J. Crowdy (Defendant), *Appellant,*

versus

Omrao Roy (Plaintiff), *Respondent.*

Baboos Rajendro Nath Bose and *Umur Nath Bose* for Appellant.

Baboo Kalee Kishen Sen for Respondent.

A share of an *ijmalee* estate may be joint and not separately defined in a revenue point of view until a *butwara*, and yet it may be a distinct share comprising distinct *puttees* or lands exclusively belonging to the holder of such share as between him and his lessee.

In a suit for ejectment, the Court in special appeal declined to allow the defendant to take the objection not taken in the Lower Courts, that plaintiff, having allowed him to hold over and to cultivate with indigo, could not eject him without sufficient notice to quit at least until the indigo season was over.

Bayley, J.—We think this special appeal must be dismissed with costs.

The plaintiff sued to eject one Mr. Crowdy as holding, after the expiry of the term of his lease, certain *puttees* which the plaintiff alleged were his separate and distinct lands and in his separate possession. This allegation of the plaintiff has been found by both the Lower Courts upon the evidence on the record to be true. Right or wrong there being some evidence, we cannot interfere with the finding of fact upon it in special appeal.

It is, however, pressed upon us that the Lower Appellate Court has committed an error in law in considering the lands in suit to be the distinct *puttee* of the plaintiff because the plaintiff, in conjunction with the other co-sharers, has applied for a *butwara* which is in the course of execution, and that until the *butwara* is completed with the sanction of the superior Revenue authorities, and until the areas and the *jummas* are separately defined and arrangement made as regards the assessment of each parcel of land, the lands must be considered to be joint and *ijmalee* as before, but the Lower Appellate Court most clearly finds as a fact that, although the share leased to Mr. Crowdy was the share of an *ijmalee* estate in a revenue-paying point of view, yet it was a distinct share comprising distinct *puttees* or lands exclusively belonging to the plaintiff as between him and his lessee Crowdy. The Lower Appellate Court further finds that even the defendant's own witnesses say that as a fact many sharers in the estate were in possession of distinct lands, and that they do not prove that since the application for the *butwara* a new system of collection has been introduced, or that the rent is being collected *ijmalee.*

The next objection taken is the third ground in the petition of special appeal which is "that the plaintiff having allowed the defendant to hold on after the termination of "his lease for some years, and to cultivate "the lands in his possession with indigo, is "not entitled to eject the defendant without "sufficient notice to quit, at least until the "indigo season is over."

It is sufficient to say that this objection is altogether a new one. It was never taken in either of the Lower Courts, no opportunity was given to adduce evidence on the point, and no judgment has been passed by the Lower Appellate Court upon it. We see, therefore, no reason to allow this objection at this last stage of the case.

The special appeal is dismissed with costs.

The 5th June 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Suit for Rent (by Co-sharer)—Butwara—Relation of Landlord and Tenant — Joinder of Parties—Cause of Action.

Case No. 1064 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 8th June 1871, reversing a decision of the Moonsiff of Jamooy, dated the 28th January 1871.

Khedoo Gope Jotedar and others (Defendants), *Appellants,*

versus

Baboo Khoob Lall Singh and another (Plaintiffs), *Respondents.*

Mr. C. Gregory and *Baboo Nil Madhub Bose* for Appellants.

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Baboo Motee Lall Mookerjee for Respondents.

The several proprietors of an estate entered into separate possession of their respective shares, and the ryots paid separately to each proprietor in whose share their lands fell the rents due on account of those lands, in anticipation of the completion and confirmation of a *butwara* for which proceedings had been taken but were subsequently quashed by the Commissioner on the ground that they included lands which had since been resumed as a separate estate. Plaintiff sued for a fractional share of the rent payable to him by defendant; but inasmuch as defendant's lands fell within the share of a proprietor other than plaintiff, and as plaintiff had not joined the other co-proprietors as parties, and had not asked the Court to determine the question of his rights as against those co-proprietors under the Commissioner's order—HELD that no relation of landlord and tenant existed between plaintiff and defendant, and that plaintiff had no cause of action.

Ainslie, J.—THIS was a suit for rent by one of three share holders of a certain mehal against one of the ryots of a certain *puttee* in that mehal.

It appears that, so far back as the year 1861, proceedings were taken under Regulation XIX of 1814 for partition of the estate amongst the several proprietors, and each proprietor obtained separate possession of his respective *puttee*, but whether it was through the *butwara* ameen, or by any private arrangement between themselves, does not appear. However, this much is evident that the parties entered into possession of their respective shares in anticipation of the completion and confirmation of the *butwara*.

In the year 1870, that is, at the very end of the year 1277, the Commissioner quashed the *butwara* proceedings on the ground that they included lands which had been subsequently resumed as a separate estate.

The plaintiff contends that the effect of this was to re-place him in the position which he occupied before the year 1861, and that therefore he has a right to sue for a fractional share of the rent payable by each ryot in the estate.

The Lower Appellate Court has adopted this view and given the plaintiff a decree.

We are of opinion that the decision of the Lower Appellate Court is erroneous in law, and must be set aside. It is clear that, from the time when the proprietors of the estate came to the agreement by which they entered into separate possession of particular lands, the ryots have continued to pay separately to the parties in whose share their lands fell the rents due on account of those lands, and therefore in respect of the lands of the defendant which fell within the share of a proprietor other than the plaintiff, no relation of landlord and tenant has existed between the plaintiff and the defendant for eight or ten years. This being so, and as the plaintiff has not joined the other co-proprietors as parties in this suit, and has not asked the Court to determine the question of his rights as against those co-proprietors under the Commissioner's order of 1870, but has simply sued a tenant as if he had, from previous years, been receiving rent from him, there really is no cause of action, and the Court has no power to pass a decree in the suit.

The decree of the Lower Appellate Court is accordingly reversed, and the plaintiff's suit dismissed with costs of all Courts.

The 5th June 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Findings of Lower Court—Inferences by High Court—Limitation—Adverse Possession.

Case No. 1185 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhangulpore, dated the 30th August 1871, reversing a decision of the Moonsiff of that district, dated the 13th February 1871.

Ghunessam Singh Kooer and others (Plaintiffs), *Appellants,*

versus

Lalla Kalee Pershad and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Kalee Kishen Sen* for Appellants,

Mr. C. Gregory and *Baboo Lukhee Churn Bose* for Respondents.

Although the Court is not limited to the express findings of the Court below, but is justified in looking to the terms of the judgment and in assuming by way of inference whatever it may clearly appear the Court intended to find as a fact, yet when the judgment of the Lower Court contains passages which clearly show that the Court did not intend to express any opinion on a particular point, the Court is not justified in drawing the inference that it did consider and determine that point. As when the Subordinate Judge said that he decided the case "without regard to the question of limitation," which was tantamount to declining to enter into the question of adverse possession, this Court could not suppose that he intended to determine that there was no possession by the plaintiff.

Ainslie, J.—THE plaintiff in this suit is the holder of a julkur mehal called Julkur Banoodut, consisting of 91 *phandees*. He alleges that he has been dispossessed by the defendant from three out of those parcels, and he claims to be replaced in possession on the ground of title and ancient occupation of the julkur in such manner as is customary under a settlement made by the Government.

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The defendant's allegation was that the three *phandees* in dispute were *dobahs* of Mozuffurpore Sadik, and not *phandees* of Julkur Banoodut; that the plaintiff's julkur was confined to Mouzah Bikrampore Chuckramee; that Mozuffurpore Sadik did not appertain to Bikrampore Chuckramee, and no settlement was made with plaintiff within Mozuffurpore Sadik. The defendant also pleaded limitation.

The first Court found in favor of the plaintiff; and on the plea of limitation its remarks are as follow:—"It has been satisfactorily proved that plaintiffs were in possession of the property in dispute within twelve years. There is no doubt that from a long time plaintiffs were in possession of the property in dispute from which they have been lately dispossessed by defendants who opposed the plaintiffs in their fishing."

The defendant having appealed, the Subordinate Judge laid down the following issues:—*Firstly*,—Was the suit barred by limitation? *Secondly*,—Whether the disputed *phandees* belonged to Julkur Banoodut, and were possessed by plaintiffs? and, *Thirdly*, What were the real facts relative to the settlement of Julkur Banoodut, and whether the plaintiffs were entitled to claim the disputed Julkur *phandees* situated in Mouzah Mozuffurpore Sadik, or whether the disputed lands were mere *dobahs* within the defendant's mouzah? The Subordinate Judge then goes into a lengthy judgment which is entirely confined to the question of the title of the plaintiffs, and finds that the plaintiffs could not claim title to any parcel situate outside of the topographical boundaries of Mouzah Bikrampore Chuckramee. At the end of his judgment the following passage occurs:—"In the absence of proof of the plaintiff's "right, and *without regard to the question* "*of limitation, it is ordered* that the appeal "be decreed and the Moonsiff's decision "reversed."

In special appeal, it has been contended that the Subordinate Judge is wrong in determining the question of title without any consideration of the question of possession which is a material point in the case.

Mr. Gregory in reply has insisted that the Subordinate Judge has in various parts of his judgment gone into the question of possession and come to a conclusion adverse to the plaintiffs on that point; but although I think that this Court is not limited to the express findings of the Court below, but is justified in looking to the terms of the judgment and in assuming by way of inference whatever it may clearly appear that the Court has intended to find as a fact, yet I do not think that when the judgment of the Lower Court contains passages which clearly show that the Court did not intend to express any opinion on a particular point, this Court is justified in drawing the inference that it did consider and determine that point. When the Subordinate Judge says that he decides the case "*without regard to the question of limitation*," he certainly declines to enter into the question of adverse possession; had he decided upon the question of adverse possession and found it in favour of the defendant that would have at once disposed of the case. We cannot suppose, therefore, that he intended to determine that there was no possession by the plaintiff. If he was not prepared to find that there was no such possession, he was bound to take into consideration the possession of the plaintiff as an element of the proof on the point of title.

It may or may not be that the *phandees* in dispute were intentionally included in the original settlement made very many years ago; but in the absence of anything to show that they were excluded, the fact of long possession, if proved as the Moonsiff holds it to be, must be taken as a very strong piece of evidence as to what was intended at the time of settlement. I would even hold that such long possession is sufficient in itself to create a title irrespective of any other title which the settlement may give.

In this view of the case, I would reverse the judgment of the Lower Appellate Court and send the case back to that Court for a distinct finding on the question of possession. Having come to this finding, the Lower Appellate Court should re-consider the question of title with reference to that finding and pass a decision accordingly.

Bayley, J.—I quite concur in the observations made by Mr. Justice Ainslie. I do not see how in the face of the words *bila* (without) *lehaz* (consideration) *ozur* (of the plea) *tumadi* (of limitation) it is ordered that the case be dismissed; it can be reasonably contended that the Lower Appellate Court did find on the question of adverse possession. The mere grammatical construction of the above few plain words clearly shew that no such question was considered by the Lower Appellate Court; and, irrespective of that, if we read the contents of the judgment of the Lower Appellate Court, it is clear that the Subordinate Judge considers that because the plaintiffs failed to show that the lands lay beyond the topographical limits of Talook

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Bikrampore Chuckramee, therefore he thought it unnecessary to consider any other point. It has been repeatedly held that adverse possession for a length of time undisturbed by any other party, is a title in itself as against all other parties, and in this view the Subordinate Judge was wrong in saying that it was not necessary to consider the question of possession.

The 5th June 1872.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Onus probandi—Plea of bonâ fide Purchaser for Value — Benamee — Apparent Title — Vendor registered as sole Owner.

Case No. 1216 of 1868.

Special Appeal from a decision passed by the Judge of Jessore, dated the 31st January 1868, reversing a decision of the Principal Sudder Ameen of that district, dated the 31st July 1865.

Bibee Jeebunissa and others (Plaintiffs), *Appellants,*

versus

Umul Chunder Chacklanuvis and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

In a suit to recover possession, the *onus* is on the defendant who pleads that he is a *bonâ fide* purchaser for value without notice of plaintiff's title, to make out that plea.

The *benamee* system being one of the recognized institutions of the country, a purchaser does not discharge himself of the *onus* which lies upon him, by looking only to the apparent title.

Nor is the *onus* discharged by the mere fact of the name of the defendant's vendor being alone registered in the zemindar's books as the exclusive owner of the putnee, or of the vendor being only sued by the zemindar for the rent of the putnee.

Mitter, J.—THIS case was remanded to the Lower Appellate Court by a Division Bench of this Court with directions to try whether the defendant is a *bonâ fide* purchaser for value or not.

It seems to me very doubtful whether the doctrine of *bonâ fide* purchaser for value can be introduced in this country for the purpose of defeating the vested rights of parties. But as this point has been settled by the order of remand, the only question which I have to determine is whether the instructions contained in that order have been properly carried out or not.

I am of opinion that this question ought to be answered in the negative.

In the first place, I find that the Judge has laid too much stress upon the weakness of the proofs adduced by the plaintiffs. The plaintiffs have already proved their own part of the case by showing that they were the lawful owners of the share sued for by them; and this is not disputed. The plea of *bonâ fide* purchaser for value is a special plea taken up by the defendant for the purpose of depriving them of that ownership; and the *onus* of making out that plea was clearly upon him. This point, I apprehend, has been set at rest by the decision of the Privy Council in the case of Vaiden Seth Sarn *v.* Luckpathy Royjee, reported in page 483 of Sutherland's Privy Council Judgments. "Let it be conceded," says the Lords of the Judicial Committee, "that a purchaser for "value *bonâ fide* and without notice of the "charge, whether legal or equitable, would "have had in these Courts an equity superi- "or to that of the plaintiff, still such inno- "cent purchase must be, not merely asserted, "but proved in the cause. To give effect "to the legal estate as against a prior equit- "able title, would be an adoption of the "English Law; and to adopt it and yet "reject its qualifications and restrictions, "would be scarcely consistent with justice." These remarks conclusively show that if we are at all to adopt the doctrine above referred to, we must take care to adopt it with all its qualifications; and the defendant is therefore bound to make out affirmatively that he is really a *bonâ fide* purchaser for value without notice of the plaintiff's title.

In the next place, the Judge says, "I con- "sider that he (the defendant) had every "reason to believe that Hybutoollah was "sole owner; the putnee was to be sold for "rent as his putnee and called so in the "proclamation of intended sale. It was "pledged for 1,004 rupees to a Mahajun as "such; to liquidate which and other debts, "Hybutoolla's deed of sale states that he "parted with it his own property, and I do "not therefore think that defendant can be "held to have failed to take all proper means "as to ascertaining the ownership of the "putnee before he bought it. The story "told by Nityanund, one of the defendant's "witnesses, to prove the contrary of plaint- "iff's witnesses, as to Ekramoolla denying "being a co-sharer when Hybutoolla asked "him to pay part of the Selamee money at "the time of his taking the putnee from "the zemindar, seems to me as little worthy

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" of credit as is the evidence given by the " opposite party. No cause has been really " shown why the purchaser should have sup- " posed that other than his vendor had any " share; the property was not ancestral, " consequently no inference as to joint pro- " perty could be merely on the ground of " brotherhood. There was no apparent " owner except the vendor, and there was " no reason why the purchaser should sus- " pect that there was any other; and I do " not believe that any further enquiry by " him would have led him to believe other " than that Hybutoolla was sole owner." But what were the enquiries which the defendant did actually make in order to satisfy himself that Hybutoolla was really the sole owner of the property? That Hybutoolla was the sole apparent owner cannot be of much consequence. The *benamee* system which notoriously prevails in this country is not prohibited by law, except in certain specified cases; and I may therefore safely affirm that it is one of the recognized institutions of the land. It would, therefore, be extremely dangerous to hold that a purchaser in this country has to look only to the apparent title in order to avail himself of the doctrine under our consideration. "The law in India" says their Lordships in the case already cited, has not enabled the purchaser to look "only to the apparent title " on the Collector's books, or the presumed " title of the owner in possession. It is " beyond the province of a Court of Justice " to effect, by decision, a change so import- " ant as that which is involved in the prin- " ciple of this decision."

The next fact relied upon by the Judge is that the only party who had been sued by the zemindar for the rent of the putnee was Hybutoolla, and that the putnee was advertised for sale as his property. Neither of these two circumstances can, in my opinion, discharge the defendant of the *onus* which lies upon him. It is admitted on all sides that Hybutoolla had, on several occasions previous to the defendant's purchase, distinctly told the zemindar that the plaintiffs were shareholders in the putnee; and if, notwithstanding such information, the zemindar still thought proper to sue Hybutoolla alone for rent, and to cause the putnee to be advertised for sale as Hybutoolla's property, there seems to be no reason why the defendant should be allowed to take any advantage of those proceedings, which, so far as the plaintiffs are concerned, must be considered as proceedings between strangers, and therefore falling within the category of *res inter alios*. It is to be borne in mind that the name of Hybutoolla alone was registered in the zemindar's books; and if the mere fact of a zemindar suing the registered tenant alone for rent, a practice very frequent in this country, is to be taken as sufficient or as any proof of the exclusive right of that individual, all that I can say is that no *benamee* title, however honest, would be safe. Did the defendant go to the zemindar and ask him for any information as to who the real putneedars were? Not a tittle of evidence has been given on this point; and in the absence of such evidence I do not think that the defendant ought to be permitted to take shelter under the proceedings in question, and thereby to defeat the vested rights of the plaintiffs.

Much stress has been laid by the Judge upon a recital in the bill of sale obtained by the defendant from Hybutoolla to the effect that the property was sold for the purpose of liquidating a prior mortgage executed by Hybutoolla in favor of a third party and for the satisfaction of certain other debts contracted by him. But it is perfectly clear that this recital cannot be used as evidence against the plaintiffs.

Lastly, the Judge says that the defendant had no reason to suspect that Hybutoolla was not the sole owner of the property. But the qustion is, did the defendant make such reasonable enquiries to satisfy himself about the real nature and extent of his vendor's title, such as every prudent and honest man in his position would be expected to make? Both the Lower Courts found on a previous occasion that the plaintiffs were in joint possession with Hybutoolla up to the date of their dispossession by the defendant. This finding has not been disturbed at any subsequent stage of the trial, and we must therefore take it to be conclusive between the parties. Now, it is beyond all question that one of the first points, to which an intending purchaser would naturally direct his attention, is the possession of his vendor. Did the defendant make any enquiry on this point? Did he go to the ryots in actual occupation of the land, and ask them for any information as to who were the parties to whom they had been paying thier rents? He seems to have done nothing of the kind; and yet we are asked by him to hold that he had made all the reasonable enquiries which a person in his position ought to have made. The Judge says that it is admitted that the property was not ancestral, and that there was no presumption; therefore that it was the joint property of Hybu-

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toolla and his brothers. But did the defendant enquire as to how the property was acquired? He gave some evidence on this point, it is true; but the Judge has expressly rejected that evidence as unworthy of credit. The fact is that the defendant rested his case in the Court of first instance entirely upon the allegation that his vendor was the exclusive owner of the property in question; and it is only after that allegation had been conclusively found against him that he has thought proper to take refuge under the doctrine of *bonâ fide* purchaser for valuable consideration without notice.

For the above reasons, I would reverse the decision of the Lower Appellate Court, and restore that of the Court of first instance with all costs.

Jackson, J.—From the judgment which has just been delivered by my learned colleague, Mr. Justice Mitter, it will be obvious enough to the gentlemen engaged in the appeal that the Court has had considerable doubt as to the decision to which it should come in this case.

I am bound to say, after much deliberation, that I am satisfied that the judgment of my learned colleague indicates the true principle upon which the enquiry should have been conducted by the Lower Appellate Court; and, tested by that principle, the judgment of that Court is defective and erroneous.

I ought also to add that I am further satisfied—although at one time I was inclined to hold a different opinion—that the decree which will remain after the reversal of the Lower Appellate Court's decision, is the right decree on the merits in the case.

The plaintiffs will recover possession, and they are entitled to their costs in all the Courts.

The 6th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Markby, *Judge*.

Court Fees Act, 1870—*Ad valorem Fee—Letters of Administration—Debts (not to be deducted) —Value of House (not Rent).*

Case referred to the Hon'ble the Chief Justice by Mr. R. Belchambers, Taxing Officer of the High Court, under Section 5 of the Court Fees Act, 1870.

In the Goods of Ram Chunder Doss, deceased.

Mr. Phillips for the Petitioner.

The Advocate-General for the Government.

In estimating the amount of the *ad valorem* fee chargeable under Clause II Schedule I of the Court Fees Act, 1870, the fee must be paid in respect of the property, without deducting the amount of the debts to be paid out of it.

The *ad valorem* fee should be charged on the value of a house, and not on the rent of it.

Reference.—In this case the deceased died intestate, leaving a widow, and two adult and three minor sons, and three adult married and two minor unmarried daughters, and leaving:—

(1.) A house, No. 71, Bentinck-street, in Calcutta, the monthly rent of which is Rs. 260, and which is valued at Rs. 20,000.

(2.) A house, No. 23, Baboo Ram Seal's Lane, in Calcutta, which is occupied as the family dwelling-house, but which is *debutter* property, having been dedicated by the grandfather of the deceased to the family idol.

(3.) A garden-house at Soorah in the 24-Pergunnahs, valued at Rs. 800, and which stands mortgaged for Rs. 700 and interest.

(4.) Outstandings and stock-in-trade valued at Rs. 16,000.

On the other hand, there are, it is alleged, debts (other than the mortgage-debt) due by the estate amounting to Rs. 15,000.

The widow, with the consent of her adult sons, has obtained letters of administration of the property of the deceased, limited for the purpose of collecting the rents of the house No. 71, Bentinck-street, and of the outstandings due to the estate, and also limited for the purpose of selling the garden-house at Soorah, and paying off the mortgage-debt.

In fixing the amount of the *ad valorem* fee chargeable under Clause II, Schedule I of the Court Fees Act, I propose to exclude the house in Baboo Ram Seal's Lane as being trust property (See Financial Resolution No. 2004, dated 14th July 1871),* and to deduct the amount due on the mortgage of the garden-house at Soorah from the value of the house.

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* In the exercise of the powers vested in him by Sec. 35 of the Court Fees Act, 1870, the Governor-General is pleased to remit in the whole of British India the fees chargeable under Schedule I Article 2 of the said Act in respect of probate of wills or letters of administration, in so far as such wills or letters of administration relate to property which a deceased person was possessed of or entitled to, not beneficially, but as a trustee for any other person or persons. Provided that this remission shall not extend to cases in which a trustee has the power of appointing or otherwise confirming a beneficial interest in the said property.

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The following questions have been submitted on behalf of the widow :—

1st,—Whether allowance should not be made for the debts due by the estate.

2nd,—Whether the *ad valorem* fee should be charged on the value of the house in Bentinck-street or on the rent thereof.

As to the first question, it has been decided that allowance should be made for a mortgage-debt (*In the Goods of Peter Innes, deceased*, 16 W. R. 253); but that decision does not apply to any other kind of debt. In England debts due by an estate are included in the amount on which probate duty is charged, but a refund may be afterwards obtained in respect of debts which have been actually paid, on proof of payment thereof. This is specially provided for by Section 51 of 55 Geo. III, c. 184 ; but there is no similar provision in the Court Fees Act.

The second question depends upon whether the house in Bentinck-street or the rent thereof (to the collection of which the letters of administration are limited) is to be considered as forming, within the meaning of the words in schedule 1, '*the property in respect of which the probate or certificate shall be granted.*' These words, it appears to me, refer to property *in esse* at the time of the grant of probate or letters of administration, and not to income to be derived from property *in futuro*. In this view the question would resolve itself into this, whether or not the letters of administration granted in the present case are, in the form in which they have been granted, in respect of the house itself. If not in respect of the house itself, then no fee either on the value or on the rent of the house would be chargeable under the provisions of the Court Fees Act.

If it should, however, be considered that the rent, and not the value, of the house is liable to the *ad valorem* fee, it will be necessary to determine upon what amount of rent it should be charged. The amount of rent may fluctuate, and the house may not always be tenanted. In addition to this, the letters of administration, though limited as to the power conferred thereby, are unlimited as regards the period of duration. It is, therefore, impossible to say how long the rent may be received thereunder. Contingencies, as the death of the administratrix or the partition of the property, &c., may at any time put an end to the letters of administration. But on the supposition that none of these contingencies will arise, and that the minor sons will all live to attain their full age, it may be expected that the sons will, on the youngest of them attaining his full age, take possession of the house. Under the circumstances the proper course probably would be to charge the *ad valorem* fee on the aggregate amount of rent calculated up to the day on which the youngest son will attain his full age.

The Advocate-General.—It would appear that in England it is very unusual to grant letters of a limited character. In 1 Swabey and Tristram 538, an application for a grant of administration *de bonis non* (with the will annexed) to a substituted universal legatee, limited to £750 stock, in which he was soley interested, on an affidavit that the parties entitled to a general grant were more than nine in number, that their residences were widely apart, and that their service with a citation would be attended with great difficulty and expense, was refused, and it was held that the Court would not give a limited grant except upon strong reason shown. [*Couch, C.J.*—The practice here is different.] It appears to me that the duty is payable on the whole amount of the property of the deceased. The administration limits the right to certain property, but it is general as to the right of the person to whom the grant is made. I do not wish to press the matter, but leave it to the fair judgment of the Court. I am not able to cite any authorities, and I will only submit that the duty is payable on the whole amount. As to the question which refers to debts, Mr. Belchambers has pointed out that there is a specific clause in the English Act, while there is none here ; and that the order *In the goods of Peter Jones, deceased*, only decided that allowance should be made for a mortgage-debt. Then as to the debutter property, I think it ought to pay duty. The exemption seems to be in favor of property which a party holds, and in which he is not beneficially interested. But in this case he is largely interested. I will only refer to the case of Doe d. Sibchunder Doss *v.* Sibkissen Banerjee, 1 Boulnois 70, as one out of several cases which have come from time to time before this Court.

The Taxing Officer here informed the Court that the *debutter* property was not included in the grant of letters of administration, and should therefore not have been mentioned in the case.

Mr. Phillips.—This is a case of Hindoo intestacy. The Hindoo Wills Act having been passed after the Court Fees Act, it was not contemplated that Hindoos would take out probate at all. Then this grant is not un-

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limited as to time in the same way as a fee-simple, but may be put an end to at any moment by the taking out of general letters of administration. Letters of administration may be limited to being a party to a suit (1 Williams on Executors, 483). If no allowance were made for debts, an administrator might have to pay for the grant a larger sum than the assets which come into his hands, and that would be contrary to the principle that no executor or administrator should be called upon to pay except out of assets. The justice of deducting debts has been recognized in England. I submit that the word *value* clearly means the value of the estate after the debts have been deducted.

Markby, J.—See the note towards the end of Schedule 1 for the meaning of the word *value.*

Mr. Phillips.—That note seems to provide only for a case in which there might be an excess, but does not bear one way or the other on the question as to whether the duty is payable on the gross value or on the value *minus* the debts. I should contend that property does not mean the estate with all its incumbrances.

Couch, C. J.—Debts are not incumbrances.

Mr. Phillips.—The property in respect of which the letters are granted is the right to collect the rents The right to deal with the house is not included, but the right to receive the rents. The question, then, is how the value of that is to be estimated.

Couch, C. J.—What sort of property would you call a right to receive the rents ?

Mr. Phillips.—I should argue that it is not property at all, and no duty on administration is chargeable at all. We have applied for letters of administration, and the only question is what stamp ought to be put upon them. The letters of administration applied for are limited to collect the rents.

Couch, C. J.—They are in respect of the house, but limited to receiving the rents, and that is what is usually done. Letters are in respect of the testator's estate but limited to a particular purpose.

J. W. Phillips.—What I mean to say is that it is nothing more or less than a ministerial duty.

Couch, C. J.—Can you have letters of administration in respect of a mere ministerial duty ?

Mr. Phillips.—Yes, to carry on a suit in Chancery, for instance.

Couch, C. J.—Still the letters would be in respect of the property, but limited to that particular purpose.

Mr. Phillips.—The way I put it is as one of two alternatives. The duty must be payable on a limited grant as though it were a general grant, or only on the portion to which it is limited. It seems to me that the duty should be payable upon the portion of the estate which comes under the control of the Administrator.

Couch, C. J.—Do you find any provision in the English Acts for imposing a different duty in respect of a limited grant from what is chargeable in other cases ?

Mr. Phillips.—No ; I have not been able to find any case which deals with stamp duty upon limited administration. I have found cases in which they are not to be included at all. See 1 Wms. on Executors, p. 497. There is a case in the House of Lords, *Partington* v. *The Attorney-General*, L. R. 4 Eng. and Irish App. 100, where the rule was laid down that whatever is recoverable by virtue of the letters of administration is chargeable with duty, and the interest is so recoverable, being, in fact, part of the estate for which administration was granted. See also the remarks of Lord Cairns in that case.

Couch, C. J.—Do I understand you to say that you ought to have letters of administration without paying any duty at all ?

Mr. Phillips.—Yes ; I contend that the duty must be paid on the value of the house itself, or no duty at all should be charged.

The Advocate-General.—I do not think that your Lordships can exempt property from duty altogether. That is the fallacy which underlies my learned friend's argument. If, then, the property is not to be exempted altogether, I contend that it must be paid according to the value of the property. Section 51 of the English Act provides for a refund. There is no such provision in the Indian Act. I, therefore, submit that the duty should be chargeable on the actual amount of property in respect of which the letters of administration are granted.

The judgment of the Court was delivered by—

Couch, C. J.—The first question which has been referred to us is, whether, in estimating the amount of the *ad valorem* fee, any allowance is to be made for the debts due by the estate ? Now, the words in the schedule are, "If the amount or value of the property in respect of which the probate or letter or certificate shall be granted exceeds one thousand rupees." The letters are granted in respect of the property of the deceased,

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although it may have to be applied to the payment of debts. It is not less the property of the deceased, because, instead of being given in legacies, it is to be applied to paying debts. It is in order that the property may be collected by the administratrix and so applied, that letters of administration are necessary. It is impossible to read the words as meaning the amount or value after deducting the debts due by the deceased. What has been done in England leads to the same conclusion. The words of the Schedule of the English Act are not precisely the same as the words in this Act, but they are subtantially the same—"*estate or effects of the deceased*"—with the addition of the exception which has been introduced here by the Financial Resolution mentioned in the reference. It was considered necessary to make an express provision in the English Act for a return of duty in respect of the portion of the property which is applied towards the payment of debts.

It may be thought a hardship that in this country that should not be allowed; and it might be better that it should. The matter may have been in the contemplation of the Legislature in India when this Act was passed, and the Legislature may have thought it was not proper to allow a deduction on account of debts, or it may be that the matter was not thought of at all. We have nothing to do with that. We are not to make the law but to put a construction upon the language which the Legislature had used, and we think the fee must be paid in respect of the property, without deducting the amount of the debts to be paid out of it.

The second question is whether the *ad valorem* fee should be charged on the value of the house in Bentinck-street or on the rent of it. Mr. Phillips was obliged to admit that the duty must be paid either on the value of the house or on nothing at all. The parties may obtain letters of administration, and have the benefit of them for the purpose of receiving the rent for an indefinite number of years (for there is nothing to prevent that), and not pay any duty at all. That almost shows that such a view of the Act is wrong. The letters of administration are granted in respect of the house and of the property in it, but they are limited to the particular purpose of receiving the rent. The administratrix is precluded from dealing with the property in any other way than simply to receive the rent; still the administration is in respect of the property. To say that the right to receive the rents is to be considered as property in respect of which there is to be administration is absurd. The right to receive the rent is incidental to the property in the house.

We think the right way to assess the duty is to take the value of the house, and upon that the *ad valorem* fee ought to be paid.

The 7th June 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Limitation—Bonâ fide proceeding to keep decree alive—Confirmation of sale—Court's delay.

No. 45 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Mymensingh, dated the 5th October 1871, *affirming an order of the Sudder Moonsiff of that district, dated the 25th February* 1871.

Gobind Chunder Chowdhry (Decree-holder), *Appellant,*

versus

Juhoorul Nissa Bibee (Judgment-debtor), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Rajendro Nath Bose, for Respondent.

The confirmation of a sale made in execution of a decree is a *bonâ fide* proceeding sufficient to keep the decree in force. The decree-holder is not answerable for the Court's delay in confirming the sale.

Mitter, J.—THIS was an application for execution of a decree bearing date the 27th April 1862. It appears on the proceedings that certain properties belonging to the judgment-debtor were sold on the 8th August 1865, but the sale was not confirmed till the 19th May 1866. The decree-holder then applied for execution on the 18th February 1869, and caused a notice to be served on the judgment-debtor on the 1st May of that year and a warrant of arrest immediately followed.

The learned Judge in the Court below admits that the proceedings held in May 1869 *viz.*, the service of a notice and the issue of a process of arrest were *bonâ fide* proceedings notwithstanding that the Court of First Instance held otherwise in consequence of certain formal defects in the form of the application upon which those proceedings were taken, but the learned Judge goes on to say that the decree-holder was not entitled to the benefit of the period intervening between the

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8th August 1865 (the date of the sale) and the 19th May 1866 (the date on which the sale was confirmed) because he says that there was an unwarrantable delay on the part of the Court; and as the decree-holder did not take any steps to move the Court to confirm the sale on an earlier date, he must suffer for that delay.

We are of opinion that this conclusion is clearly erroneous in law. The proceeding of the 19th May 1866 confirming the sale was clearly a *bonâ fide* proceeding sufficient to keep the decree in force up to that date. The delay, if any, was that of the Court, and the appellant ought not to suffer for it.

It is argued for the respondent that the confirmation of the sale was a mere formal proceeding, but this view of the law is erroneous. The confirmation of a sale made in execution of a decree is indispensably required by the law, and the judgment-creditor could not reasonably be expected to proceed with further execution of the decree until he knew whether the Court was going to confirm the sale or not.

It is further argued that the Judge is wrong in holding that the proceedings taken in May 1869 were *bonâ fide* proceedings, but the finding of the Judge on that point is a finding of fact, and we cannot interfere with it in special appeal even if we were disposed to do so upon the merits.

It is quite clear that the decree-holder has taken every reasonable step to have his decree executed, and it would be a gross injustice to him if we hold, notwithstanding all the efforts which he persistently made to carry out the execution, that the decree is barred by limitation.

For the above reasons we reverse the decision of both Lower Courts with all costs, the costs of each Court being assessed at two gold mohurs.

The 2nd March 1872.

Present:

The Rt. Hon'ble Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Benamee Purchase—Act VIII of 1859 *ss.* 260, 259, *and* 261 *to* 266.

*On Appeal from the High Court at Calcutta.**

Mussumat Bahuns Koonwur,

versus

Lalla Buhoree Lall and another.

Benamee purchases in India, not having been declared by law to be illegal, must be recognized and have effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course. There is nothing in Section 260 Act VIII of 1859, either taken by itself, or taken in connection with Sections 259 and 261 to 266, from which an inference can be drawn of an intention to prohibit *benamee* transactions.

THE facts which raise the question for decision in this appeal may be very shortly stated.

Brijlal Opadhia was mortgagee in possession of Talooka Doodhur. Whilst he was so in possession, the interest of the mortgagor was offered for sale under a decree obtained against him by a creditor. Buhoree Lall became the ostensible purchaser at such sale, and the certificate of sale was granted to him in his own name as the purchaser.

Brijlal Opadhia remained in possession until his death, and after it this suit was brought by Buhoree Lall against his heirs (the present appellants) for the redemption of the talook and possession of it; alleging that the mortgage-debt had been paid off by the receipt of the profits, and, if not, that he was ready to pay what might remain due.

The defence was that the purchase was made by Buhoree, in his own name, as a *benamee* purchaser for Brijlal Opadhia, and with his money; and that the attempt by Buhoree to set up title in himself was a fraud.

It has been decided by the Courts in India that this defence is true in fact, and it was admitted that it must be so treated in dealing with the question to be decided in the present appeal, which is, whether, having reference to certain Clauses of the Code of Procedure, the defence can in law be made available.

The point upon the construction of the Code is one of considerable difficulty, and was felt to be so by the Courts in India. The Principal Sudder Ameen decided in favor of the defendants (the appellants). His decision was reversed by a Division Bench of the High Court. However, the same Division Bench, in consequence of the doubts they entertained, upon a second hearing, referred the point by a short memorandum to the Full Bench, who gave judgment for the respondents; Mr. Justice Jackson dissenting from the decision.

* From Full Bench judgment reported in 11 W. R., F. B., 16.

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It must be observed at the outset that the suit to be dealt with is one in which the plaintiffs (the present respondents) seek to establish a right against the defendants (the appellants), and that they invoke the aid of the Courts to give effect against equity and good conscience to a claim founded upon fraud.

It must be conceded that it is only by force of positive statutory law that it can be obligatory upon the Courts to give their active assistance in such a case to the fraudulent plaintiffs against the defrauded defendants. But it is said that this obligation is found in the Code of Civil Procedure.

It is well known that *benamee* purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and therefore they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course.

The enactments relied on by the plaintiffs are found in a Code professing to deal, not with rights, but with remedies, and procedure to enforce rights.

The preamble states the object of the Code to be "to simplify the procedure of the Courts of Civil Judicature." It is right to bear this object in mind in construing the Clauses on which the plaintiffs rely.

The only express enactment on the subject occurs in Section 260. That Clause, after directing that the certificate shall state the name of the person who is declared at the sale to be the actual purchaser, says this:—"And any suit brought *against* the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the purchaser was used, shall be dismissed with costs."

This enactment is clear and definite; there is nothing from which it can be inferred that more is meant than is expressed. It is confined to a suit brought against the certified purchaser, and to a specific direction as to what shall be done with that suit, *viz.*, that it shall be dismissed with costs.

The present suit, which is the converse of that pointed at in the Clause, is not within the words or scope of it, and if dealt with in the manner directed, would, of course, come to a disastrous end.

It has, however, been contended, in support of the opinion of the majority of the Judges of the High Court, that there may be inferred from this Clause, taken in connection with Section 259, and the Sections relating to the manner of giving possession, a general intention, having for its object to prevent any enquiry between the purchaser *de facto* and the person for whom he is alleged to have purchased, upon the question whether the purchase was *benamee* or not, and that effect should be given to that general intention.

Their Lordships consider it would not be safe to make such an inference, except it arose upon very clear implication, and that it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments, which would exclude an enquiry into the truth in *any* suit between the parties; when the express enactment is narrowed and confined to a specific direction as to what shall be done in a particular suit, which is described and defined in precise terms. And it appears to their Lordships that effect can reasonably be given to the provisions of the Code without making such implication.

Section 259, requiring the Court to grant a certificate to the person declared to be the purchaser at the sale, and directing that such certificate shall be taken and deemed to be a valid transfer of the debtor's right and interest, does no more than create statutory evidence of the transfer, in place of the old mode of transfer by bill of sale. Their Lordships consider that no inference fairly arises from this Clause, that it was intended to interfere with *benamee* transactions; for the language is adapted to meet the case of ordinary purchasers, and the same language might well have been used if *benamee* transactions had been wholly unknown.

The same observations apply to Sections 261 to 266, which prescribe modes of giving possession of the various kinds of property. These provisions would naturally find a place in the Act in order to govern ordinary purchases, and no inference can, therefore, be drawn from them of an intention to prohibit *benamee* transactions.

It is evident from this analysis of the Sections of the Code, that the inference sought to be made against *benamee* transactions rests entirely on the 260th Clause, and that if this Clause were absent from the Code, there is absolutely nothing in the other Sections from which such an inference could be drawn.

It was strongly pressed upon their Lordships that as, by the express terms of the

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260th Section, a suit brought against a purchaser on the ground that the purchase was *benamee* must be dismissed, that it would, in many cases, lead to inconsistency, if that ground could be set up as a defence against a suit brought by a *benameedar*.

If this really were so, it would result from the attempt to deal with the subject of *benamee* in a partial manner; and even in that case their Lordships would consider it fitting that the Legislature should declare its view, and supply a remedy rather than that the Courts should strain the existing statute. But it will probably be found that the suggested inconsistencies will not be great, and even if the respondents' view were adopted, they would not be wholly avoided.

The object which the framers of the Code probably had in view, was to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property, and to empower the Court selling under a decree to give effect to its own sale, without contention on the ground of *benamee* purchase, by placing the ostensible purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of *benamee* shall be dismissed.

In the cases where actual possession can be given of the thing sold by the Court, no difficulty can arise; for there the certified purchaser, having both the certificate and possession, can hold the property by virtue of Clause 260, against any suit brought against him; and if that possession should be interfered with, either by force or fraud, on the part of any person, even a *benamee* claimant, it no doubt ought, without enquiry as to the *benamee* claim, to be restored.

It has been suggested that difficulties may arise in the case of possession given, under Section 264, of lands in the occupancy of ryots to a certified purchaser, who had bought *benamee* for the judgment-debtor, to whom the ryots may have been afterwards induced to pay their rents. It was said that, upon the strict construction of the Code, the purchaser might be precluded from suing the ryots for these rents. It is not necessary to decide these questions, but their Lordships do not consider this to be a necessary consequence of the construction; for, as regards the ryots, the certified purchaser when put into possession, becomes their landlord, both by title and possession, and it may well be that they should not be allowed to set up the *benamee* right of another against the person to whom they had thus become tenants.

So, in the case where debts due to the judgment-debtor have been sold and delivered to the certified purchaser, the debtors may well be prevented from setting up the *benamee* title of a third person in actions brought by the holder of the certificate of sale, for they are by Section 265 prohibited from paying to any one except the certified purchaser, and they could not, therefore, set up title in another. Besides, when suing them, the certified purchaser is only reducing into possession the very thing he purchased.

In fact, the instances would probably be very few where any difficulty would arise. It would occur only in cases like the present, where the certified purchaser, who is really a *benameedar*, having been put into complete possession by the Court of the thing purchased at the judicial sale, attempts to bring a new suit against the real purchaser, not to complete the title or even the possession to the thing purchased, but to enforce a right attaching to it. In this case, the purchaser has full possession of the thing he bought, so far as the selling Court can give it, and it cannot be taken from him; but when the seeks, as mortgagor, in a suit altogether new, to redeem against the mortgagee in possession under his mortgage title, then the express enactment contains no words to restrain the defence set up.

But difficulties would also arise from giving a wide construction to the Code, beyond the ordinary meaning of the words. It was declared by the High Court, in conformity with former decisions, that, where the real owner has been permitted to have or retain possession by the ostensible purchaser, the latter cannot insist on his certified title to recover. Now, if the Code is to be read as wholly prohibitory of *bemeedar* judicial purchases, thus rendering them illegal, the defence in such cases ought to be disallowed; for if allowed to be set up, then effect must necessarily be given to that which, upon the hypothesis, is prohibited and illegal. The mere permission to hold possession cannot alone give or transfer a title from the *benameedar* to the real owner. The title must depend upon the purchase having been made *benamee*, and if that be unlawful, then it ought not to be allowed to prevail in the cases in which the High Court agree that it should do so.

The authorities, therefore, which have held that, in the cases just referred to, the real owner may set up his *benamee* right against the *benameedar*, necessarily involve

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the opinion that the Code has not made *benamee* purchases unlawful; and if that is so, there seems to be no sufficient reason for giving the provisions of the Code, in cases like the present, a larger operation than the language imports.

The High Court, in their judgment in this case, approve of the above authorities; but they say they may be explained on the ground that the *benameedar* has, by consenting to the possession of the real owner, waived his right to the benefit given to him by the Code; but the Code had certainly not for its object the desire to confer a benefit on fraudulent *benameedars*. Its provisions must have been framed on grounds of public policy, to which the doctrine of waiver is not properly applicable. That policy, if it was meant to be carried to the extent of making such transactions unlawful, might have been so declared and enacted, but the Code stops short of such an enactment. Their Lordships consider that, where the Legislature has stopped, the Courts must stop.

It was said that the certified purchaser in a case like the present, would have the shadow only, and not the substance of the thing he bought, but this is exactly what in equity and good conscience he ought to have if no positive law intervened. The question is, whether such positive law does intervene in this case.

For the reasons given, their Lordships do not feel justified in adopting a construction beyond what the language of the Code imports, when such a construction would in effect be to declare that to be unlawful which the Code itself has not declared to be so; and they are consequently of opinion that there is no bar to preclude the enquiry in this suit into the real title.

Their Lordships find that a cross-appeal to Her Majesty against the decision of the Courts below on the question of fact is pending. Without prejudice to such cross-appeal, and to any order to be made thereon, in case the same should be prosecuted, their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the decrees appealed from, and in lieu thereof, to order that the appeal to the High Court from the decree of the Principal Sudder Ameen be dismissed with costs. The appellant will have the costs of this appeal.

The 25th May 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Alluvian Land—Riparian Proprietors—Shifting Ownership and Right of Possession—Custom—Servitude—Covenant running with Land.

*On Appeal from the High Court at Calcutta.**

Baboo Bissessur Nath and others,

versus

Maharajah Mohessur Bux Sing Bahadoor and others.

One of the grounds on which plaintiff sought to disturb defendant's long uninterrupted possession since 1790 of land (which had once been alluvial) lying between two branches of a river, or between two rivers, the volume of water in which from time to time shifted, so that alternately one of those channels was deep, and the other fordable, was by virtue of an alleged custom in the district. HELD that the custom which plaintiff was bound to establish by clear and distinct evidence of its existence, was that the ownership and right of possession of the whole intermediate tract of land shifted with the volume of the water, always attaching to the riparian proprietor on the side of the channel which happened for the time being to be fordable.

As to the other ground on which plaintiff relied, their Lordships were of opinion that it was not in the power of the then zemindar to impress upon the land a *quasi* servitude, or to burden it with a covenant which would run with it into the lands of any possessor of it by any title, and that consequently a contract between two former zemindars that the ownership and right of possession of the land should shift in the manner abovementioned, was not binding upon the defendant who derived his title from a person who was a stranger to the arrangement.

THIS was a suit to recover possession of a large tract of land which had at one time been alluvial, but which for a great number of years had been regularly cultivated and inhabited, lying between two streams described by the plaintiffs (who are now the appellants) as branches of the Ganges, but which might perhaps be more correctly described, the one as being the river Dewha, and the other as being the river Ganges.

The plaintiffs were the owners of a zemindary, of the name of Manjhee, on the north side of the north channel; the defendants were the owners of a zemindary, of the name of Arrah, on the south side of the south channel, both streams flowing from the west and joining each other to the east of the property in dispute.

* From the judgment of Raikes and Levinge, JJ., dated 30th June 1863.

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It appears that the tract of land between these two channels was, as early as the year 1790, in the possession of one Noorool Hossein, with whom, as occupier and proprietor, a settlement was made by the Government in the year 1790, and that in the year 1800 a permanent settlement was made with his son.

The defendants claim the land in question by purchase from a descendant of Noorool Hossein, and it appears to be undisputed that Noorool Hossein and his heirs and those who succeeded him in title down to the present defendants have held uninterrupted possession of this land from 1790 to the present day.

The plaintiffs seek to eject the present possessors, the defendants, upon these grounds: it appears that, in the year 1849 or 1850, the great volume of water left the northern channel, and took the southern channel, whereby the northern channel which before had been deep became fordable, and the southern channel which before had been fordable became deep, and they allege that, upon that state of facts, they are entitled to obtain possession of the whole of the land lying between these two channels, by virtue, *first*, of an alleged custom; *secondly*, of an *ekrarnamah* executed in 1780 between the then proprietor of the zemindary Manjhee, and the then proprietor of the zemindary Arrah.

It is necessary to examine separately these two grounds on which the plaintiffs rely. First, as to the custom. The custom on which the plaintiffs rely is nowhere to be found clearly stated in their pleadings, and their counsel found some difficulty in quite accurately defining it. It appears to their Lordships that, in order to succeed in disturbing a possession of such long duration, under the circumstances of this case, it is necessary for the plaintiffs to establish a custom existing in the district in which these properties are situated to the effect that, where land which had once been alluvial lies between two branches of a river (or it would appear between two rivers), and from time to time the volume of water shifts, so that alternately one of those channels is deep, and the other is fordable, then the whole of such intermediate land belongs to the land-owner on the side of the channel which at any given time is fordable; in short, that the ownership and right of possession of the whole intermediate tract of land shift with the volume of the water, always attaching to the riparian proprietor on the side of the channel which happens for the time being to be fordable.

It should be observed that this custom appears to be based on the hypothesis that at all times one channel is deep, and the other fordable, because it could not apply if both were deep, or both were fordable; it would also appear that this custom is wholly independent of any question of accretion or arrosion of banks; that it attaches merely upon the water becoming deeper or shallower in one channel or the other without necessarily any alteration in the beds or banks of the channels.

This being the custom which it appears to their Lordships that the plaintiff is bound to make out in order to establish his case, their Lordships would require to be satisfied by very clear and distinct evidence of its existence, since the operation of such a custom must be to render the rights of property fluctuating and precarious.

A question has indeed been suggested, whether a custom of this description falls within the terms of Regulation XI of 1825 Section 2. Their Lordships, however, do not think it necessary to decide this question, inasmuch as they have come to the conclusion that no "clear and definite usage" such as would be necessary to support the plaintiffs' case has been in point of fact established by the plaintiffs.

Reference has been made very frequently in the record, and in the course of the argument, to certain proceedings on the part of the Government which took place in 1780, and the *ekrarnamahs* executed by the proprietors of the respective estates at that time in pursuance of those proceedings; but their Lordships are of opinion that the effect of those proceedings and the *ekrarnamahs* amounts to no more than this: that there being a dispute, indeed a violent quarrel, as it would appear, between two zemindars whose properties were contiguous the one to the other, the Government adopted a settlement at the time between them which appeared to be equitable and expedient, and to be in conformity with what had been done on previous occasions by previous owners of the same properties, and that this arrangement made with these two landowners by the Government was acquiesced in, adopted, and ratified by the *ekrarnamahs* which have been referred to which it will be necessary subsequently to state more in detail. This by no means amounts to that clear proof which would be required to support a distinct custom of this description, and to sustain the claim of the plaintiff to transfer to themselves this

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property from those who have been in possession of it for 80 years or more.

The other evidence which has been relied upon in support of the custom consists mainly of supposed admissions on the part of the defendants in the course of various legal proceedings; but upon examination those admissions do not appear to amount to more than this, that the defendants or their predecessors appear in certain proceedings to have insisted upon a rule somewhat similar to that which the plaintiffs now allege, but by no means identical with it, as applicable to these zemindaries, and do not point to "a clear and definite usage" binding all property within the district.

Reference has been made also to various proceedings with respect to other properties, in which the Government authorities have treated the main channel of the Dewha as the boundary between certain zillahs; and to one case in which they appear to have intimated that that boundary should be applied also to certain private properties; but the circumstances of these cases are not so distinctly before their Lordships that they are enabled to treat them as proof of such a custom as that which has been before described, and upon which it is necessary for the plaintiff to rely. It may be observed that it by no means follows that, if a certain fluctuating boundary, *viz.*, the course of a river, is adopted between two zillahs, its adoption for that purpose affects the rights of landed proprietors in those zillahs. The case of Rae Manick Chund *v.* Madhoram, in 13th Moore's Indian Appeals, p. 1,* which has been referred to, is to the effect that there may be a fluctuating boundary between zillahs, which by no means affects the rights of landed proprietors.

Their Lordships are of opinion that sufficient evidence has not been given to prove this custom, which is necessary in order to make out the plaintiff's case. They agree, indeed, with Mr. Justice Raikes who says in his judgment:—"I think it is fully made out "that, when claims were preferred to an island, "a new formation in the Ganges, by rival "riparian proprietors, the custom was to "award possession to the proprietor on "the side on which the alluvial lands were "fordable; and if the question before us was "for the possession of newly formed lands, "and we were asked to apply the custom to "such lands, I should have no hesitation in "doing so;" but their Lordships also agree with what Mr. Justice Raikes further says:—"But this is not the nature of the present suit."

Their Lordships are, therefore, of opinion that the plaintiff has failed to make out the first ground upon which he relies.

The second ground is the *ekrarnamah* that was entered into between the then owner of the Pergunnah Arrah, Rajah Bickromajeet Singh, who is the grandfather of the defendant, and Tegh Ali Khan, who was then the owner of Pergunnah Manjhee, under whom the plaintiffs claim title; and it is to this effect:—The Rajah recites that there had been a suit with respect to *diara* lands of certain villages which he describes; then that Mr. Matthew Leslie and Mr. Gream had been sent to survey the land in dispute, and taken the statements of both parties. Then he goes on to say:—"The gentlemen of the "Council of Azeemabad and Mr. Gream "forwarded to the Council at Calcutta a "report of the dispute between the parties, "and a map of the *diara* lands," which, unfortunately, is not now forthcoming. Then he recites that orders were received from the Council at Calcutta, that on whichever side the Ganges was fordable, the *diara* lands will appertain to that side; and then that Mr. Leslie and Mr. Gream came again to the *diara* lands, "and finding that the river "Ganges on the side of Pergunnah Arrah, "Sircar Shahabad, had dried up and was "fordable, and on the side of Pergunnah "Manjhee was a flowing current with "deep water, gave possession to me the "declarant, from 1187 Fuslee, of the *diara* "lands aforesaid, with all the crops thereon;" and that he therefore took possession. Then he says:—"Therefore I declare and give this "writing, that the boundary of the *diara* "between Pergunnah Arrah, Sircar Shahabad, "and Pergunnah Manjhee, Sircar Sarun, has "been fixed in this manner that, if the river "Ganges becomes fordable on the side of "Pergunnah Arrah, the *diara* lands will "belong to the zemindars of Arrah; and if it "becomes fordable on the side of Pergunnah "Manjhee, Sircar Sarun, they will belong to "Pergunnah Manjhee. If any or either of "us act contrary to this agreement, our act "shall be false and void, and we will be "liable to punishment by the Government." A duplicate of this agreement was executed by Tegh Ali Khan, the then zemindar of Manjhee.

It has been contended, on the one hand, that this agreement relates only to newly formed lands or alluvial lands which may be

* 11 W. R., P. C., 42.

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formed after its date; on the other, that it distinctly refers to the lands in question, at all events in their then state, and that it is applicable to them now. But be that as it may, assuming the meaning given to this document by the appellants to be correct, their Lordships are of opinion that, whatever may have been its effect as a contract between the two zemindars who executed it, it clearly cannot be binding upon the defendants, who derive their title from Noorool Hossein, who was a stranger to it.

Their Lordships are of opinion that it was not in the power of the then zemindar to impress upon the land a *quasi* servitude, or to burden it with a covenant which would run with it into the hands of any possessor of it by any title.

Their Lordships are therefore of opinion that the plaintiffs fail also on the second ground of claim.

That being so, it is unnecessary to go into a question which has been raised of the identity of the lands.

For these reasons their Lordships are of opinion that the plaintiffs fail to make out their case; and they will humbly advise Her Majesty that the decree of the High Court in India be affirmed, and that this appeal be dismissed with costs.

The 31st May 1872.

Present:

The Rt. Hon'ble Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Act VIII of 1859 *s.* 2—*Res Adjudicata—Dowl—Towfeer—Costs (one set of, to Respondents in the same Interest).*

*On Appeal from the High Court at Calcutta.**

Woomatara Debea

versus

Kristokaminee Dossee, Wooma Soondurce Dossee, and others.

Where a plaintiff in a former suit saw fit in that suit to admit that no portion of the land then sued for was included within the limits of her talook as originally settled and defined by the *dowl*, but that she had, as talookdar of that talook, acquired title to it as *towfeer*, HELD that she could not, under s. 2 Act VIII of 1859, bring her present suit and claim to fall back upon the other title.

The Privy Council saw no ground in this case for departing from the general rule of allowing but one set of costs to respondents in the same interest, since the Collector, as Court of Wards and representing the infant defendant, would sufficiently have discharged his duty and have exercised a sound discretion, if, seeing that the suit was to be substantially defended, he had left the defence in the hands of the other respondents, or at the most had applied for leave to join in their case.

THEIR Lordships propose to dispose of this appeal upon the only point that was dealt with by the High Court, namely, whether the present suit can properly be brought consistently with the second Section of the Act of Procedure. That Clause is in these words:—"The Civil Court shall not take cognizance of "any suit brought on a cause of action which "shall have been heard and determined by a "Court of competent jurisdiction in a former "suit between the same parties, or between "parties under whom they claim."

The first question that occurs to their Lordships upon that Section is, what is meant by the cause of action? And in the present case they are clearly of opinion that the cause of action in both suits was the dispossession of the appellant by the fixing of the boundary which is now complained of, and the other proceedings which culminated in the decision of the Judge in the Act IV case. The result of those proceedings was to affirm the possession of the defendants in the land which was the subject of the first suit, and to leave the party who felt aggrieved by them to her remedy by a civil suit.

The first suit was accordingly brought, and in the present suit both Courts have found, and it has been fairly admitted at the bar, that the land which is now in dispute is a portion of the land which was then sued for. The identity, therefore, of the subject-matter of the two suits is admitted, and, as their Lordships have already said, the cause of action in both was the dispossession of the appellant by reason of the proceedings then taken.

It is sought, however, to distinguish the case upon the ground that the appellant, who was the plaintiff in the former suit, saw fit in that suit to admit that no portion of the land then sued for was included within the limits of Talook Shahazadapore, as originally settled and defined by the *dowl*, but that she had as talookdar of that talook acquired title to it as *towfeer*, that is, that by gradual squatting or encroachment she had enlarged the boundaries of her talook, and by bringing the land into cultivation had acquired a preferable right to have the settlement made with her.

* From the judgment of Phear and Hobhouse, JJ., dated 2nd December 1868, 10 W. R., 426.

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Now it is perfectly clear to their Lordships upon the proceedings that the real question in issue to be determined between the parties then was whether the lands then sued for which included the lands now sued for, belonged as of right to the talookdar, or whether they fell within lot 32, which belonged to the defendants? and it was open to the plaintiff, the present appellant, in the former suit to shape her title in either of three ways. She might have said, as she did say, according to Mr. Doyne's argument today, that the whole of the land then claimed was *towfeer* land; or she might have said, a portion of the land fell within the talook, as originally settled and formed part of the 7,000 odd beegahs mentioned in the *dowl*, and the residue of it is *towfeer* land; or she might have put her case in the alternative, and have said that she had a good title to a portion as her original land, but that should the proof of that fail, that portion also was to be considered as *towfeer* land.

With the full knowledge of all the circumstances, she chose to say:—"I admit that "I am in possession of all that I was entitled "to under the *dowl*, but I claim this land, "the whole of it, as *towfeer* land." The contention now is that, although she saw fit to take that course then, she has now a right to fall back upon the other title, and to say:— "The boundary was improperly drawn, so as "to include in the defendants' holding that "which of right should have been within my "originally settled talook; and, as I now "claim in that way that which I might have "claimed in the former suit, I am not pre-"cluded from bringing this second suit." It appears to their Lordships that that contention cannot prevail against the clear terms of the Section in question, or indeed upon principle.

It is clear that it does not fall within the principle of the decision* given by Lord Justice Turner at this Board upon the earlier Regulation, in which he takes the distinction that the Regulation "was only to prevent the "re-trial of the same question, and that it "was not intended to apply to cases like the "present, in which new circumstances had "intervened and altered the nature and "character of the questions to be deter-"mined." Here no new circumstances at all have intervened.

Nor does it appear to their Lordships necessary to decide whether, in some of the cases put by Mr. Doyne, where the party wa suing entirely under a new and a different title, such a distinction as he contended for might not be taken; because here it seems to their Lordships that the matter in dispute throughout was the title of the talookdar of this talook to the land in question, and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit, that her right in any way to this land was capable of being therein determined. The Court in that suit seems almost to have considered that the title now sued upon had been put forward and could not prevail; and that if the talookdar had any title at all, it was by way of *towfeer*.

The Court of appeal, proceeding on the admission of the plaintiff that the whole of the originally settled talook was in her possession, and that all she had been dispossessed of was claimed by her only as *towfeer* lands, dealt with that claim; but it is perfectly clear that, if the plaintiff had chosen to put forward the other title in the way I have suggested, the Court would have dealt with the whole question and considered it, that question being in point of fact a mere question of quantity and boundary, and whether the plaintiff was in any way entitled to recover the lands sued for from the defendants who are the defendants also in the present suit.

It therefore seems to their Lordships that the case really falls within the principle and letter of the Section in question, which has been properly decided to be a bar to the suit.

They think it desirable to remark that the principle upon which their decision in this case proceeds seems to be almost identical with that laid down in a judgment delivered by Lord Westbury in the case of Kattama Nauchear in 11 Moore's Indian Appeals, page 72.† In that case a party had brought a suit, claiming under a will, having, as defendant in a former suit, abandoned his title under that will, admitting that the will did not amount to a devise, and resting his title upon the issue whether the estate was separate or undivided, and Lord Westbury said:—"That being the state of the case, "we are now called upon to approve of a "suit subsequently instituted by the very "person who had deliberately given this "character to the instrument, a suit founded "upon an allegation wholly contradicting "what he had stated to this Court of Justice, "and insisting upon this paper as being a "valid will and testament. It is impossible

* 3 W. R., P. C., 11; Suth. P. C. Cases, 570.

† 2 W. R., P. C., 31; Suth. P. C. Cases, 520.

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"that any such suit should be allowed to "proceed. In the first place, it is clear upon "the former record, that the appellant had "then the power of relying upon that docu-"ment as being a valid will. He in effect "stated, or might have stated, his defence in "the suit of 1856 in the alternative. He "might first have insisted that it was an "undivided property, and that therefore the "plaintiff in those suits had no interest there-"in; and, secondly, he might have pleaded, "but if it shall turn out to be a divided pro-"perty, then my title arises under this instru-"ment, and I plead and rely upon it as "amounting to a valid devise in my favor. "When a plaintiff claims an estate, and the "defendant, being in possession, resists that "claim, he is bound to resist it upon all the "grounds that it is possible for him according "to his knowledge then to bring forward. "The present appellant might have insisted "on the validity of the alleged will, but "instead of doing so when his suit came on "to be heard and decided in the Court of "final appeal, he in effect disclaimed all the "title under the instrument as a will, and "insisted that it must be regarded by the "Court as not being testamentary. There "would be an end to all security in the ad-"ministration of justice if the course now "taken by the appellant of setting up the "will were allowed."

The present case is even stronger than that referred to, inasmuch as in the latter the party was a defendant in the first, and plaintiff in the second suit; whilst the appellant is plaintiff in both suits, and as such had in both the means of shaping her case as she chose.

Their Lordships therefore entirely concurring with the judgment delivered by Mr. Justice Phear in the High Court, are of opinion that this appeal must be dismissed. It is possible that the appellant has lost what she might have been entitled to; but if she has lost it, the loss is entirely the result of her own mode of dealing with her case in the former suit.

Their Lordships have only further to observe that the appeal must of course be dismissed, with costs, but that the ordinary rule of this Board is to give only one set of costs to the respondents in the same interest. We have not had an opportunity of knowing why there has been a severance in defence, or whether there are any special grounds why that rule should be varied.

After some discussion at the bar on this point, Sir James Colvile said:—

Their Lordships see no ground for departing from the general rule of allowing but one set of respondents' costs; and considering that those represented by Sir Roundell Palmer were first in the field and had entered their appearance first, their Lordships think that the Collector, as Court of Wards, and representing the infant defendant, would sufficiently have discharged his duty, and have exercised a sound discretion, if, seeing that the suit was to be substantially defended, he had left the defence in the hands of the other respondents; or, at most, had applied for leave to join in their case. Their Lordships do not think that there was a necessity for his increasing the costs by coming forward as a separate respondent. Their Lordships therefore think they ought not, in justice to the appellant, to do more than give one set of costs, and that they ought not, in justice to the principal and original respondents, to deprive them of any part of their costs.

The 3rd June 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Act VI of 1862, *B. C., s.* 10 *(Object of)—Measurement—Enhancement—Resumption—Onus Probandi.*

Case No. 1082 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 14*th July* 1871, *reversing a decision of the Deputy Collector of Pubna, dated the* 24*th March* 1871.

Sharoda Pershad Gangolly and others (Plaintiffs), *Appellants,*

versus

Raj Mohun Roy and others (Defendants), *Respondents.*

Baboo Turuck Nath Dutt for Appellants.

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Respondents.

Section 10 Act VI of 1862, B. C., was intended to assist a proprietor to measure the lands comprised in his estate when he cannot ascertain who the ryots are, what lands are in their occupation, and what rents they have to pay,

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but not to enable him to enhance the rents of the ryots, or resume rent-free lands by throwing the *onus* on the lakherajdar to prove his rent-free holding.

Bayley, J.—THIS special appeal must be dismissed with costs. Section 10 Act VI of 1862, B. C., is intended to assist a proprietor to measure the lands comprised in his estate when he is unable to do so on account of his inability to ascertain what lands are occupied by what ryots and what rents are payable by them for the same. But in fact, that is not the position of the special appellant. He admits that the whole tenure was held under him by an intermediate holder, Gooroo Churn Bhoomick. Gooroo Churn Bhoomick defaulted, and he, the special appellant, became the purchaser of Gooroo Churn's tenure. He had a measurement of the entire Mouzah before his purchase, and therefore he is hardly in a position to show that he knew nothing about the tenure he purchased. An Ameen was deputed very wrongly, and he was instructed not only to measure the lands but to assess such rates as he might think proper. It is quite clear that the rent paid to Gooroo Churn Bhoomick was 12 annas a *pakee*, and that 2 rupees now demanded is a simple arbitrary act of the Ameen.

Again, the Lower Appellate Court very properly referred the special appellant to a regular suit for the resumption of lands alleged to be rent-free. The object of this suit is quite clear; it is to resume rent-free lands by throwing the *onus* upon the lakherajdar to prove his rent-free holding. The special law under which the attempt is made, being one for executive purposes to help a proprietor to measure and ascertain the actual area of a particular estate, is not intended to supersede the general law of the land, supported by a current of decisions, to the effect that the whole *onus* of proving that the lands alleged to be rent-free are held under an invalid title lies upon the zemindar by showing that the lands pay rent and as such are included in the Mâl. This burden of proof is most illegally and improperly attempted to be thrown upon the lakherajdar by the way in which the measurement law has been misapplied by the help of an Ameen in this case. Again, the special appellant says there is no evidence to enable him to ascertain the holdings of the ryots and the rents payable by them. We think that the proceedings in the former suit, which was instituted by this very appellant, were quite sufficient for a basis for that object.

The appeal is dismissed with costs.

Mitter, J.—I also concur in dismissing this appeal. The Lower Appellate Court has found as a fact, and that finding is corroborated by all the facts and surrounding circumstances of the case, that this suit was instituted under color of Section 10 Act VI of 1862 B. C., more with a view to have the rents of ryots, who are in occupation of the lands in question, enhanced, than with that of obtaining information as to who those ryots are, what lands are in their occupation, and what rents they have to pay for the same. The Section above referred to was never contemplated to apply to a case of this description ; and I am bound to say that the whole proceedings in the former suit, which was instituted by these very plaintiffs against one Gooroo Churn Bhoomick, and in which the lands were measured parcel by parcel, holding by holding, clearly show that this suit was instituted to have the rents payable by the ryots of the entire village enhanced wholesale through the instrumentality of the Ameen, who was deputed to make a local enquiry in this case, and who, it is clear from his report, had no idea whatever of the duty he had to perform in it. Upon this ground, and this ground alone, I would dismiss this special appeal with costs.

The 4th June 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Benamee Purchase—Bonâ fide Purchaser for Value—Acquiescence—Enquiry—Sale—Mahomedan Woman—Improvement of Property—Indian Deeds of Sale—Clause as to consent of Family.

*On Appeal from the High Court at Calcutta.**

Ramcoomar Koondoo and another,

versus

McQueen and another.

It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed

* From the judgment of L. S. Jackson and Markby JJ., dated 2nd April 1869.

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circumstances which ought to have put him upon an enquiry which, if prosecuted, would have led to a discovery of it.

There is nothing in the position of a vendor being a Mahomedan woman living with her children upon the estate, and sometimes letting it, which should put any one upon enquiry whether she was the real owner or not.

Without laying down any general rule as to the circumstances which should prompt enquiry in cases of this kind, the PRIVY COUNCIL were of opinion that the circumstances must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular enquiry ought to have been made.

The mere fact of a man building upon, or spending money to improve, property belonging to the woman with whom he was living, cannot lead to the inference that, contrary to the apparent title, he had purchased the land for himself; and neither this fact, nor the circumstance of the deed of sale from a Mahomedan woman containing the apparently usual clause that she had made the sale with the consent of the family, was sufficient to put the purchaser on enquiry.

THEIR Lordships do not think it necessary to call upon Mr. Leith to reply, having come to the conclusion that the judgment of the High Court cannot be sustained.

The suit was brought by the respondents to recover 3½ beegahs of land and some buildings erected upon it situated at Howrah, near Calcutta. The land had been purchased by the deceased father of the appellants, Ramdhone Koondoo, from a Mahomedan woman of the name of Bunnoo Bebee, in June 1843. Their father and they, since his death, have held undisputed possession from that time until the present suit was brought, a period of 24 years.

The short facts are these:—Alexander Macdonald, who lived in Calcutta and cohabited with Bunnoo Bebee as his mistress, had two children by her,—Alexander Macdonald, who is dead; and Maria, one of the respondents, who married Mr. McQueen, the other respondent. The father died in 1834. The history of the property appears to be this: The land, which is perpetual leasehold, at a fixed rent, was conveyed in August 1831, by the then proprietor to Bunnoo Bebee by a deed of sale, and the price paid at that time was only Rs. 130. In the following September the deed was registered, and thereupon the zemindar granted a fresh pottah to Bunnoo Bebee, at the fixed rent of Rs. 35. It does not appear with any certainty that Macdonald, the father, was in possession of the land and of the buildings. At all events, it is not clear upon the evidence that he ever resided upon the property. There are two witnesses who speak to his residence. One of them says that he did not live in the new bungalow, and the other says he did. The evidence is far from satisfactory to establish the fact that he really did reside upon the property. But it is clear that, after his death, Bunnoo Bebee did go to residé upon it, and she resided there for some time. She afterwards let it, and received the rent from the tenants. Then, in June 1843, she sold the property to Ramdhone Koondoo, and conveyed it to him by a deed of sale. The price she obtained was Rs. 945, and there is nothing to show that that was not the full value of the property. At the time she sold, she made a surrender to the zemindar of the leasehold interest, and a fresh pottah was granted to the purchaser, under which undisputed possession was held for 24 years. During that time the purchaser erected important buildings upon the land, and increased the value to such an extent that the property is valued in the present suit at Rs. 40,000. Bunnoo Bebee died before the commencement of the present suit; there is a contest as to the time of her death, which was material only as regards the question of limitation; and as it is not now necessary to consider that point, it becomes immaterial to determine the precise period of her death, whether in 1856 or 1861. Their Lordships, however, see no reason to dissent from the view which the High Court have taken of that fact in the case.

The claim put forward in this suit is that the purchase, although in the name of Bunnoo Bebee, was a purchase *benamee* by Macdonald; that he was the real purchaser, but had used her name in making the purchase. His will is put in evidence, and the respondents claim under it. Undoubtedly, if the purchase was a *benamee* purchase, they have established a *primâ facie* title to this estate, or at least to a moiety of it.

The answer of the appellants is, that their father purchased the estate of Bunnoo Bebee without any notice of the *benamee* title, and that they are entitled to hold it, notwithstanding there may have been, originally, a resulting trust in favor of Macdonald. It certainly would require a strong case to be established on the part of the respondents, to defeat a possession for so long a period of property for which full value had been given to the person in the apparent ownership of it. The burden of proof lies very strongly on them in such a case. They have of course to establish, in the first instance, the fact that the purchase was really made by Macdonald, and with Macdonald's money, on his own behalf. Their Lordships cannot help observing that the evidence, even on that cardinal fact, is extremely scanty. It rests almost entirely on the admission made by Bunnoo

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Bebee in the inventory made by her after Macdonald's death, in which she treats the property as part of the estate of Macdonald. There is some evidence that Macdonald improved the property after the purchase, by building a new bungalow upon it; but that evidence, without the admission, would clearly be insufficient to establish the fact that the purchase, contrary to all the documents, was made by Macdonald and with his money. Their Lordships however do not feel it necessary to express any definite opinion upon the fact of the purchase being *benamee*, having come to the conclusion that, assuming it was so, the appellants have established their right to hold the property against the *benamee* title.

It is scarcely suggested that the purchaser had any notice that the title was other than or different from the apparent one. None of the documents give any notice whatever that the transaction was other than it appeared to be. On the contrary, all the documents are entirely consistent with the purchase having been made by Bunnoo Bebee herself, or by somebody for her benefit. The case, therefore, cannot be put on the ground of actual notice, but it was said,—and this appears to have been the ground upon which the High Court decided in favor of the respondent,—that there were circumstances which ought to have put the purchaser upon enquiry; and that if he had enquired, he might have discovered the real title.

It is not necessary to say whether this case is to be decided upon the principles on which the English Court of Chancery acts in cases of resulting trusts, when questions arise between the equitable owner and the purchaser for value without notice; or whether it is to be decided upon the general rules of equity and good conscience, which bind the Courts in India, because the principle of decision must in either case be the same. It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry, that, if prosecuted, would have lead to a discovery of it.

The High Court treat the defence as an attempt to introduce "a very peculiar doctrine of the English Court of Chancery." Their Lordships cannot think that this is a correct view of the defence which is set up in this case. It is one to which, no doubt, the Court of Chancery in England gives effect, but it only gives effect to it in a peculiar manner, because of the distinction in England between legal and equitable estates, and legal and equitable remedies. If this case had arisen in England, the respondent would have had no *locus standi* whatever in a Court of law, and must have resorted to a Court of equity.

After the discussion which has taken place, the case seems to result in this,—whether or not, under the circumstances of this case, the purchaser ought to have enquired. The High Court think that he ought to have made enquiry, because of the *status* and position of Bunnoo Bebee. The learned counsel who has argued this case for the respondent does not himself rely upon that circumstance as one which ought to have put the purchaser upon enquiry, and their Lordships cannot see that there is anything in her position as a Mahomedan woman living with her children upon this estate, and sometimes letting it, which should have put any one upon enquiry whether she was the real owner or not. It is admitted that, if an enquirer had gone to the office of the zemindar, or to the public Registry, he would have found that she was the owner. She was in possession, and her former life led to no presumption that she might not have had money to purchase for herself, or that others might not have purchased by way of gift to her; on the contrary, the circumstance that she had cohabited with one or two persons of some property, might have fairly led to the supposition either that she had acquired money, or that gifts had been made to her for her advancement and comfort in life.

But circumstances have been relied upon at the bar which were not adverted to by the High Court. In cases of this kind the circumstances which should prompt enquiry may be infinitely varied; but, without laying down any general rule, it may be said that they must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular enquiry ought to have been made. It is not enough to assert generally that enquiries should be made, or that a prudent man would make enquiries; some specific circumstances should be pointed out as the

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starting point of an enquiry, which might be expected to lead to some result. Mr. Cowie, feeling that the case must really depend upon the existence of such circumstances, has referred to two. First he says that, if any enquiry had been made, it would have been found that Macdonald had been in possession, and had improved the property. It has been already observed that the facts do not show, with anything like distinctness, that Macdonald was in possession during his lifetime. There is evidence that he had built upon the property, but, supposing enquiry had been made, and the fact ascertained, it would not lead to the inference that, contrary to the apparent title, he had purchased the land for himself; for it is quite probable to suppose that he would spend money to improve property which belonged to the woman with whom he was living.

The other circumstance relied on is that, in the deed of sale itself from Bunnoo Bebee to the appellants' father, she says she made the sale with the consent of her family. If this had been shown to have been an unusual clause, or that it had been only usual to insert it in deeds where the consent of the family was really required and obtained, there might have been some ground for the superstructure of argument which was built upon it; but their Lordships have no evidence and no suggestion that this is not in common form; on the contrary, it appears that in the deed of sale to Bunnoo Bebee herself from her own vendor, the same expressions occur. It appears to their Lordships that the clause is one without any specific force or meaning, inserted, like many other general phrases, in Indian deeds, to exclude any possible objection that might be raised against them. It is very like that which so frequently occurs after a full conveyance: "I and my heirs have no longer any claim." Those words are often unnecessary, but they are of very frequent occurrence. Their Lordships therefore think that the two facts relied on as those which ought to have put the purchaser on enquiry do not support the contention made at the bar, and that the whole case of the respondents fails on its substantial merits.

Other questions have been raised in the case with which it is not now necessary to deal. Their Lordships, in the result, are glad to come to a conclusion by which it is quite evident substantial justice will be done. There has not been a suggestion throughout of any collusion between the purchaser and Bunnoo Bebee, or that the purchase was not made entirely *bonâ fide* on his part, and without notice of any title other than that he took from her.

In the result their Lordships will humbly advise Her Majesty to allow this appeal and to reverse the judgment of the High Court. Their Lordships will further advise Her Majesty that the suit be dismissed, and that the appellants should have the costs in India and of this appeal.

The 7th June 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Guardianship of Minors—Revocation of Certificate—Misconduct—Act XL of 1858 *s.* 21.

Case No. 4 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Mymensingh, dated the 30*th September* 1871.

Pitamber Dey Mozoomdar (Petitioner), *Appellant,*

versus

Ishan Chunder Dutt Biswas (Opposite Party), *Respondent.*

Baboos Romesh Chunder Mitter and *Kally Kishen Sen* for Appellant.

No one for Respondent.

A certificate of guardianship was cancelled under s. 21 Act XL of 1858, in a case where the guardian, without any sufficient cause or justification, and without legal advice, withdrew an appeal made to set aside a sale of the estate of the minors, and at the same time dealt with the auction-purchaser and obtained a *putnee* of a portion of that very property in the name of his own wife.

Bayley, J.—This is an application under Section 21 Act XL of 1858 for the cancellation of a certificate of guardianship given to one Ishan Chunder Dutt as guardian of certain minors. The ground of the application is the misconduct of the said guardian. It is said that Hur Soonduree, the mother of the minors, had, in a certain case in which the property was sold, appealed to have the sale set aside under Section 257, that there were good grounds for that appeal, but that, without any sufficient cause shown, the guardian Ishan Chunder withdrew the appeal, and in collusion with the auction-purchaser obtained a *putnee* of a portion of the property sold in the name of his wife for a sum alleged

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to be Rs. 100. It is further alleged that Ishan Chunder was the tool of and in negociation with one Ekram Hossein, the former proprietor and auction-purchaser of the property, and was endeavoring to have a transfer of it to the prejudice of the interests of the minors.

On this application we sent for certain records which were not at first before this Court, and those papers having now arrived, we have to deal with the whole case on the merits.

It is here to be observed that Ishan Chunder did not appear before us, although by double notice ample opportunity was given him to do so. This probably would be enough to raise a strong presumption and pass a decision against him, but we have gone through the whole records.

Now it has to be remarked that all the transactions above referred to have been borne out by the evidence of Pitamber, while on the side of the respondent the testimony of witnesses is quite vague, bears evident signs of being tutored, and is in every respect utterly untrustworthy. Then come the reasons given by the Lower Court which we are bound to meet before we reverse its judgment. The Lower Court says:—"There "is no sufficient proof of *mala fides* or of "any misconduct on the part of the guardian "and manager."

Now, when a party standing in the position of fiduciary guardian to the minors, without any sufficient cause or justification, withdraws an appeal made against an order affecting the estate of the minors, and that without legal advice, and at the same time deals with the proprietor and auction-purchasers, and purchases a portion of that very property himself in the name of his wife and other kinsmen, we cannot agree with the Lower Court in saying there is no proof of *mala-fides*. As said before, Ishan Chunder was allowed ample opportunity to explain why he withdrew the appeal, how he came to purchase a portion of the property in his wife's name, and on the whole to justify his conduct as to the above circumstances. No prudent guardian, acting *bonâ fide* on behalf of the minors, should have withdrawn such an appeal without some justifying circumstances or legal advice which he might adduce as legal warrant when called upon to do so. It was, however, remarked by way of argument that even the taking of the *putnee* by Ishan Chunder may have been for the benefit of the minors; but if it were so, why was the purchase made in the name of Ishan Chunder's wife and her relations? The whole appearances and circumstances are against Ishan Chunder, and there is nothing shown to justify them.

For the above reasons we reverse the order of the Lower Court, cancel the certificate given to Ishan Chunder, and send the case back to the Lower Court for proper orders as to the appointment of a guardian either in the person of the petitioner Pitamber, or such other person as the Court may think fit.

The 7th June 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Execution of Decree—Mesne Profits—Reference to Maps not expressly referred to in Decree.

Case No. 76 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 29th November 1871, *reversing an order of the Moonsiff of Jamalpore, dated the 27th February* 1871.

Shiboo Soondery Dossee (Decree-holder), *Appellant,*

versus

Bama Soondery Dabee Chowdhrain (Judgment-debtor), *Respondent.*

Baboos Sreenath Doss and *Mohiny Mohun Roy* for Appellant.

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Respondent.

In this case the Lower Appellate Court was held to have erred in not referring to two maps not expressly referred to in a decree, so as to assist it in ascertaining the amount of mesne profits due under the decree.

Mitter, J.—THE appellant in this case is the holder of a decree bearing dated the 23rd August 1862, for possession of certain lands with mesne profits from the date of dispossession to that of recovery of possession.

It appears that one Hurrish Chunder, under whom the appellant holds the talook which was awarded to him under the decree above referred to, instituted a suit for the declaration of his proprietary right in certain lands designated as *Pahary Puttul* against these very respondents. This suit was decreed in favor of Hurrish Chunder on the 25th June 1867 after an Ameen had held a local

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investigation and prepared a map showing the lands which were in dispute in that suit. Within these lands, however, there were two talooks, one named Talook *Bissessur Dey*, the other named Talook *Kalika Proshad;* the lands of Talook *Bissessur Dey* being situated towards the east, and those of Talook *Kalika Proshad* towards the west of that village. The proprietor of Talook *Bissessur Dey* also brought a suit to recover a portion of the lands above referred to. An Ameen was deputed to the spot, who prepared a map, clearly showing the lands which constituted Talook *Bissessur Dey*, and the Court, after having accepted the map as a correct representation of the lands in dispute on that occasion, gave a decree in favor of the proprietor of Talook *Bissessur Dey*. The appellant in this case subsequently brought a suit for possession of 3 annas 4 gundas of the lands in Talook *Kalika Proshad* with mesne profits; and, as already observed, a decree was passed in his favor on the 23rd August 1862 on the basis of the two decrees passed in the two previous suits above referred to.

It is not disputed in this case that the appellant has already got possession of the lands awarded to him by that decree, and the present contention relates only to the amount of mesne profits which he is entitled to recover from the defendants.

The first Court deputed an Ameen to ascertain the amount of mesne profits due to the appellant, with directions to ascertain the amount of land decreed to him with reference to the two decrees passed in the previous suits, *viz.*, in the suit instituted by Hurrish Chunder, and in that instituted by the owner of Talook *Bissessur Dey*. On the Ameen's submitting his report to the Court, a certain amount was awarded to the appellant on account of the mesne profits due to him. This order has been reversed by the Judge in appeal on the ground that the decree sought to be executed is too indistinct, and cannot therefore be executed in the mode adopted by the first Court.

We are of opinion that the decision of the Lower Appellate Court is erroneous, and that the error which it has fallen into could have been easily avoided if it had taken into consideration the two maps prepared in the two suits mentioned above, *viz.*, in the suit instituted by Hurrish Chunder and in that instituted by the owner of Talook *Bissessur Dey*. Those maps were drawn scientifically, and there was no real difficulty in ascertaining the lands to which the appellant in this case was entitled, and therefore in ascertaining the amount of mesne profits due to him on account of those lands. The learned Judge in his judgment says :—"The decree "of which execution is now taken out is in "itself indistinct, but it has reference to the "former decree in favor of Hurrish Chunder "Chowdhry, and if there is sufficient dis-"tinctness in that decree of 25th June 1857, "then it is the duty of the Court to execute "it accordingly. On the face of it, the "decree-holder is entitled to wassilat on 3 "annas 4 gundas of Talook *Kalika Proshad*, "there is no mention of the area or number "of plots or their position, but the bound-"aries stated are *general* and external boun-"daries of the village, and within these "boundaries are other lands and other ta-"looks not now under consideration; what is "required are the details of the various plots "which make up the Talook *Kalika Proshad*. "It is certainly clear that the present enquiry "has included much land in excess, for the "assessment of a 3-anna 4-gunda share "is Rs. 420 per annum, which is much more "than the *entire* talook is valued at in the "former suit." No doubt, the learned Judge is correct in saying that, taking the decree which was passed in favor of Hurrish Chunder *alone*, there were no sufficient data to determine the exact quantity of land to which the appellant in this case is entitled; but if in conjunction with the decree passed in favor of Hurrish Chunder, the learned Judge had also taken into consideration the decree passed in the second suit, *viz.*, in that instituted by the owner of Talook *Bissessur Dey*, there would have been no difficulty whatever in arriving at a correct conclusion upon the merits of this case. The lands of village *Pahary Puttul* constituted two distinct talooks, one called Talook *Bissessur Dey*, the other Talook *Kalika Proshad*. Talook *Bissessur Dey*, however, consisted only of a 9-anna 12-gunda share of certain lands situated on the eastern side of the village; the remaining 6 annas 8 gundas of those lands, together with the entire lands situated on the western side of that village, belonging to Talook *Kalika Proshad*. If, therefore, we take in the first place the map prepared in the suit instituted by Hurrish Chunder as showing the total quantity of land comprised in *Pahary Puttul*, and if we then exclude therefrom the 9 annas 12 gundas share of the lands which were delineated in the map prepared in the suit instituted by the owner of Talook *Bissessur Dey*, the lands belonging to the plaintiffs' Talook *Kalika Proshad* can be determined with the

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utmost facility. The learned Judge further says that there is nothing whatever in the decree of 1857, which was passed in favor of Hurrish Chunder, to show that the map relied on by the first Court, *viz.*, the map prepared in the case of Hurrish Chunder, was adopted or approved of by the Court which passed that decree; but on this point the learned Judge appears to be wrong. The judgment which was followed by that decree clearly shows that the map was adopted and approved of by the Court, and it was probably for that reason that the decree was left indefinite, there being no dispute at that time as to the situation of the lands which formed the subject-matter of *that* suit.

It has been contended that the Court has no power to go beyond the precise terms of the decree, and to refer to the maps above mentioned, because those maps were not distinctly referred to in the decree itself. This contention appears to be untenable. It is notorious that decrees in this country are not always drawn up with that decree of precision with which they ought to be drawn up; and if we adhere too strictly to the mere letter of such decrees, there can be no doubt whatever that in many cases great injustice would follow. We therefore cannot accept this contention. Of course, it is not open to the Court sitting in the execution department to do anything which is inconsistent with the decree itself, but that is not what is asked for by the appellant in this case.

For the above reasons we reverse the order of the Judge, and remand the case to him for the determination of the other questions raised in the appeal.

The appellant will get his costs from the respondent in all the Courts; the costs of each Court being assessed at one gold mohur only.

The 8th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Small Cause Court—Plaint (Reception of, by Nazir).

Reference to the High Court by the Officiating Judge of the Small Cause Court at Bohur, dated the 16th May 1872.

Raj Chunder Gope, *Plaintiff*,
versus
Joogal Gope and another, *Defendants.*

A Nazir of a Court of Small Causes is not authorized to receive plaints.

Case.—Baboo Hur Mohun Goopto, a pleader of this Court, presented this plaint, now before me, with a bond dated the 24th Magh 1275 B. S., which fell due in the month of Cheyt of that year, to the Nazir of the Court, on the 11th April last, corresponding with 30th Cheyt 1278 B. S., when the Court was closed on account of *Mohabihub Sankranti.*

Under provisions of the Statute of Limitation, 30th Cheyt was the last day for instituting the suit, and it appears to me from the statements of the Clerk, Nazir, and pleader Baboo Hur Mohun Goopto, and a subseqnent deposition of the Nazir on oath, that the Clerk did not come to office, nor was he at Bohur on that day; and as the Judicial Officer was not holding his sittings in the station, then the pleader submitted the plaint to the Nazir of the Court at the pleader's own residence, after calling him there, as he was on his way by it to some other direction, and not to office. A few days after, the plaint was again returned to the pleader by the Nazir, and it has eventually been submitted to me, accompanied by a petition on the 22nd April last, the first sitting day of that month in the Bohur Court of Small Causes.

The Hon'ble Court's decision dated 1st September 1871, in the case of Anunto Ram Chatterjee, appellant (*vide* Weekly Reporter, Vol. XVI, page 230), very clearly sets down as a rule that plaints could be accepted on Sundays or other close holidays, and I, accordingly, had no hesitation to number and register the plaint, notwithstanding it was presented on a holiday, as otherwise limitation would stand a bar to plaintiff for his coming to Court with the cause on the following day. But the question which arises for reference is, whether the Nazir taking the plaint at the pleader's private dwelling would be deemed as reception by the proper officer at a proper place.

The Clerk is in a Mofussil Small Cause Court recognized the officer who receives and numbers plaints, &c., in absence of the Judge, and filing plaint at the Clerk's "private residence" has been held good by the precedent noted in the margin.

5th June 1863, Muddun Mohun Chuckerbutty *versus* Tabeer Biswas and Bramdee Biswas Sutherland's Small Cause Court Ruling Book, page 36.

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The Clerk, I find, was not under the necessity of attending office on an authorized holiday, and was no way in the fault for not being found that day. But the Nazir's receiving the plaint, and instead of presenting it to the Judicial Officer of the Court for his discretion on the matter, his return again to the pleader after interval of a few days was indeed improper and unsatisfactory.

Under the circumstances stated above, I entertain doubts if I were justified in allowing a number to the plaint for adjudication, in consideration of its being preferred to the Nazir on the 11th April last, up to which day the plaintiff had a right to institute the suit, and not afterwards. I, therefore, humbly await the instructions of the Hon'ble Court as to the point in question, until arrival of which the plaint should remain with the Clerk of the Court without finding a place in the Register of Causes.

The judgment of the High Court was delivered as follows by—

Ainslie, J.—We are of opinion that a Nazir of a Court of Small Causes is not authorized to receive plaints.

The 10th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Second Marriage by Mahomedan—Agreement with first Wife—Construction—Limitation—Nudum pactum.

Case No. 1383 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 14th September 1871, affirming a decision of the Officiating Subordinate Judge of that District, dated the 1st July 1871.

Meer Fyez Ali (Plaintiff), *Appellant*,

versus

Meer Nuzzuff Ali and others (Defendants), *Respondents*.

Mr. R. E. Twidale for Appellant.

Moonshee Mahomed Yusoof for Respondent.

Where a Mahomedan husband, on contracting a second marriage, executed an agreement giving his first wife a monthly allowance, and stipulating to give her, or, at her death, her children, a certain share of what he was possessed of or might acquire, and the first wife died leaving children of whom plaintiff was one,—HELD that, as to property acquired in the wife's lifetime, the right to have the agreement enforced would at the latest accrue at her death, plaintiff having three years from attaining his majority to bring his suit for the non-performance of that part of the agreement; and that, as to property acquired since the wife's death, the agreement was a *nudum pactum*, there having been no consideration for the promise.

ON contracting a second marriage, Nuzzuff Ali executed an ikrarnamah dated 10th December 1849 in favor of his first wife Imambandee, giving her a monthly allowance of Rs. 30, and stipulating that he would give her, or, at her death, her children, 6 annas of what he was possessed or might acquire. The plaintiff Fyez Ali, and the defendant Kumar Ali were the only two surviving children of Imambandee. Plaintiff on attaining his majority demanded his share of the property from his father; and on the latter declining to surrender it, brought the present suit upon the ikrarnamah for 3 annas share of the defendant Nuzzuff Ali's moveable and immoveable property.

The Subordinate Judge held that the suit was barred by limitation, since more than 12 years had lapsed since the ikrarnamah and since Imambandee's death, and more than three years since plaintiff attained his majority.

Plaintiff appealed to the Judge principally on the terms in the ikrarnamah "what property he might acquire," showing that certain property had been acquired in 1864 and 1869, and he contended that his claim was not barred with respect thereto. He also stated that the ikrarnamah was not infructuous, as under it Imambandee had sued for and obtained an order for maintenance under Regulation VII of 1819.

The Judge was of opinion that, if the ikrarnamah was not infructuous, it must be held to have had effect from the date of the order under Regulation VII, which would bar plaintiff's claim. As to the words "what property he might acquire" in the ikrarnamah, the Judge did not consider that this would make the term of its operation indefinite, but that the proper construction to be put on it was that it might have effect at any time within twelve years, or whatever might then be the term of limitation; that if Imambandee were alive, she would receive under it, or if she were dead, her children would receive under it, 6 annas of whatever property Nuzzuff Ali might then have. The suit not having been brought within twelve years from the execution of the deed, or within three years of the plaintiff attaining his

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majority, the Judge held that it was rightly dismissed.

The plaintiff now appealed specially upon the following grounds :—

I. That the Lower Courts had erroneously applied the law of limitation to the present suit, for when petitioner's father supported him during his minority (during which time petitioner was in constructive possession of his share), and when petitioner on attaining majority demanded his share which was refused, such refusal constituted his cause of action, from which date twelve years had not elapsed.

II. That the limitation of three years did not apply to the present case, for even assuming that from the date of his attaining majority petitioner did not enjoy any portion of the proceeds, inasmuch as twelve years had not elapsed from the date of attaining majority, the suit was within time under the provisions of Clause 12 Section 1 Act XIV of 1859. The cause of action under such circumstances must be considered to have accrued when petitioner left his father's house, and was no longer in enjoyment of the proceeds.

III. That the terms of the ikrar have been misconstrued by the Lower Courts, and the property claimed having been acquired within twelve years prior to suit, the suit was not barred.

The judgment of the Court was delivered as follows by—

Couch, C. J.—As to property which was acquired in the lifetime of the wife, the suit is barred by the law of limitation, because the right to have the agreement enforced would at the latest accrue at her death, and the son would have three years from attaining his majority to bring a suit in respect of the non-performance of that part of the agreement.

With respect to property acquired since the death of the wife, there is no agreement with her ; the agreement is an agreement to give it to the sons. It appears to us that was a mere promise which would not bind the father. There was consideration for the agreement with the wife to give her a share and upon her death that it should go to her children. But it was different with respect to property acquired after her death. It appears to us that what the agreement intended was that a share of the property which was acquired by him during her lifetime should go to her and after her death to her children. The suit cannot be maintained, and the appeal must be dismissed with costs.

The 13th June 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution of Decree—Attachment by one Creditor—Sale by another—Priority—Right of former against other Property of the Debtor.

Case No. 94 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 16th December 1871, affirming an order of the Subordinate Judge of that district, dated the 22nd May 1871.

Kalee Pershad Dutt (Decree-holder), *Appellant,*

versus

Rajah Mahomed Jowahur Jumma Khan (Judgment-debtor), *Respondent.*

Baboos Kalee Mohun Doss and *Bama Churn Banerjee* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Where a judgment-creditor attached land in satisfaction of his debt, but allowed the sale to be postponed to enable the judgment-debtor to raise the money by way of mortgage, and whilst the attachment was pending the property was sold at the instancee of another creditor—HELD that the former judgment-creditor was entitled to proceed against other property belonging to the judgment-debtor.

Kemp, J.—THE decree-holder is the appellant in this case. It appears that he attached certain released lakheraj lands in satisfaction of his debt. The judgment-debtor applied for time to raise the money by way of mortgage or in some other way. The judgment-creditor allowed this, and the sale was postponed, the attachment subsisting. Subsequently, another creditor brought to sale the same property, and the property was sold. The judgment-creditor, the appellant before us, now seeks to attach and sell other property belonging to his judgment-debtor, and both Courts have held that he is not at liberty to do so inasmuch as his attachment of the property first attached still subsists, and the lands are subject to all liability under his decree, and that he must therefore proceed against these lands and sell them, and that he is not at liberty to attach and sell other lands. We think that the finding of the Lower Courts are wrong. We have not been shown that the surplus sale proceeds are sufficient, supposing the special appellant to have priority of attachment to satisfy the whole of his claim, and

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it is clear from the ruling to be found in Vol. II, Weekly Reporter, page 297, that "if two parties attach a property in execution "of separate decrees, and the sale of the pro-"perty takes place at the instance of the "decree-holder who made the second attach-"ment, the decree of the decree-holder who made the first attachment will be first satisfied from the sale proceeds; but the sale cannot be disturbed if such decree-holder, instead of taking his money out of the sale proceeds, put up the rights and interests of his debtor in the property again for sale." Now, in this case, as already observed, at the most all that the special appellant could claim would be the right of priority to be satisfied out of the sale proceeds; we have not been shown whether the sale proceeds would be sufficient to satisfy his decree, and it is represented to us that they are nothing like sufficient, and if he was to proceed to sell the property which has already passed by sale to a third party, the sale could not be disturbed. We think, therefore, that the judgment-creditor was perfectly justified in proceeding against any other property of his judgment-debtor, and we do not see how the judgment-debtor is in any way prejudiced by his doing so. It is said that the Sudder jumma of the property attached is Rs. 16,000; if that be the case, the judgment-debtor is clearly in a position to pay his just debts; and, if he wants to avoid the sale, he must satisfy the decree.

The appeal is decreed with costs, and the decision of the Lower Court reversed.

The 13th June 1872.

Present:

The Right Hon'ble Lord Westbury, Lord Justice James, Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Execution of Orders of Privy Council—Procedure—Act II of 1863 *s.* 14—*Declaratory Orders.*

*Proceedings on a Petition to enforce Execution of Her Majesty's Order in Council on an Appeal from an Order of the Judicial Commissioner of the Punjab.**

In re Barlow *v.* Orde.

A party in a suit, desirous of executing an order or judgment of Her Majesty in Council, ought to apply, in conformity with s. 14 Act II of 1863, to the Court from which the appeal was finally brought to the Queen in Council, to enforce and execute the decree of Her Majesty in Council; and it is the duty of such Court to give directions for executing the decree to the Court of first instance by which the suit was originally tried.

A declaration of Her Majesty in Council must not be considered as not being equivalent to an order. When Her Majesty in Council does make a declaration, the form in which that declaration is conceived, and the words in which the order is framed, amount to a direction to the Court below to clothe that declaration in the proper form of a mandatory order, and to give effect to the mandatory order so expressed. If any difficulty should arise in that form, or be sought to be produced from having recourse to that non-existent ground of objection, the Privy Council will not fail to recommend Her Majesty to deal with such obstructiveness in the most serious and stringent manner.

Mr. Leith.—I HAVE now to apply to your Lordships, upon petition, in respect of the non-execution of a judgment or order of Her Majesty in Council, which was made on the 31st of March 1870, under a judgment of your Lordship's Board, bearing date the 9th of March 1870, by which judgment your Lordships reversed the judgment of the High Court, which had been pronounced against my client. The effect of that reversal was to leave standing and in full effect the judgment of the Lower Court, of the Court of first instance, which had decreed in favor of my client, and had decreed possession in respect of the property which was the subject of the suit. When the order of Her Majesty in Council was received, it was remitted to India, and the usual application was made by my client that the order of Her Majesty in Council should be carried into effect by the proper Court.

Lord Justice James.—What Court?

Mr. Leith.—The Court in the Punjab. It was sent to the Commissioner.

Lord Westbury.—The order is:—"Their "Lordships do this day agree humbly to re-"commend your Majesty to reverse the "decree of the Judicial Commissioner of the "Punjab of the 21st January 1865." That was the original decree, was not it?

Mr. Leith.—Yes, that is the Appellate Court.

Lord Westbury.—Was that the Appellate Court?

Mr. Leith.—Yes. That decision was against my client. We appealed against it, and your Lordships reversed that order.

Sir J. W. Colvile.—Then you see there are two decrees reversed. Are they both appellate decrees?

Mr. Leith.—They are both appellate decrees.

Lord Westbury.—Because the second decree is earliest in point of date?

* 17 W. R., 77.

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Mr. Leith.—Perhaps it would be as well that I should state what were the decrees originally. I took it for granted that your Lordships had them. I will state the proceedings. The suit was commenced on the 4th of June 1863, and was brought in the Court of the Officiating Deputy Commissioner of Hissar by my client on behalf of herself and the guardian to the infants to establish the will. On the 13th October 1863, the judgment and decree was made by that officer, the Officiating Deputy Commissioner. That is the one that remains standing, which I have referred to as being the Court of first instance.

Sir Montague E. Smith.—That is the decree reversed by the Commissioner?

Mr. Leith.—Quite so. That decree found and decided all the issues in favor of my client, stating that a moiety of the one, and the fifth part of the other share, which was all we sued for under the devise of the two wills, "passed by the devise thereof con-"tained in the latter will to your petitioner and his said infant son." That was the decree which is in terms the same as your Lordships' subsequent decree, reversing the decree of the High Court, deciding everything in favor of my clients, all they have claimed.

Sir James W. Colvile.—It ends, I suppose, with something mandatory?

Mr. Leith.—Yes, in the usual way. Then on the 26th January an appeal was instituted against that judgment of the first Court, and on the 26th January 1864 the Officiating Commissioner or Superintendent and Civil Judge—all these offices meeting in the same individual—of Hissar recorded his judgment and decree by which he allowed the appeal and reversed the judgment of the Lower Court. He decided the claims and dismissed the suit. He refused to establish or to decree the claims of my client. We appealed against that decision, and on the 21st of January 1865 the Judicial Commissioner, the officer in the Appellate Court of the Punjab, made and recorded his judgment and decree, by which he dismissed our appeal, and affirmed the decision of the intermediate officer which I have referred to. Then, my Lords, we applied for the ordinary leave to appeal to Her Majesty in Council against that judgment of the Judicial Commissioner. I may mention that the Judicial Commissioner is the highest functionary, that is, the highest Court of Appeal in the Punjab, and the appeal is therefore direct from the Judicial Commissioner to Her Majesty in Council. We made the usual application, by petition for leave to appeal to Her Majesty in Council, which was granted, and that appeal came on, and was argued before the Lords of the Judicial Committee.

Lord Westbury.—Is this the state of things? The Court of first instance made a decree in your favor upon all the points, and concluded that decree by finding for the plaintiff on all the issues. There was an intermediate appeal which reversed that decree, and there was an appeal from the Court so reversing it; and that appeal was rejected, with all the costs, whether in this Court or the Courts below. From that decree, or rather from the two decrees of intermediate Courts of Appeal, the appeal to Her Majesty was presented. Now will you be good enough to tell us this? How came it to pass that, in dealing with that appeal to Her Majesty, we were not content with annulling the decrees of the two intermediate Courts of Appeal, and affirming the decree of the Court of first instance which had given you all you desired? Do I make myself understood?

Mr. Leith.—I really do not know.

Lord Westbury.—Does there appear any reason on the face of the judgment?

Mr. Leith.—No, none. It goes on very minutely in dissecting the case, and proceeds to adjudicate upon every point, but does not go on to say that possession shall be given, or, in a mandatory way, that the parties shall be put into possession at the end of the judgment.

Sir J. W. Colvile.—There is one part of the order of Her Majesty which perhaps was new, which was an enquiry.

Lord Westbury.—An enquiry at the request of Mrs. Orde. An enquiry is directed, that is, an additional thing to the decree of the Court of first instance, because you see before we proceed to deal with what has been done in the Court below, one wants to see whether the order which Her Majesty made on the recommendation of this Committee was in itself complete, so as not to afford room for any mistake or misapprehension. Now I want to see how it came to pass that we should have subverted the foundations of the decree of the Court of first instance with which you were content, and which in effect we built up again; because you know we might have reversed the intermediate orders on appeal, and have affirmed the decree of the Court of first instance, and, in addition, at the request of Mrs. Orde, might have directed the enquiry. My Lord sug-

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gests, which is no doubt the fact, that, if we did not deal with or touch the decree of the Court of first instance, and if the declarations made are all consistent with that decree, the only addition being that enquiry at the option of a particular party, the course should have been that it should have gone back to that Court, and that Court would have had no difficulty whatever in giving effect to the whole of it. But then comes what is to me a difficulty; how comes it that it did not go back to that Court, but that it went back to an intermediate Court of Appeal?

Mr. Leith.—That is according to the Code of Procedure. I will explain that presently. With reference to this enquiry, as your Lordship has just pointed out, which I was going to answer, which his Lordship had suggested to his mind before, that was an option left to be decided in India by my client. It was not a suspension of any part of your Lordships' order, but was independent of the order which confirmed the original Court's decree. It was a question raised by the respondents with regard to certain of the property; and then it was said:—"If, however, Mrs. Sophia Orde"—that is my client, the present applicant—"requests, and is content "to take at her own risk an enquiry on this "subject, their Lordships will recommend "that such enquiry shall form part of the "order to be made. Their Lordships will "humbly advise Her Majesty to reverse the "decree appealed from, and to declare that "Mrs. Sophia Orde and James, the son and "daughter of Major James Skinner, are "entitled in equal shares, by virtue of the "will of Colonel Skinner, to one equal fifth "part of all the estates and property thereby "devised and bequeathed to the testator's "five sons in equal shares, and also to declare "that one equal fifth part of all the estates "and property purchased or acquired after "the death of the Colonel, by means of the "rents, profits, or income arising from the "estates and property, devised and bequeath-"ed to the said five sons of the testator, "belonged absolutely to his second son," and then it goes on to say also "and at the request "and risk"—that is to say, If Mrs. Orde requests—"of Mrs. Sophia Orde, let an "enquiry be made by or under the direction "of the Court from whose decree this ap-"peal is brought, whether any renewals or "leases of lands that had been held by the "Colonel during his lifetime were made or "granted by the Government or any other "persons to the executors or managers of "the Colonel's will, and under what circum-"stances, and for what consideration the "same were made. There remains the sub-"ject of costs," and then the costs of the appeal are dealt with.

Sir Montague E. Smith.—The enquiry is directed to be made by the Court from whose decree the appeal is brought.

Mr. Leith.—It would be made so.

Sir Montague E. Smith.—That is the intermediate Court, is it not?

Mr. Leith.—No, that would be the highest Court of Appeal; they would send it down to the other Court.

Sir Lawrence Peel.—They would direct the enquiry to be made according to the practice of that Court.

Mr. Leith.—When we received the order of Her Majesty with the report, a certified copy thereof was transmitted to India, and we applied under Sections 262 and 234 and 235 of Act VIII of 1859, in respect of the execution of the said order. The Code of Procedure was extended to the Punjab in 1866.

Lord Westbury.—Let us see exactly the course that ought to have been taken. Her Majesty's order supplied in her declarations a foundation for the principal parts of that decree, and superadded an optional enquiry. Now, then, which was the tribunal in India that ought to have been applied to, to give effect to that decree?

Mr. Leith.—The Court in which the original decree was made, supposing that the Code applies.

Sir J. W. Colvile.—Is that so? Would not it be the duty of the highest Court, the Court from which the appeal comes to us, when the record is remitted to them to amend the decree? because our duty is to make the decree which that Court ought to have made. Then, as I understand, that Court ought to have amended the decree, and put it in the proper form, and sent it down to the Lower Court for execution.

Mr. Leith.—The whole of that turns on the Section. I will give you the Section upon which they acted. Probably the ruling of your Lordships' Court would be that the highest Court there, the Court of the Judicial Commissioner, from which the appeal came, and whose judgment was reversed, would have the duty cast upon it of executing your Lordships' judgment. I think that would appear, but they have been misled by taking the Code as their guide, in regard to what is done in a decision by an Appellate Court in India, not by your Lord-

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ships' Court. The Section which is referred to, 361, has this provision, that a copy of the decree certificate of the Appellate Court shall be transmitted to the Court which passed the first decree, and it shall be filed with the proceedings, and an entry made in the original registry of the suit of the judgment of the Appellate Court, so as to make it a judgment of that Court; and then Section 362 points out that the party must make an application for execution of the decree of the Appellate Court, that is, in that Court to which it was remitted, "to the Court "which passed the first decree, and shall be "executed by that Court as an original "decree, when the decree cannot be exe-"cuted by that Court," and then it goes into another jurisdiction as in this case. But upon those two is founded the error in this case. They treated the order of Her Majesty in Council as a decree of an Appellate Court under the Code. Therefore it is open to your Lordships now to decide that that does not apply to a decision of your Lordships' Board followed by the order of Her Majesty in Council, which ought to be executed by the Court of last resort in India.

Lord Westbury.—We must not go too fast, if you please. This is a mere entrance to the labyrinth. You agree that these Sections give the rule?

Mr. Leith.—Yes.

Lord Westbury.—Well, then, if it was a rule, it was incumbent upon you to observe it. Now see what the rule is in 361:—"A copy of the decree or other order "disposing of the appeal,"—that would be Her Majesty's order,—"certified by the "Appellate Court, or the proper officer of "such Court, and sealed with the seal of the "Court, shall be transmitted to the Court "which passes the first decree." Now what Court answers that description?

Mr. Leith.—That is the Court of the Assistant Commissioner.

Lord Westbury.—What I have called the Court of first instance?

Mr. Leith.—That would be the Court of first instance. That would be the Court which I have designated as the Court of the Officiating Deputy Commissioner.

Sir Lawrence Peel.—Do I understand you went to the second Court of Appeal?

Mr. Leith.—No; to the first.

Sir Montague E. Smith.—What did that Court do?

Mr. Leith.—It said it was a declaratory order, and not mandatory.

Sir Montague E. Smith.—It is described as the Judge of Meerut.

Mr. Leith.—Yes; it was sent to another jurisdiction under another Clause of the Act.

Lord Westbury.—We want to know whether the directions of Her Majesty ought to have been carried into effect by the Court of first instance, or by the last Court of Appeal, but I am told we need not discuss that because it is settled by an Act.

Mr. Leith.—Quite so. There are two Acts: there is one of 1852, which applies to the Regulation Provinces; there is an Act, No. II of 1863, which applies to the Non-regulation Provinces, within which category this comes. And by that Act it is provided that, if a party in a suit is desirous of preferring an appeal to Her Majesty in Council from any final judgment, decree, or order made on appeal or revision by the Court of highest civil jurisdiction in any province in British India not subject to the general Regulations,—which this is,—or from any such final judgment, decree, or order made in the exercise of original jurisdiction by the said Court, in any case in which the sum or matter at issue is above the amount or value of Rs. 10,000, or which judgment, decree, or order shall involve directly or indirectly that sum, or when the Court shall declare it to be a fit one for appeal, then such appeal shall be allowed.

Lord Westbury.—Does this case come within those numerous descriptions?

Mr. Leith.—Quite so. This was an appeal from the Court of highest appellate jurisdiction in a Non-regulation Province, so it comes exactly within the terms. Then, after providing for other matters connected with the security to be given, and the proceedings forwarded, and the expenses, then comes Section 14. The intermediate Sections do not apply. The 14th is:—"The orders or "decrees of Her Majesty in Council, when "duly certified, shall be enforced and executed under the directions of the said Court."

"*Lord Westbury.*—What is "the *said* Court?"

Mr. Leith.—The following words explain it:—"By the Judge or officer by whom the "suit was originally tried in the manner and "according to the rule."

Lord Westbury.—That does not explain it at all. What is "the *said* Court?"

Lord Justice James.—Then it is all to go back?

Mr. Leith.—To the Court of first instance.

Lord Westbury.—Are you quite sure of that? "The said Court" must refer to a

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Court previously described. What is the previous description? You see you wander up and down in an Act of Parliament as in a wood.

Mr. Leith.—There is no immediate antecedent to that word.

Lord Westbury.—Cannot you tell what "the *said* Court" is?

Mr. Leith.—I have given my own construction that it is the Court of first instance.

Lord Justice James.—You are making a suggestion against yourself. This seems clear that the Court from which the appeal comes is to give directions to the Judge or officer by whom the suit was originally tried.

Mr. Leith.—I think so.

Lord Westbury.—Then "the said Court" is the Court appealed from to Her Majesty?

Mr. Leith.—No doubt.

Lord Westbury.—Then the order of Her Majesty should be certified and delivered to the Judge of that Court, and his duty it is to transmit the order and the directions to the Court of first instance.

Mr. Leith.—I think so.

Sir Lawrence Peel.—Many hundreds of appeals come here. This tribunal is not supposed to know the practice of each Court. Their duty is to execute Her Majesty's command according to the practice of the Court, and if there is any error, to see that it is corrected.

Mr. Leith.—The Registrar will be able to state also that it is the practice here to send to the Appellate Court the order of Her Majesty in Council.

The Registrar.—Her Majesty's orders commonly say nothing about the Lower Courts. Appeals frequently come from the High Court of Calcutta, and their Lordships addresss the Judges of the High Court. It is then the duty of those Judges to send down an order to the Zillah or inferior Court to execute it in the province wherever it is. That must be so. Her Majesty always addresses the order to the High Court.

Lord Westbury.—Now, Mr. Leith, having ascertained the prescribed order of proceeding, namely, that this decree, made by Her Majesty in Council, should have been sent to the Court of highest civil jurisdiction, namely, the Court from which the appeal was presented, and having ascertained the duty of that Court, which is prescribed in the 14th Section of the Act of 1863,—"the orders or "decrees of Her Majesty in Council, when "duly certified, shall be enforced and exe-"cuted under the directions of the said Court "by the Judge or officer by whom the suit "was originally tried,"—that will be their duty. Now, what is the name or denomination of the Court of civil jurisdiction from which the appeal was presented?

Mr. Leith.—The Judicial Commissioner.

Lord Westbury.—Of Meerut?

Mr. Leith.—No, of the Punjab.

Sir J. W. Colvile.—But since that there has been a change.

Mr. Leith.—Yes; I have not explained that to his Lordship.

Lord Justice James.—To which Court did you apply?

Mr. Leith.—It is stated in the petition, "that your petitioner, on receiving in India "a duly certified copy of the last-mentioned "order of your Majesty in Council, duly "applied, under Sections 362, 234, and 235 "of Act VIII of 1859 (in respect of the "execution of the said order) to the Court "of the Officiating Deputy Commissioner of "Hissar."

Lord Westbury.—We must go through this much more narrowly. Tell us first from what Court the appeal was originally presented to the Queen.

Mr. Leith.—From the Court of the Judicial Commissioner of the Punjab.

Lord Westbury.—Was that Court in existence after you got Her Majesty's order?

Mr. Leith.—Yes.

Lord Westbury.—Did you apply to that Court?

Mr. Leith.—It does not appear on the face of it, further than that it appears by the judgment of the Court which has refused to execute the order of Her Majesty, that a copy of the decree had been transmitted, as required by that Section, that is, from the High Court. That is the only evidence I have.

Sir J. W. Colvile.—What I should like to know is whether you applied for execution in the Court of the Deputy Commissioner.

Mr. Leith.—We did under the Section.

Sir J. W. Colvile.—For execution of what decree did you apply?

Mr. Leith.—For the execution of the decree of Her Majesty in Council.

Lord Justice James.—You did not go to the right quarter.

Mr. Leith.—With submission, yes. The High Court, that is, the Court of the Judicial Commissioner, transmitted the order of Her Majesty in Council to the Hissar Court.

Sir Montague E. Smith.—Where does that appear?

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Mr. Leith.—By this judgment : the judgment states it.

Sir J. W. Colvile—They transmitted only the order as it stands. They did not draw up or amend the decree of the Court of first instance, and so send the complete decree down to the Lower Court.

Mr. Leith.—They only sent a transcript of the original order in Council of Her Majesty to that Court to put it in motion; and then we, under the Section I have cited, Section 362, made the application to that Court, being then in possession of the record to execute it, and then subsequently what made the difference of the name Meerut is this : it could not be executed by that Court, in consequence of its not having jurisdiction over the property, and then it was, under Sections 234, 235, and 236, remitted to the Court which had the local jurisdiction, that is, Meerut, and then the present judgment which your Lordships have to consider was pronounced by that Meerut Court.

Sir R. P. Collier.—You must first get it from this Court. By whom did it go ?

Mr. Leith.—By the Registrar ; it was sent direct. I take it, that is the ordinary course of practice.

Lord Westbury.—To whom was it sent ?

Mr. Leith.—Your Lordships' Registrar will say whether it has been sent to the Judicial Commissioner or the Governor of the Punjab.

The Registrar.—The Queen's orders are not sent at all by this office to the Court abroad. All orders are given to the agents of the parties, and it is their business to serve them in the proper manner. This order on the face of it, is addressed to the Governor-General of India, the Judicial Commissioner, or Judges of the Punjab for the time being.

Sir Montague E. Smith.—It appears as if it had been sent to the Commissioner, and transmitted to the Judge at Meerut.

Sir R. P. Collier.—There is an intermediate Commissioner.

Sir Montague E. Smith.—What the Judge at Meerut says is, it had been transmitted by the Deputy Commissioner under the provisions of Section 285.

Mr. Leith.—I am instructed by my solicitor that he sent a copy of it to his client in India.

Lord Westbury.—That does not help us.

Sir J. W. Colvile.—We do not know what the client did with it. It is evident that it goes to the Court of the Deputy Commissioner at Hissar for execution. The Deputy Commissioner says:—"I cannot execute it against this property, because this "property is not in my jurisdiction. I will "send it to the Deputy Commissioner of "Meerut, within whose jurisdiction it is ;" and then the Deputy Commissioner at Meerut says:—"I cannot execute this decree, because it is a mere order of Her Majesty "containing declarations, and there are no "mandatory words, and I do not know what "I have got to execute."

Mr. Leith.—Quite so.

Lord Westbury.—You see you have got into this predicament: The Court of first instance, when it gets the decree, says, "This is no child of mine, for the property "is not within my jurisdiction." Then you go to the Court which has the property within its jurisdiction, and that Court repudiates the decree in like manner as not being addressed to it. The course you ought to have taken, whatever that be, is contained in the 14th Section. Now, the 14th Section says :—"The order of Her Majesty shall be enforced and executed under the directions of the said Court." Now we have ascertained that that uncertain expression "the said Court" means the Court from which the appeal was finally brought to the Queen in Council. Therefore it was the duty of the parties to have brought the decree of Her Majesty in Council to the knowledge of that Court, and asked that Court to enforce and execute the decree, and it would be the duty of the Court to give directions for that purpose. Of course, it has no primary power of doing it ; but it is to be enforced and executed, under the directions of the Court, by the Judge or officer by whom the suit was originally tried. The course of conduct was clear. You should have taken the decree of Her Majesty in your hand, and applied to the Judge of the said Court, that is, the last Court of Appeal, and asked that Judge to send directions for executing the decree to the Judge or officer by whom the suit was originally heard. Now, have you done that ?

Mr. Leith.—I am sorry I am not in a position to—

Lord Westbury.—You appear not to be in a position to say where the fault lies, or where the defect lies.

Mr. Leith.—All I have is the letter to my solicitor, which says:—"I applied to the Judge "of Meerut under a certificate of the Punjab "Civil Court for execution of the decree," without saying what Civil Court.

Sir J. W. Colvile.—What order do you now ask their Lordships to make ?

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Mr. Leith.—I had a difficulty in framing it, but this is what I ask your Lordships to do :—" Your petitioner now humbly prays " that your most Excellent Majesty in Council " will be graciously pleased to order and " direct that the said Judge of Meerut, under " the said reference made to him as aforesaid " by the said Officiating Deputy Commissioner " of Hissar, or the last-mentioned Judge " himself, do forthwith execute the said " original judgment or decree of the last- " mentioned Judge, or that Your Majesty in " Council may be graciously pleased to make " such other order, directing and ordering " thereby possession of the shares aforesaid, " together with mesne profits in respect there- " of to be forthwith given to your petitioner " according to the declaration and the decree " of right contained in the said order of " your Majesty in Council."

Lord Westbury.—Suppose, in your perplexity and difficulty, we were to do this—that we were to recommend Her Majesty to make a supplemental order touching the mode of executing the decree, and that that supplemental order should follow distinctly the language of the 14th Section ; then, if you took that in your hands, do you think it will land you in safe ground ?

Mr. Leith.—I see the objection which was taken by the Judge of the Court below, and the distinction he draws between what he calls a declaratory judgment and one which is mandatory, in which he refers to the Code as defining what is declaratory and what is mandatory, that he would have no authority to give effect to a mere declaration of right, unless your Lordships went on to recommend Her Majesty that possession should be given.

Sir Lawrence Peel.—The objection is that your Lordships have not drawn up the decree in mandatory language, but only made a declaration. It would be quite impossible for your Lordships to hit the exact practice of every Court in every part of the world from which an appeal lies. It is an obligation imposed upon all those Courts that they should put the thing in the right course, so that the party may have his rights declared.

Sir J. W. Colvile.—They might take this over to the highest Court with a direction that the decree should be drawn in accordance, and then it would be exactly in the ordinary way. I thought the property in dispute was in the hands of trustees, and that it was a question of your getting your share?

Mr. Leith.—Quite so ; there is no adverse title.

Sir J. W. Colvile.—Then an order on the trustees would be sufficient ?

Mr. Leith.—It was a petition with regard to property purchased subsequently as being declared to be part of the original estate. I think it would be certainly the safest course that there should be something in the supplemental order of a mandatory character.

Lord Westbury.—One would deal tenderly, no doubt, with any difficulty which has been felt *bonâ fide* by the Judge, though the difficulty would have been removed if the subject had been better understood. But you know we cannot advise Her Majesty, when a Judge in a Court below miscarries as to his understanding of her order, to make the order more explanatory and clear, simply for the purpose of giving that Judge a better understanding of the subject. In the last 52 years of my experience at the bar and on the bench, I have never known such a difficulty, and yet almost every day in the House of Lords, if there had been any room for the difficulty, it would have arisen. Nothing is more common than in the case of a Scotch decree to say " their Lordships" (speaking of the House of Lords) " do declare and find," and then follow the declarations, and then the direction is " and their Lordships do direct " that the cause with these findings and decla- " rations be remitted to the Court below to " carry the same into effect." There is no difficulty about that. I never found any difficulty ; and if there were difficulty that could reasonably be expected to be produced, it is not likely to escape the fertile imagination of Scotch lawyers; I have never known such a thing. Well, now, to meet the difficulty that you feel, you must remember that the language of the Section (which I should propose, if their Lordships agree to it, should be followed) is this:—" The orders or decrees of Her Majesty in Council shall be enforced and executed." Surely those words involve the giving every necessary direction for the purpose of enforcing and executing ?

Mr. Leith.—Quite so. I think that would be sufficient.

Sir M. E. Smith—According to their own practice.

Lord Westbury.—No Court of Appeal can by any possibility tell what is the exact form of execution that is required. If we are making an order, we cannot exactly tell what are the words that may be necessary for giving effect to the order.

Mr. Leith.—I think that would be sufficient.

Sir Lawrence Peel.—Possession in this

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case means nothing more than paying over money.

Mr. Leith.—There is some land.

Lord Westbury.—This is an important matter. I am only afraid that it may open the door to obstructiveness. We must take great care to avoid that. It is possible that the present case may have arisen from the circumstance (and I do not wonder at it) that you have mistaken the exact course which ought to have been taken. It would not be a bad thing to have this added to a form of order of Her Majesty in Council in a proceeding similar to this :—"And with these "declarations remit the cause to the said Court "with direction to enforce and execute the "order in conformity with the 14th Section "of the Act of 1863."

Mr. Leith.—Quite so.

Lord Westbury.—It is not for that Court to enforce and execute. I should have said *to give directions* to enforce and execute. It is to be the medium of originating and transmitting the directions for enforcing and executing to the Court of first instance.

Sir J. W. Colvile.—You did not apply to the Chief Court, did you, after this refusal ?

Mr. Leith.—I cannot say. It is under these ambiguous words, "a certificate of the Punjab Civil Court." It does not say what Court, whether it was the Judicial Commissioner's, or any other Court.

Sir R. P. Collier.—The certificate might have amounted to a direction.

Lord Westbury.—It seems at present to be the conclusion of their Lordships that the safer way would be to let this petition stand over with the following minute :—"It appear-"ing to their Lordships that it was the duty "of the petitioner to have made application "in conformity with the 14th Section, and "the duty of the Judges therein mentioned "to have carried the directions of that Sec-"tion into effect, let the present petition "stand over until a further application has "been made."

Mr. Leith.—I am much obliged to your Lordships ; that is sufficient.

Sir J. W. Colvile.—I take it for granted that all the powers and duties of the Judicial Commissioner were transferred to the new Chief Court of the Punjab ?

Mr. Leith.—Oh, yes. I take it for granted that all causes must have been transferred in the state in which they were at the time the new Court was appointed.

Lord Westbury.—Your clients will take care to understand, and it must be generally understood, that their Lordships do not recognise the existence of any doubt or difficulty in that which has embarrassed the Court below, namely, that a declaration is not equivalent to an order. It is the duty of Appellate Court frequently, and all that it can do, to make a declaration, and then the form in which that declaration is conceived, and the words in which the order is framed, amount to a direction to the Court below to clothe that declaration in the proper form of a mandatory order, and to give effect to the mandatory order so expressed. It must not be supposed for a moment, therefore, that, if any difficulty arises in that form, or any difficulty is sought to be produced from having recourse to that non-existent ground of objection, this tribunal would fail in recommending Her Majesty to deal with such obstructiveness in the most serious and stringent manner.

The 8th June 1872.

Present :

The Right Hon'ble Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Act VIII of 1859 s. 14—Jurisdiction—Disputed Situation of Land.

On Appeal from the High Court at Agra.

Baboo Puhlwan Sing and others,

versus

Maharajah Mohessur Buksh Singh.

A former decision by the Courts in India confirmed by the Privy Council, adjudging the land in dispute to be an accretion to the respondent's settled estate in Shahabad, was held to be a bar, under s. 14 Act VIII of 1859, to the jurisdiction of the Ghazeepore Courts to try the present suit for the same land.

THE question with which their Lordships have at present to deal is that upon which the judgment of the High Court of the North-Western Provinces which is under appeal has entirely proceeded, *viz.*, whether the Ghazeepore Courts had jurisdiction to try the cause, having regard to the 14th Section of the Code of Procedure ? That article is in these words : "If, in a suit for "land situate on the borders of the Court's "local jurisdiction, the defendant object to "the hearing of the suit on the ground that "the land is not included within the local "jurisdiction of the Court, the Court shall "have power to determine the point, and if

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"the Court shall find that the land is included "within its local jurisdiction, it shall pro-"ceed to try the suit. Provided that, if it "be shown that the land in dispute has been "adjudged by competent authority to belong "to an estate, village, or other known divi-"sion of land, situate within the local juris-"diction of another Court, the Court in "which the suit is brought shall reject the "plaint, or return it to the plaintiff, in order "to its being presented in the proper Court."

The High Court of Agra have come to the conclusion that that Section was a bar to the present suit, and that it was their duty to act under the latter part of the Clause in question. Their Lordships are of opinion that that was a correct decision upon the Section as applied to the facts of this case.

The question, as it seems to their Lordships, is what was the *res decisa* in the former case? In that suit an objection was taken similar to that which is taken in this suit to the jurisdiction of the Shahabad Court. It was treated as if the land in dispute was within Zillah Ghazeepore, or an accretion to land in the possession of the defendants, which belonged to Zillah Ghazeepore; and it was contended that, by reason of a former decision of the Collector of Ghazeepore, the latter part of this Section applied, and that the Court of Shahabad had no jurisdiction to entertain the suit. That was decided against the defendants in that suit, who are the plaintiffs and appellants in this suit.

In order to decide that case, the Principal Sudder Ameen, who was the Judge of first instance, thought it advisable to try the question of jurisdiction, together with the merits of the suit, and he came to the conclusion that the whole of the land coloured yellow in the map which has been produced in both suits,—and it is the most favorable way of putting the case for the appellants to suppose that nothing but that land was then in dispute,—was an accretion to the plaintiff the Maharajah's settled estate in Shahabad. That decision was confirmed by the High Court. It then came here upon appeal, and this Board, confirming generally the decisions of the two Courts, held that, treating the whole of the yellow land as alluvial accretion, there were grounds for giving a portion of it to the defendants, the present appellants, as an accretion to their land, which had formerly, at all events, been in Ghazeepore; but that the other land, the portion on the other side of the line which they drew, was to be treated as an accretion to the land marked green; and that the plaintiff, the Maharajah, in that suit, was entitled to recover that as an accretion to his settled estate; affirming, therefore, with the above exception, all that had been done by the Courts below, *viz.*, that the land was alluvial land, and that it was an accretion to the settled estate of the plaintiff in Shahabad.

Now, no doubt, it might be possible to suppose cases in which the decision as to the accretion might not necessarily be a decision that the land to which it was accreted was within the local jurisdiction of the Court which had dealt with it. But all these questions must be tried with respect to the subject matter in the particular suit. And it seems to their Lordships impossible, in construing the Section with reference to what was in issue in the former suit, to come to any other conclusion than that the decision did, by necessary implication, find that the green land was within the settled estate of the Maharajah in Shahabad. He came as plaintiff into Court; he claimed the whole of the land as an accretion to his settled estate in Shahabad. From the map and the evidence, it is obvious that, if an accretion to his land, it could be an accretion to nothing but the green land. The accretion was found to be an accretion to his land in the settled estate of Shahabad, and that proposition necessarily implied that the green land was a part of the settled estate in Shahabad.

It seems, therefore, to their Lordships that the decision of the High Court of the North-Western Provinces was correct; and that being the case, their only duty is to advise Her Majesty to dismiss this appeal, with costs.

The 13th June 1872.

Present:

The Rt. Hon'ble Sir James W. Colvile, Lord Justice James, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Procedure—Duties of Court—Issues—Evidence (Disregard of)—Deciding on Suspicion—Falsification of Bond.

*On Appeal from the High Court at Calcutta.**

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* From the judgment of Norman and E. Jackson, JJ., dated 9th January 1864.

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Baboo Bhugwan Doss,

versus

Baboo Hunnooman Pershad Sahoo and others.

It is the duty of a Court (whether of first instance or of appeal) to act upon the issues and upon the proofs in the case, and not (upon a suspicion derived from its own notion of what is the habit of the people or anything else) to throw aside the whole evidence, and give effect to their suspicion as if it were legal proof, more particularly where the suspicion acted on is wholly inconsistent with the case alleged and sworn to by the person in whose favor the Court has decided.

The Privy Council observed that the plaintiff and his witnesses in this case had great cause of complaint in that they were pronounced guilty of an offence (the fraudulent falsification of a bond) on which they had not been heard, and not only without evidence but without allegation.

THEIR Lordships are of opinion that the decree of the High Court of Calcutta reversing the decree of the Zillah Court cannot be supported.

The plaintiff's case was *primâ facie* a very simple and plain one. He sued the defendant upon a mortgage-bond, which he annexed to his plaint within a very short time indeed after the bond became due. The defendant's case was that he had never borrowed any money at all from the plaintiff; that he never had any transaction which would justify the bond; that he had never put his name to the bond; and that it was an entire forgery. This was the sole issue which he tendered in the Court below; that is what he puts in his answer; and that is what he stated in his deposition when he was examined as a witness in his own behalf. Upon this the plaintiff calls witnesses; he calls the writer of the bond, and all the attesting witnesses; he puts in evidence a *mooktearnamah* to authorise the registry of the bond, and he proves his case as completely as it was possible for a case to be proved by evidence. Unless the whole of that evidence is to be put aside at once as utterly false from beginning to end, the plaintiff's case is a case not admitting of controversy. On the other hand there is this: that the defendant maintained and persisted on oath in the assertion that the signature was not his, and he is found by both Courts, both the first Court and the Appeal Court, in this to have been guilty of deliberate perjury. Moreover, both Courts agree in this, that for the purpose of giving more effect to his false statement, for the purpose of giving more color to his perjured evidence, he signed his name to his deposition in a feigned hand, in order that, upon comparison of that signature with the signature to the bond, the Court might be induced to come to the conclusion that that signature was, as he alleged, a forged signature. Both the Courts have arrived at the same conclusion with respect to the defendant's contention and the defendant's conduct.

Their Lordships further observe that the plaintiff, upon being called upon so to do, put in evidence his own books and the entries of the transactions which were connected with the bond, thus enabling the defendant to cross-examine the plaintiff, and to put him to give any explanation of anything which appeared on the face of the books. As far as their Lordships can see upon these proceedings, no attempt was made to cross-examine the plaintiff with respect to the books, nor was there any suggestion made with reference to them such as has been made at their Lordships' bar to-day by counsel, that there is something in the books themselves which amounts to suspicion and to evidence of something wrong, from which the corollary is that the bond itself was wrong and a fabrication.

The Judge of the first instance came to the conclusion upon the evidence, seeing the witnesses and having an opportunity of seeing the books, that the plaintiff had established his case, and gave a decree accordingly. From that there was an appeal to the High Court; and there, without any fresh evidence, the High Court, agreeing as to the fact that tehre was a loan for Rs. 6,200, part of the Rs. 16,200, the sum for which the bond was given, agreeing as to the fact that the signature was a genuine signature, took upon themselves to follow a course which their Lordships are bound to say they have noticed with great surprise and great regret. They took upon themselves, sitting in error from the Court below, not to deal with the case upon the issues and evidence that had been before the Court below, not to deal with the case upon any fresh materials, or any fresh evidence that was before them, but on a mere inspection of the document, and a suggestion that there was an alteration apparent in an endorsement made by the obligor of the bond, to frame out of their own minds the following theory, *viz.*, that the bond was originally given in blank, so far as the body of it is concerned, and that the real thing which the defendant had signed, and intentionally signed, was the marginal portion of it in the *mohajunee* character; that he had given that with a limit, limiting it to Rs. 6,200; that then it was filled up

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by fraud with Rs. 16,200, instead of the genuine Rs. 6,200; and that then, or as connected with that, without the knowledge or assent of the defendant, there had been a fraudulent alteration of the endorsement, from Rs. 6,200 to Rs. 16,200; and that, therefore, the whole thing was to be treated as a forgery, this being a theory wholly inconsistent with the case ever made by the defendant himself. It was a case which the Court took upon itself to imagine and to declare proved by the mere inspection of the document. If, upon the inspection of the document, it had appeared to that Court that there was something on the face of it which required explanation,—and it does seem to some of their Lordships that there is something which might properly have been inquired into,—it was the obvious duty of the Court to have summoned the parties, to have examined the witnesses, and to have put the thing in train for investigation by the examination and cross-examination of the plaintiff, by the examination and cross-examination of the defendant himself, and by the examination and cross-examination of the witnesses. The Judges, in corroboration of their theory, observe that there is a line which appears to have been thrown out of its proper place by the signature of a witness, from which they infer that the bond must have been written after the signatures of the witnesses. But no question was put to the writer of the bond or to the witness, nor was any explanation sought as to this assumed displacement.

Their Lordships cannot but think this to be a grave misapprehension of the duties of a Court, either of first instance or of appeal. It is their duty to act upon the issues and upon the proofs in the case. Of course, they must receive all evidence with careful scrutiny; if necessary, with suspicion; but they must after all decide the rights of people according to the matters which are proved before them; and it never can be allowed that a Court is, simply upon a suspicion derived from its own notion of what is the habit of the people or anything else, to throw aside the whole evidence and give effect to their mere suspicion as if it were legal proof. This obviously applies with great additional force to a case where the suspicion acted on is wholly inconsistent with the case alleged and sworn to by the person in whose favor they have decided.

Their Lordships think it right to make these observations, because one or two cases have come before them recently in which there seems to have been the same sort of readiness to disregard testimony in favor of suspicion, and because they feel that the plaintiff and his witnesses in this case have great cause of complaint in this, that they were pronounced guilty of an offence, the fraudulent falsification of a bond, on which they were not heard, and not only without evidence, but without an allegation. Their Lordships will recommend Her Majesty that this decree be reversed, and the decree of the Zillah Court affirmed; and that the appellant have his costs of the appeal and in the High Court.

The 14th June 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Suit—Execution—Sale—Representative—Act XXIII of 1861 *s.* 11.

*On Appeal from the High Court at Calcutta.**

Chowdhry Wahed Ali,

versus

Mussamut Jumaee.

The Privy Council, dissenting from the general proposition laid down by the High Court that a party sued in a representative character is not a party to the suit within the meaning of s. 11 Act XXIII of 1861, observed that, where a decree has been properly passed and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit within the meaning of that Section, with respect to any question which may arise between him and the other parties relating to the execution of the decree; but affirmed the decree of the High Court and held that Act XXIII was not a bar to the present suit, on the ground that there did not exist any decree authorizing an execution against the respondent's (plaintiff's) estate, and that consequently the question in the present suit was one not properly relating to the execution of a decree but to a sale under orders which had not the support of any decree.

THIS was an appeal from the judgment of a Full Bench of the High Court at Calcutta, affirming a decision of the Principal Sudder Ameen of Patna in favor of the respondent, the plaintiff in the suit below.

The suit was brought by Mussamut Jumaee, the respondent, to obtain a declaration that an execution sale of certain mouzahs

* From Full Bench judgment, dated 13th August 1868, 11 W. R., F. B., 1.

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under color of a decree made in a former suit brought against her and others by the appellant should be set aside, and her possession of the mouzahs confirmed.

It may be convenient to designate the former suit, which led to the sale complained of, as suit A. Suit A was itself the sequel of a protracted litigation, and became in its turn the starting point of new and intricate proceedings.

The appellant, who was mortgagee of mouzah Mayjara, had obtained decrees in suits against his mortgagors for the mortgage debt under which he attached their interest in that mouzah. Waris Ali, the father of the respondent and the respondent and other persons intervened, claiming interests in the mouzah. Waris Ali claimed to have advanced money to the mortgagors under certain *bhurnanamas*. The respondent's claim was distinct. She was married to Enayet Ali, and she claimed certain shares of the mouzah under a purchase made previous to the appellant's mortgage. Notwithstanding these claims, the mouzah was sold under the appellant's decrees, and purchased by him. Being unable to obtain posssession of the mouzah, the appellant brought suit A to recover it, making Waris Ali and the respondent and other persons (in all 103) defendants, charging them with combining to keep him out of possession.

Waris Ali set up his claim under the *bhurnanamahs*, which was ultimately held to be invalid. The respondent, however, established her title to the shares of the mouzah she claimed. During the pendency of suit A, *viz.*, in January 1856, Waris Ali died, and thereupon, under the 104th Section of Act VIII, his heirs, *viz.*, the respondent and her brother and sister, were entered in the register as defendants in his place. Thus the respondent became a party to the suit in a double capacity, which led to the confusion in the proceedings to be presently noticed.

On the 29th November 1861 the Judge of Patna made a decree in favor of the appellant for possession, and "for mesne profits to "be charged on the defendants jointly and "separately." Although the Judge had "stated in his judgment that the title of the respondent to the share she claimed was proved, and therefore ought to have decreed to that extent in her favor, his decree does not so find, nor does it separate her from the other defendants in the award of possession and mesne profits against them.

This ill-advised and erroneous decree in suit A was the origin of a labyrinth of intricate and too often irregular proceedings, through which it is not easy to find the way to a definite end.

The respondent Jumaee, amongst others, appealed against it to the High Court. On the 10th July 1863 that Court gave judgment to the effect that, it having been adjudged by the Judge at Patna that Jumaee had a good title as purchaser to the share of the mouzah claimed by her, she was needlessly made a party to the suit, and it was ordered that she should be released from it, with costs.

This judgment undoubtedly went too far in releasing Jumaee altogether from suit A, as her learned counsel, Mr. Cowie, fairly admitted; because the grounds on which it proceeded do not touch her liability in her representative capacity as one of the heirs of Waris Ali; but apparently the decree stands unreversed—a circumstance which it is material to bear in mind.

Although no attempt appears to have been made to review or alter this decree, proceedings, now to be noticed, were taken, by force of which the sale (sought to be set aside in the present suit) of Jumaee's private estate to the appellant, as purchaser under his own decree, took place. They are succinctly described by the Chief Justice in the following extract from the judgment now under appeal:—

"On the 17th August 1863, Wahed Ali, "the then plaintiff, applied to the Court at "Patna to execute the decree which he had "obtained for mesne profits. Jumaee, the "present plaintiff, appeared upon that application and urged that, according to the "decree of the High Court of the 10th of July "1863, she had been wholly discharged from "liability. Wahed Ali admitted that she "had been discharged by that decree so far "as her private interests were concerned, but "contended that she remained liable as one "of the heirs of Waris Ali. The Judge of "Patna took that view of the case, and on "the 5th October 1863 ordered a sale of that "part of the property which belonged to her "own right, and which had been attached in "execution of the decree. On the 7th of "October 1863, the plaintiff petitioned the "Judge, contending that even if she were "liable as heiress of her father, she could "only be liable under Sections 203 and 211 "of Act VIII of 1859, to the extent of "assets inherited from him. On the same "day the Judge ordered the petition to be "rejected; and, on the following day, the

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"8th of October 1863, the plaintiff's own "portion of the property which had been "attached under the execution against her "in her representative capacity, was sold "under the execution, and Wahed Ali, who "was then the plaintiff in the suit, became "the purchaser under his own decree. Nu-"merous other proceedings took place to "which it is not necessary to refer. It is "sufficient to say that, on the 15th of March "1864, the Judge confirmed the sale.

"The present plaintiff petitioned the High "Court against the order for execution and "the sale of her property; and, on the 8th "of July 1864, the High Court ordered that "the decree of the 5th of October 1863 "should be amended by declaring that the "present plaintiff was only liable to the assets "inherited from her father, so that, in fact, "the order under which the plaintiff's private "property was sold in execution was so far "altered that it did not justify the sale which "took place under it on the 8th October "1863.

"The plaintiff again appealed to the High "Court against the order of the 15th of "March 1864, confirming the sale under the "execution; and, on the 30th of January "1865, the Court declared that the sale could "hold good only if the plaintiff had received "assets from her father's estate, and in that "case only to the extent of the assets so "received. The case was therefore remand-"ed to the Judge to make inquiry upon that "point. The Judge upon that remand found "that the plaintiff had inherited nothing "from her father, and on the 27th of May "1865 set aside the confirmation of the sale.

"From that order Wahed Ali appealed to "the High Court; and, on the 18th Septem-"ber 1865, a division bench held that as the "sale had been confirmed, there was no power "to cancel it; that the two orders of the 8th "of July 1864 and the 30th January 1865 "were wrong; and they advised Wahed Ali "to apply to the High Court for a review of "the order of the 30th of January 1865. "Wahed Ali acted upon that advice, and ap-"plied for a review of the judgment of the "30th of January 1865, and, on the 28th of "September 1866, the division bench held "that the sale could not be set aside except "by a suit by the present plaintiff in the "Civil Court. They amended the order of "the High Court of the 30th of January "1865, and the order of the Judge of the "27th May 1865, and restored and confirmed "the Judge's order of the 15th of March "1864, by which the sale had been confirmed."

The above summary seems to be in substance correct, except that the order of the 8th July 1864 appears to be, technically, not an order to amend the decree, but to declare in the execution proceedings what was the limit of Jumaee's liability under it.

The result, so far as a result can be extricated from these involved and contradictory proceedings, appears to be, that whilst the High Court held the sale of Jumaee's private property to be utterly wrong, and at first ordered it to be set aside, they, in the end, reversed their own orders, on formal grounds, leaving the order for sale and confirmation to stand, but suggesting to Jumaee to obtain redress by a new suit.

Accordingly, she brought the present suit and obtained the concurrent judgments of the Courts of India in her favor, which the appellant now seeks to reverse: 1st, on the merits; and, 2nd, on the ground that it was not competent to the respondent to bring this suit.

On the merits it was at first contended that she was personally liable in suit A for having acted in concert with the other defendants to disturb the appellant's possession. Their Lordships, however, think that not only is this liability unsustained by the evidence, but the amended decree, in any view of the amending order, absolves her from it.

It was next contended that she had received assets from her father, Waris Ali, and was therefore liable. It was scarcely insisted that any had descended from her father, but it was strongly urged that from the time of his death to the end of suit A, a period of five years, she was in joint possession, with her co-heirs, of the mouzah which was the subject of suit A, and must therefore have received profits, which she was bound to account for. It is sufficient to say that their Lordships can discover no clear and definite proof, either in suit A or in the present suit, that this was so; and the Courts below having assumed to the contrary, it is impossible their Lordships can now, for the first time, find the fact of such possession.

The case is thus reduced to a question of procedure, *viz.*, whether it was competent to the respondent to bring the present suit. The appellant's contention is founded on Section 11 of Act XXIII of 1861, which, among other things, enacts that "any question arising "between the parties to the suit in which the "decree was passed, and relating to the exe-"cution of the decree, shall be determined "by order of the Court executing the decree, "and not by a separate suit, and the order

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"passed by the Court shall be opened to "appeal."

This enactment was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation. They therefore feel bound to say they are unable to assent to some of the reasons on which the High Court have founded their judgment. They cannot concur in the general proposition, that a party sued in a representative character is not a party to the suit within the meaning of Clause 11 of the Act of 1861, which is, as the Chief Justice observes, to be read as part of Act VIII of 1859.

The 203rd Section of Act VIII makes express provision for the manner of execution in such cases, *viz.* (1) against the goods of the deceased person, and (2) in certain events against the defendant "to the extent "of the property not duly applied by him, in "the same manner as if it had been against "the defendant."

It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit, that under certain conditions his own private property may be attached and sold. It is true, that to fix him with this liability, it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable, and proper to be ascertained in the suit in which the decree is made, during the progress of the execution proceedings founded upon such decree.

It does not seem to their Lordships to follow that, because all the provisions relating to execution cannot be applied to a defendant sued in a representative character, such a defendant cannot be regarded as a party to the suit within the meaning of such of them as may be applicable to his case.

It may be true that "cross-decrees" cannot be set off between parties to suits in different characters under Section 209; and that decrees cannot, in the first instance, be enforced by imprisonment against a party sued only in a representative character under Section 201. But it may be observed, that in a case where there is a finding that the property of the deceased has not been properly applied, and when the decree under Section 203 may be executed against the defendant to the extent of the property wasted, as if it had been against him personally, there would seem to be no inconsistency in holding the Clause relating to imprisonment to be applicable.

In a case then, in which a decree has been properly passed, and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree, within the meaning of the 11th Clause of the Act of 1861.

But their Lordships consider that there are other grounds upon which the judgment in the present case may be supported. In their view it is not satisfactorily established that there is an existing decree which warranted any execution whatever against the respondent. It has been already pointed out that the original decree was amended by the High Court on appeal, by a decree directing Jumaee to be released from the suit altogether. This decree was obviously erroneous, for it is clear she ought not to have been released from the suit in her representative character as one of the heirs of Waris Ali, but only in her own personal capacity. The decree releasing her from the suit altogether was, as the Chief Justice observes, probably so drawn up by mistake. Still it was so drawn up, and it does not appear to have been ever formally set right. It is true that by the order of the High Court of the 8th July 1864, upon Jumaee's own appeal against the order for sale of her private estate, the Court, by declaring that her liability under the decree as one of the heirs of Waris Ali extended only to such property as she might have inherited or received as such heir, implied and affirmed that she was liable to this extent. But this order was made, not on an appeal against the decree, but against the order of sale made in the execution proceedings. In point of form, therefore, the decree releasing her altogether was left standing; and although the mistake may have been in substance corrected by the order of the 8th July, that order was not acted upon by the present appellant; and, on the contrary, it was at his instigation swept away by the subsequent proceedings above referred to.

If that order had been acquiesced in and acted upon by the appellant, it might perhaps have been regarded as a virtual amendment of the decree, but even in that case the sale of the respondent's private estate, of which she now complains, could not properly have taken place under it. However, the appellant refused to acquiesce in it, choosing to rely on his strict right; and upon his objection that in point of procedure it was wrong and could not affect the orders of sale of the

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5th October 1863, and of confirmation of the 15th March 1864, it was set aside, or at least declared to be without force.

When, therefore, the appellant insists that the present suit is not competent, because the questions relating to the execution ought to have been determined in the former suit A, his objection, which relates only to procedure, may, their Lordships think, be properly met by the counter-objection that in point of procedure his own decree in suit A is ineffectual, as actually drawn up, to support any execution against Jumaee, and that the proceedings which may have virtually set it right, and warranted some execution, have lost all efficacy for that purpose by his own acts. Their Lordships cannot find, after the incongruous proceedings above described, that there exists any decree authorizing an execution against the respondent's estate; and consequently the question in the present suit is one not properly relating to the execution of a decree, but to a sale under orders which have not the support of any decree.

Their Lordships, therefore, being of opinion that the decrees under appeal are substantially just, and that under the peculiar and exceptional circumstances of the case Act XXIII of 1861 was not a bar to the suit, will humbly advise Her Majesty to affirm the decrees, and to dismiss this appeal, with costs.

The 14th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution of Decree (for Lands)—Portion taken by Government for Railway Purposes—Separate Suit for Compensation-money.

Case No. 109 of 1872.

Miscellaneous Appeal from an order passed by the Judge of 24-Pergunnahs, dated the 6th January 1872.

Shumsoonnissa Begum (Decree-holder), *Appellant,*

versus

Mirtunjoy Bose (Judgment-debtor), *Respondents.*

Boboo Bhowany Churn Dutt for Appellant.

Mr. R. E. Twidale for Respondent.

Where a decree provided that the judgment-debtor was to execute a conveyance to the decree-holder of certain lands, and did not provide that any money was to be paid by the judgment-debtor—HELD that the decree-holder must bring a separate suit to recover the compensation-money which represented the portion of the land which had been taken by Government for Railway purposes subsequently to decree, and for which the judgment-debtor could not execute a conveyance.

Kemp, J.—A PRELIMINARY objection has been taken by Mr. Twidale, the pleader for the respondent, the judgment-debtor, to the effect that the decree which this Court has to construe, and which is now sought to be executed, provides that his client, the judgment-debtor, was to execute a conveyance to the decree-holder, Shumsoonnissa Begum, for certain lands measuring 36 beegahs 12 cottahs 8 chuttacks 5 gundahs; but that subsequently the Government, for Railway purposes, took a portion of that land, or 3 beegahs 13 cottahs 11 chuttacks, for which compensation was paid by Government amounting to Rupees 4,850-2-7, and subsequent interest raised that sum to Rupees 5,113-3-6, which the judgment-debtor, it is alleged, has received from Government. The decree does not provide, and this is admitted by the pleader for the appellant, that any moneys are to be paid by the judgment-debtor; and if the land has been taken by Government, it is obvious that the judgment-debtor cannot execute a conveyance for that portion of the land which has been taken for Railway purposes. It is admitted that he has executed a conveyance for the remaining portion of the land decreed, and therefore the decree-holder must bring a separate suit if he wishes to recover the compensation-money which represents the land which has been taken by the Government for Railway purposes.

The appeal must be dismissed with costs.

The 14th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decree—Execution—Attachment (of Judgment-debtor's Moneys in Deposit in the Collectorate).

In the matter of

Kristo Doss Koondoo (Decree-holder), *Petitioner,*

versus

Indro Narain Chowdhry (Judgment-debtor, *Opposite Party.*

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Baboo Aukhil Chunder Sen for petitioner.
No one for Opposite Party.

Petitioner obtained a decree in satisfaction of which he applied to the Subordinate Judge to attach certain moneys in deposit in the Collectorate to the credit of his judgment-debtor. The Subordinate Judge moved the Judge to apply to the Accountant-General to have the sum attached, but the Judge refused to do so on the ground that the money had been confiscated by Government. HELD that the Judge ought to make the desired application to the Accountant-General.

Kemp, J.—THIS is an application by Baboo Kristo Doss Koondoo. It appears that he obtained a decree in 1869 against Indro Narain Roy. In satisfaction of that decree, he applied to the Subordinate Judge to attach certain moneys in deposit in the Collectorate to the credit of his judgment-debtor, Indro Narain Roy. The Subordinate Judge moved the Judge to apply to the Accountant General for authority to have the sum in question which was entered in the register of deposits attached. The Judge, however, has held that, inasmuch as the sum in question has been confiscated by the Government, the word used in the vernacular order of the Judge being জব্দ, therefore this sum cannot be attached at the instance of the judgment-creditor.

We think that the Judge ought in this case to make the desired application to the Accountant-General under Section 29 of the Rules for the observance of Judges, Magistrates, and other Judicial officers, published by the Accountant-General of Bengal under the authority of the Government of India. The Judge will, therefore, be directed accordingly.

The 15th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act XIV of 1859 *s.* 20—*Limitation—Execution—Bonâ fide Proceeding—Making alive Decree once dead.*

Case No. 110 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Hooghly, dated the 9th January 1872.

Kalla Chand Paul (Judgment-debtor), *Appellant,*

versus

Maharajah Dheeraj Mahatab Chand Bahadoor (Decree-holder), *Respondent.*

Baboo Umbica Churn Bose for Appellant.

Baboo Juggodanund Mookerjee for Respondent.

Where the execution of a decree is once barred by lapse of time, no subsequent executions, *albeit* not objected to on the part of the debtor, can make the decree alive again. A "proceeding" under s. 20 Act XIV of 1859 must be a proceeding which is not at the time barred by limitation.

Glover, J.—THE decree in question in this case was passed in the year 1821. Various applications for execution were made at different times, of which it is only necessary for this case to notice one of the 26th or 28th of January (it does not clearly appear which) 1862. The next application was on the 11th February 1865. Between that date and the present application, there have been several executions, in two of which sales of the debtor's property have been effected, and all of which were admittedly within time, counting from February 1865.

The Judge has decided that the decree is not barred now, although it was admittedly so in February 1865, because there have been *bonâ fide* proceedings taken within three years next preceding the present application, and that under Section 20 Act XIV of 1859 this was all that was to be looked to.

In appeal, it is contended that the Full Bench decision in the case of Bisheshur Mullick *versus* The Maharajah of Burdwan, 10 W. R., F. B. R., 8, applies, and that a decree once barred by limitation, as this was in 1865, cannot be revived by any subsequent process of execution.

An attempt was made on behalf of the respondent to show that the decree was not barred in February 1865. It was argued that the time began to run from the 13th of February 1862, and not from the 28th of January of that year, and that, therefore, the application of 11th February 1865 was not barred.

Now, in the first place the Judge distinctly states in his decision that both parties admitted that the decree was dead in February 1865; but were we to decide the point, the decree-holder could get no advantage. On the 28th January 1862, the decree-holder was told to proceed with his execution; and, in pursuance of that permission, he applied on that day for the arrest of the heir of the judgment-debtor. The order refusing this is dated February 13th. The decree-holder wishes to count from this date, but he ought not, we think, to be allowed to do so. The application to arrest the judgment-debtor's heir was a totally illegal one, and the decree-holder

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must have known it to be so; it looks very like an attempt to add a few more days to the limitation time by a proceeding which cannot be said to have been made *bonâ fide*. We must take it as a fact, both admitted and proved, that in February 1865 the decree was barred by the three years' law of limitation.

The question then is, does the Full Bench ruling apply? The Judge holds that it does not, and that all that a Court has to do is to see whether the application last made was in time, and whether the former proceedings were such that under them processes of execution would have lawfully issued if the application had been opposed. In other words he holds that the present application is not barred, because, less than three years ago, a prior application had been made, which was not opposed by the judgment-debtor on the plea of limitation.

The case referred to the Full Bench was of precisely a similar nature to the one now before us, and the decree-holder, we observe, was the Maharajah of Burdwan. The Judge took precisely the same view of the law as is now taken by the Judge who tried this case. The reference to the Full Bench was made by the Division Bench Judges in these words:—"The facts are that execution of the "decree was at one time barred by the "application of the statute of limitations, "and that subsequently to this time the "judgment-debtor suffered effectual proceed-"ings to be taken in execution, so that, as "the case now stands, such proceedings have "been taken within three years next preced-"ing this present application for execution."

We can see no difference between the cases, and think that the decision of the Full Bench applies.

The action taken by the decree-holder in February 1865 was not a "proceeding" in the terms of the law, inasmuch as a "proceeding" must be one not barred by limitation, and this was already barred by limitation, and might have been successfully opposed on that ground if the debtor had come forward. The fact, that the debtor did not oppose it, would not make it a proceeding under Section 20 Act XIV of 1859.

We consider it to be settled law that, where the execution of a decree is once barred by lapse of time, no subsequent executions, *albeit* not objected to on the part of the debtor, can make the decree alive again. A "proceeding" under the Act must be a proceeding which is not at the time barred by limitation.

We reverse the decision of the Judge, and declare that the decree-holder is barred by lapse of time from executing his decree. Costs 2 gold mohurs.

The 17th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Onus Probandi—Plea of Lakheraj.

Cases Nos. 1314 and 1315 of 1871.

Special Appeals from a decision passed by the Judge of Jessore, dated the 31st July 1871, modifying a decision of the Subordinate Judge of that district, dated the 27th March 1871.

Goonomonee Dossee and others (Defendants), *Appellants,*

versus

Rajah Burrodakant Roy Bahadoor (Plaintiff), *Respondent.*

Baboo Grija Sunker Mozoomdar for Appellants.

Baboos Obhoy Churn Bose and *Ashootosh Dhur* for Respondent.

The rule which, in cases where the defendant pleads *lakheraj*, lays on the plaintiff the *onus* of proving that the land is *mâl*, is not inflexible but may be altered according to circumstances, as in this case where the defendant admitted plaintiff's title as landlord and never set up any plea of *lakheraj* until years after the suit was brought when a second Ameen was deputed to the spot to make a local enquiry.

Glover, J.—THESE cases have been the subject of more than one remand to the Court below. The only question on which they were on the last occasion sent back to the Judge was to find whether a certain quantity of land measuring 97 beegahs 1 cottah 12 chittacks was the *lakheraj* land of Kristo Chunder Ghose, or *mâl* land belonging to the plaintiff. The Judge has now found that the lands are the *mâl* lands of the plaintiff; and that being so he sent back the case to the Court of first instance to have a proper rent assessed upon it. The only substantial point taken in special appeal is that the Judge has not carried out the order of remand which directed him to place the *onus* of proving that the land was *mâl* upon the plaintiff. With regard to this we observe that the Judge, in more than one place in his decision, does distinctly say that he considers that the plaintiff has proved his

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case with regard to the lands being *mâl*; in one place he says :—"The plaintiff does show that they formed part of the *gantee* held by the defendant as *mâl*," and in another place he says :—"I think that the plaintiff must be held to have shown that the 97 beegahs, namely, 68 beegahs 3-1-4 cottahs in Tripoorapore, and 28 beegahs 18½ cottahs in Karnakali formed part of the defendant's rent-paying *gantee*." He likewise says that he has paid due attention to the High Court's order as to whom the burden of proof was to be laid on, and it must be supposed that he did place the *onus* on the plaintiff, and that he considered that the plaintiff had proved his case. No doubt, he likewise makes several remarks in his judgment which would tend to show that he is of opinion that the *onus* ought to have been laid on the defendants.

We may observe here that the rule which, in cases where the defendant pleads *lakheraj*, lays the *onus* of proving that the land is *mâl*, on the plaintiff, is not inflexible, but may very reasonably be altered under a particular state of circumstances, and we think that in this case these circumstances exist. When the suit was first brought, the defendant never set up any plea at all of *lakheraj*, but himself admitted the plaintiff's title as landlord and claimed the land under special tenure as part of his *gantee* tenure. It was only years after, on the occasion of a second Ameen being deputed to the spot to make a local enquiry, that he turned round and claimed a part of the tenure as his *lakheraj* land. With regard to the other objection taken that there was no sufficient legal evidence that this land formed part of the defendant's *gantee* tenure as *mâl*, and that it was necessary to prove this by specific evidence, we think on this point that the Judge has come to a finding of fact on the evidence, and we cannot interfere in special appeal.

The appeal is dismissed with costs.

The 17th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Conflicting Decrees—Last to prevail—Mesne Profits.

Case No. 101 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 9th December 1871, *affirming an order of the Moonsiff of Naraingunge, dated the 28th November* 1870.

Annund Mohun Hazrah and others (Decree-holders), *Appellants,*

versus

Shibo Soonduree Dabea and others (Judgment debtors), *Respondents.*

Baboo Lullit Chunder Sein for Appellants.

Baboo Kashie Kant Sein for Respondents.

Where a decree of 1865 confirmed on appeal by the High Court, decided that the entire land which was decreed to H in 1861, and on which H now claimed *wassilat* (both the suits being between the same parties), belonged to T, although the suit in which the last decree was passed was for a share only—HELD that the last decree must supersede the first for all the purposes of this execution suit, and that H could not get *wassilat* on land declared to belong to another and different estate.

Glover, J.—WE do not think that we can interfere in this case. The Judge has found by a comparison of maps and other evidence that the land decreed to the Hazrahs in 1861 is identical with that afterwards decreed to the Thakoors in 1865. This is a finding that we must accept, this being a special appeal.

How the latter decree was possible in the face of the former decree of 1861, both suits being between the same parties, it is useless now to enquire. As a matter of fact, the decree of 1865, which was confirmed on appeal by the High Court, decided that the land on which the Hazrahs now claim *wassilat* belonged not to their talook but to another estate. The decree appears to have included the entire land, although the suit was for a share only.

Under these circumstances, it would seem, as decided by the Judge, that the last decree must supersede the first for all the purposes of this execution suit, and that the Hazrahs cannot get *wassilat* on land which has been declared to belong to another and different estate.

The appeal is dismissed ; but, under the circumstances, we make no order as to costs.

The 18th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rajbaree Jote—Suit to establish Title and for Possession—Onus probandi.

Case No. 19 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 14th September 1871, *reversing a decision of the Moonsiff of Luchragunge dated the 29th June* 1871.

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Mussamut Misree Bewa (Defendant), *Appellant*,

versus

Ram Doolal Biswas and others (Plaintiffs), *Respondents*.

Baboo Umbicka Churn Banerjee for Appellant.

Baboo Doorga Mohun Doss for Respondents.

In a suit to establish plaintiff's title to and for possession of a jote which was admittedly the *Raj-baree* jote of defendant's ancestor, the real point in the case is, how such a jote came into the hands of the plaintiff, and the *onus* is on him to show that defendant's ancestor or his heir relinquished the jote to the zemindar, and that the zemindar had authority to *puttun* the jote to the plaintiff.

Kemp, J.—THE plaintiff in this case, special respondent, sued to establish her title and for possession of a jote. On the plaint it appears that this jote was formerly the jote of one Ashkur Khan, and it is described in the plaint as Mudafut Ashkur Khan Ryotee Baree. The plaintiff had been unsuccessful in a possessory suit under Section 15 Act XIV of 1859, and the present suit is therefore brought to establish the plaintiff's title. The *onus*, therefore, is plainly on the plaintiff.

The first Court, the Moonsiff, dismissed the plaintiff's suit. He held that it was admitted that this was the jote of Ashkur Khan, and that the defendant, special appellant, had acquired this jote by inheritance, he being related to Ashkur Khan, and that he was in possession. The plaintiff's suit was, therefore, dismissed.

In appeal the Subordinate Judge has altogether lost sight of the real point in the case, namely, as to how this jote, which is described as a Ryotee Baree jote, a jote which a person would not relinquish easily, has come into the hands of the plaintiff. There is evidence on the record—of course we cannot refer to that evidence—but there is evidence of the fact that the defendant is in possession. Even amongst the witnesses for the plaintiff there are two or three men referred to in the decision of the Moonsiff who admit this; but be that as it may, the Subordinate Judge ought to have tried the real point in this case, namely, how this jote, admittedly the jote of Ashkur Khan, the ancestor of the defendant, came into the hands of the plaintiff.

The case being one in which the plaintiff has to establish his title, he must clearly show that Ashkur Khan or his heir relinquished the jote to the zemindar, and that the zemindar had authority to "puttun" this jote to the plaintiff. The case must, therefore, be remanded, and the Subordinate Judge will try it with reference to the above remarks.

The 18th June 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges*.

Limitation—Bonâ fide Proceeding to keep Decree alive—Service of Notice in another District.

Case No. 111 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Dinagepore, dated the 30th December 1871.

Rajeeb Lochun Saha Chowdhry (Decree-holder), *Appellant*,

versus

Mr. James Wilford Masseyk (Judgment-debtor), *Respondent*,

Baboos Sreenath Doss and *Kalee Kishen Sen* for Appellant.

Baboos Romesh Chunder Mitter and *Rash Beharee Ghose* for Respondent.

In this case an application for execution of a decree, filed within eight days of the expiry of the period of limitation, was held to be a *bonâ fide* proceeding to keep the decree alive, though the notice upon the judgment-debtor, which had to be served in another district through the Court of that district, had not actually been served upon him.

Bayley, J.—I AM of opinion that this appeal ought to be allowed and the order of the Lower Court reversed.

The main ground of the Lower Court's judgment is that the suit is barred by limitation, inasmuch as the decree-holder took no *bonâ fide* and effectual proceedings to enforce his decree within the period allowed by the law of limitation, *viz.*, three years.

The decree is a decree of the High Court dated the 24th August 1863, and the application for execution was filed on the 16th August 1866, that is, within eight days of the expiry of the period of limitation. The notice upon the judgment-debtor had to be served in a different district, that is, in Bhaugulpore, and the notice was sent there in September 1866 and returned on the 23rd November 1866. It appears that there was no one who could point out the judgment-debtor, one Mr. Masseyk, and the notice was stuck up at his abode.

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On the 3rd October 1866, the decree-holder was required to deposit the Ameen's fees within three days, and it appears that on the 26th October the case was struck off. The order striking off the case merely says that the case is struck off; no reason is there given as to why it is struck off, but in another part of the same paper it is said because the decree-holder had failed to comply with the Court's order to deposit the Ameen's fees.

The Lower Court has found that no notice was actually served on the judgment-debtor, and upon that the Lower Court argues that the decree-holder took no effectual proceeding to enforce his decree. This is really the gist of the Lower Court's judgment. Speaking for myself, I am not at all prepared to say that in all cases the mere fact of the actual service or non-service of a notice upon the judgment-debtor decides the question as to whether the decree-holder's proceeding to enforce his decree is *bonâ fide* or not. Every case must depend upon its own circumstances. In this case, the notice had to be served in a different district, and the duty of serving it there was entirely that of the Court. The objection that the notice was not served on the judgment-debtor was not taken till the very last stage of the proceedings, *viz.*, till December 1871. It is, however, suggested by the pleader for the respondent that the impression of the judgment-debtor possibly was that twelve years was the period of limitation for execution of the decrees of the High Court, and that thus the judgment-debtor might have been misled, and thus not taken the objection earlier; but no such explanation was tendered at the time when the objection was taken. Again, it appears that the judgment-debtor throughout the Ameen's proceedings and throughout the whole litigation was cognizant of the acts of the decree-holder, and in some cases consented to those acts, such as in postponing the Ameen's measurement, and so forth.

We have been referred to certain decisions in Volume XIII, Weekly Reporter, page 83, Volume XIV, Weekly Reporter, page 112, Volume IX, Weekly Reporter, page 529, but in none of these cases are the facts similar to those of the present case. For instance, in those cases the notice had to be served within the jurisdiction of another Court by the concurrent Court as here, and this is a matter requiring the diligence of the concurrent Court and not of the decree-holder. Independent of this, I would observe that in regular appeals of this kind, a finding by one Division Bench upon certain general facts and upon the evidence of a particular case, does not necessarily bind another Division Bench in a case somewhat similar upon those general facts to come to the same conclusion, but that it is open to each Court upon the peculiar features of the case before it, and upon its own estimate of the value of the testimony given in it, to arrive at its own independent conclusion.

Looking, therefore, essentially to the conduct of the decree-holder, who in this case, it seems to me, was all along more or less endeavouring to enforce his decree, and who under the circumstances above stated cannot be affected by any return of any officer of the Bhaugulpore Court, over the proceedings of which he had no possible control, I am of opinion that the decree in this case is not barred by the law of limitation.

I would, therefore, reverse the order of the Lower Court and allow execution to proceed.

I would notice that the case appears to have been several times struck off—on the 21st November 1866, 29th March 1867, 1st June 1867, 29th June 1869, and the 9th July 1870. These dates very curiously coincide with the dates when explanation of pending execution cases beyond six months is required in the quarterly statements. It has also to be observed that although an application for revival of the case was made on the 29th December 1867, that is, at the very close of the year, the case was not restored till January 1868, so that the case was not a pending case at the close of 1867, but was so after eight days of 1868. Further, in two instances the same order which struck the case off the file passed an urgent requisition for the return of the notices which were ordered to be issued by the other Court, and without which return the record could not be complete.

The costs will be assessed at 10 Gold mohurs.

Ainslie, J.—The only point before us in this case is, whether the application of the 16th August 1856 and the proceedings taken thereon are sufficient to keep the decree alive. I think, under the circumstances stated by Mr. Justice Bayley, that they are. Much reliance has been placed upon a case reported in Weekly Reporter, Volume IX, page 527, in which Mr. Justice Phear inferred from the long interval that elapsed between the dates of the successive applications for execution and the several orders striking the case off the file, that the proceedings were not *bonâ fide*, and held that when a first application for execution is not carried to a

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successful termination, before asking for a second, the decree-holder is bound to show why the steps previously taken by him in execution had not led to a full discharge of the debt. We do not exactly know what the nature of the decree in that case was, whether it was for money or otherwise. No doubt in many cases there is reason to believe that decrees for money are allowed to remain unsatisfied, and are merely kept alive by means of certain colorable proceedings taken at considerable intervals, either with the object of swelling the amount due thereon by the accruing of interest until the debtor is unable to save his property from a sale in execution, or merely for the purpose of holding them as a convenient form of bond; and in such cases it can be inferred from the delay that takes place in execution that the proceedings are not *bonâ fide:* but the case now before us is quite different. It is perfectly true that, in the first instance, upwards of two years and eleven months were allowed to elapse before the first application for execution was made, but there was nothing in the nature of the decree in this case which would lead us to question the good faith of the decree-holder, on the ground of delay in proceeding with the execution of his decree. There were no costs or *mesne profits* on which interest was accruing. It appears to me that the decree-holder has been, ever since the year 1866 and down to the present time, endeavouring to carry out the execution of his decree, and that there has been no second interval of delay such as that noticed in Mr. Justice Phear's judgment above referred to.

When application for execution of the decree was made in 1866, notice under Section 216 was sent to the Bhaugulpore Court with a view to its being served in that district. I do not think that it was absolutely necessary for the decree-holder to attend for the purpose of assisting in the service of the notice in that district. No doubt a decree-holder must render assistance where such assistance is needed, but in the present case there is nothing to show that he was called upon for help. The Court of Bhaugulpore seems to have undertaken the service of the notice and to have been satisfied that there was a proper service. And even if it were true that the service was incomplete, there is nothing to show that the decree-holder knew or had reason to know this to be the case. The return shows that as no one was found in the house of the judgment-debtor, the notice was stuck up on the door of the house, and a paper purporting to be a certificate of certain residents of the village to this effect was brought into Court. It is alleged by the judgment-debtor that the notice was not actually served on him, and it is attempted to prove that there was no chowkeydar called Dobay (the name which appears on the proceedings). Even assuming that there was no such chowkeydar, I think the judgment-creditor need not be supposed cognizant of any fraud practised on the Court at Bhaugulpore by the serving officer; he was entitled to assume that the return made by the Bhaugulpore Court to the Dinagepore Courts was a true one, and all proceedings founded on such an assumption might be *bonâ fide* proceedings though it should afterwards turn out that the return was false.

I agree in reversing the order of the Lower Court and allowing the execution to proceed.

The 18th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Unregistered Transfer of Tenancy—Recognition by Zemindar—Payment of Government Revenue by third Party.

Case No. 17 of 1872.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 24th August 1871, affirming a decision of the Moonsiff of Memary, dated the 30th May 1871.

Ram Gobind Roy (Plaintiff) *Appellant,*

versus

Dushoobhoojah Debee and another (Defendants) *Respondents.*

Baboo Mohendro Nath Mitter for Appellant.

Baboo Rash Beharee Ghose for Respondents.

A landlord, by having allowed the sums paid into the Collectorate by a third party to be carried to his credit, was held to have clearly recognized the transfer from the tenant to the third party, although such transfer had not been registered.

Kemp, J.—We think the special appeal must be dismissed. The plaintiff, special appellant, purchased at a sale for arrears of Government revenue Talook Bahadoorpore, No. 5537 in the *towjee*. The present suit is brought for arrears of rent for the years

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1274 to 1277 against Aolad Ali. Aolid Ali did not appear, but a third party, one Dashoo Ojah Debee, did appear and pleaded that she had purchased from Aolad Ali, and that she had paid a portion of the Government revenue or Rs. 33 into the Collectorate at various times during the years 1274 to 1277, and that the plaintiff had permitted these sums thus paid into the Collectorate to be carried to his credit. She, therefore, prayed that credit might be given her for this sum of Rs. 33.

The first Court gave the plaintiff a modified decree for Rs. 35-1-2 out of the sum claimed. The first Court remarked that, as the plaintiff had received the rents paid by the third party into the Collectorate, he had by that act acknowledged the transfer by Aolad Ali to Dashoo Ojah Debee.

The second Court concurred in the decision of the Moonsiff.

The grounds taken in special appeal are that the purchase by Dashoo Ojah Debee not having been registered, the plaintiff is not bound to recognize her as his tenant, or to acknowledge any payments made by her into the Collectorate as payments made on account of the tenure, and that any payments made by Dashoo Ojah to the Collectorate for Government revenue were made without any legal necessity and as such were voluntary payments. It is clear in this case that the plaintiff has allowed the sums paid in by Dashoo Ojah Debee into the Collectorate between 1274 and 1277 to be carried to the credit of his account as payments for arrears of Government revenue, and thereby prevented the sale of the property. We think that by this act the plaintiff has clearly recognized the transfer from Aolad Ali to Dashoo Ojah Debee. In this view of the case, we confirm the decision of the Court below, and dismiss the special appeal with costs.

The 18th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decision on the Merits—Res Adjudicata—Evidence.

Case No. 9 of 1872.

Special Appeal from a decision passed by the Judge of Dacca, dated the 19th September 1871, affirming a decision of the Moonsiff of Mannickgunge, dated the 30th June 1871.

Rummun Kishen Sen (Plaintiff) *Appellant,*

versus

Mr. J. P. Wise (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Rash Baharee Ghose* for Appellant.

Mr. C. Gregory and *Baboos Nullit Chunder Sen* and *Hem Chunder Banerjee* for Respondent.

The first Court dismissed this suit for rent as barred under Act VIII of 1859, s. 2, on the ground that the *kaboolent* on which plaintiff sued had been declared inadmissible in a former suit. The Lower Appellate Court held the first Court wrong in holding the suit barred as *res adjudicata*, but considered the former decision a strong piece of evidence against plaintiff, and dismissed his suit on the evidence. HELD in special appeal that there had been a decision on the merits.

Glover, J.—WE think that this special appeal must be dismissed. The suit was for arrears of rent, and the Moonsiff dismissed it on the ground that, in a former suit between the same parties, the *kaboolent* on which the plaintiff sued was declared inadmissible, and this decision he held to be a bar to the plaintiff's claim under Section 2 of Act VIII of 1859.

The Judge, on appeal, considered that the Moonsiff was wrong in holding the claim of the plaintiff barred as *res adjudicata*, but held that the former decision was a strong piece of evidence against the plaintiff. He upheld the decree of the Court below.

Mr. Allan, who appears for the special appellant, contends that there has been no decision on the merits; that the decision in the former suit was no evidence at all against the present plaintiff, or at all events that it was not evidence of such a character as the Judge had considered it to be; and that the proper course for the Judge to have pursued on finding that the Moonsiff had wrongly held that the suit was barred, was to have remanded the case to the Court of first instance to be tried on the merits.

This objection, we observe, was not taken in the grounds of special appeal; the only objection there taken is as to the weight allowed by the Judge to the decision in the rent suit for the years 1274 and 1275. Now, the Judge has nowhere stated that the decision in that suit is an estoppel, or would in any way prevent the plaintiff from succeeding in this suit if he could establish his case. He says in one part of his decision, after holding that the Moonsiff was wrong in considering the suit barred under Section 2 of Act VIII of 1859, "still the suit must

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be dismissed on the merits." No doubt, the decision of the Judge is a very short one, and he has not entered into what these merits are; but still he gives us to understand that he has considered the evidence in the case, and has treated the decision in the Act X suit as part of that evidence. He says:—"He (the plaintiff) is bound by that decision *until he can in any way get over it*," which we understand to mean that, if he can produce any evidence to establish the validity of the *kabooleut* which was rejected in the former suit, he, the Judge, would be prepared to consider that evidence; but that, as no such evidence had been adduced, he thinks that the plaintiff's suit must fail. There appears to be no grounds of special appeal in this case, and the appeal must be dismissed with costs.

The 18th June 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Evidence—Deposition of Serving Peon—Report of Nazir—Execution—Sale.

Case No. 108 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Dinagepore, dated the 17th January 1872.

Meah Khan and others (Judgment-debtors) *Appellants,*

versus

Narain Chunder Chowdhry and others (Decree-holders) *Respondents.*

Mr. R. T. Allan and *Baboo Jugodanund Mookerjee* for Appellants.

Baboos Unnoda Pershad Banerjee, Rajendar Misree, and *Rajendar Bose* for Respondents.

The same rule which holds that the deposition of the serving peon on oath is evidence, also holds that the report of the Nazir not being upon oath or on anything on which perjury can be charged, is not evidence.

The market-value of a property is not the value which ought to be taken as the standard at an auction-sale in execution of a decree, where the purchaser ordinarily gets neither a title nor the title-deeds as in a private sale, but only the right, title, and interest of the judgment-debtor at the time of sale.

Bayley, J.—This is a simple case. Under Section 257 Act VIII of 1869 objection is taken that the sale is invalid owing to the proclamation not having been advertized on the spot, and that material injury has resulted therefrom, the sale having realized a smaller price than what the property would otherwise have done. These are the two objections which Baboo Jugodanund in opening the case took. He also stated that certain papers referred to by the Lower Court were not on the records.

Now, as to this last matter, we have to observe that if the papers were not forthcoming, it was for the party who takes the objection and requires them to support it, to ascertain earlier, either by asking this Court to send for those papers from the Lower Court or by other means, as to whether they really existed on the record. In the absence of any such attempt, we must take that the papers which the Lower Court refers to did exist on the records before it. It is not for the Court to conduct cases for parties in such matters; they must do that themselves. Nor does it seem that any objection was taken as to these papers when they were referred to by the Lower Court.

Now, the whole case here turns upon the evidence. We have heard the evidence from the first to the last, and we are clearly of opinion that the evidence on the part of the purchaser is trustworthy and that on the part of the judgment-debtor unreliable.

It is contended that the Lower Court had no right to make a general assertion without giving reasons as to why it credits the statements of one set of witnesses and discredits those of another; but the reason is clear on the face of the judgment. The Subordinate Judge clearly says that the witnesses on behalf of the judgment-debtor are his dependants, get their livelihood from him, and are therefore interested and subservient witnesses.

The serving peon deposes to the service of the notice; but it is argued by Mr. Allan that the report of the Nazir shows that no notice was actually served. Now, the same rule which holds that the deposition of the serving peon on oath is evidence, also holds that the report of the Nazir not being upon oath or on anything on which perjury can be charged is no evidence. Here, however, there is not only the evidence of the serving peon but it is supported by that of Rughoobur Chowkeedar, who states that the parties were present. These two are independent witnesses. They have no connection with either party; and we are of opinion that upon the whole the notice is proved to have been duly served. No evidence is given as to the inadequacy of the price fetched by the sale, and it follows therefore that the sale must stand.

We would further notice that the market-

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value of a property is not the value which ought to be taken as the standard at an auction-sale in execution of a decree. In a private sale the purchaser gets a title and the title-deeds. In an execution-sale he ordinarily gets neither, but only the *right, title, and interest, whatever that might be, of the judgment-debtor* at the time, which in many instances has been seen to lead purchasers to great loss and ruin.

Mr. Allan also takes an objection that the notice was not served in the Judge's Cutcherry. Now, there is not the slightest trace on the record that this objection was taken before; and, if it were really a good objection, the Judge's Cutcherry was the place where it ought to have been taken and substantiated. On all these grounds, we dismiss this appeal with costs.

The 19th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation — Adverse Possession — Alluvial Lands—Temporary Settlement—Co-sharers.

Case No. 8 of 1872.

Special Appeal from a decision passed by the Judge of Dacca, dated the 1st August 1871, *affirming a decision of the Moonsiff of Manickgunge, dated the 20th February* 1871.

Bissessuree Dossee (Plaintiff) *Appellant,*

versus

Kalee Koomar Roy (Defendant) *Respondent.*

Baboos Sreenath Doss and *Kishen Dyal Roy* for Appellant.

Baboo Jogendro Nath Bose for Respondent.

Where one co-sharer managed the property, and, in the absence or during the minority of the other co-sharer, obtained from the Collector a temporary settlement in his own name of *chur* lands accreting to the parent estate—HELD that the latter was entitled to participate in the temporary settlement, and that the possession of the former under that settlement was not adverse to the latter.

Kemp, J.—THE plaintiff is the special appellant in this case. The suit was to establish her right to participate in the settlement of certain *chur* lands. It is alleged, and not disputed, that the plaintiff's father Nobo Coomar Roy, and the defendant's father Ram Coomar Roy, were first cousins, and held the parent estate as co-sharers; that, after the death of Nobo Coomar, the plaintiff's mother succeeded to his moiety, and after her death the plaintiff succeeded to her father Nobo Coomar's share; that during the plaintiff's minority the defendant managed the property for her; that in the year 1263 the plaintiff came of age, and in that year the defendant made over to the plaintiff her rights in the parent estate, including the right to participate in the settlement of the *chur* lands; that during her absence at Jessore, the defendant has obtained a temporary settlement of those lands from the Collector in his own name. The plaintiff therefore brings this suit to establish her right to a share in the temporary settlement which has been effected with the defendant in respect of these chur lands.

Both Courts have found that the plaintiff's suit was barred. In appeal it is contended that the Lower Courts are wrong in applying the law of limitation to the plaintiff's claim, and that the possession of the defendant under the temporary settlement obtained in the absence of the plaintiff cannot be considered as adverse to the plaintiff.

We have heard the argument on both sides, and a decision has been referred to by the pleader for the appellant, to be found in the Gap No. of the W. R., page 149, which in our opinion precisely fits the present case. It is very clear that the title of the plaintiff in the persent estate is not disputed; the temporary settlements which the defendant, in the absence of the plaintiff, or during her minority, has obtained from the Collectorate in his own name, does not in any way bar the plaintiff's title to participate in that settlement, and the possession of the defendant under this temporary settlement, is not, according to the ruling referred to above, a possession adverse to the plaintiff.

The decision of the Courts below is therefore reversed, and this appeal decreed with costs.

The 19th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Review (of Predecessor's Judgment).

Cases Nos. 20 and 21 of 1872.

Special Appeals from a decision passed by the Subordinate Judge of East Burdwan, dated the 3rd May 1871, *affirming a decision of the Moonsiff of Kulnah, dated the 21st June* 1870.

Kangalee Churn Josh (Plaintiff) *Appellant,*

versus

Dursunee Dossee and others (Defendants) *Respondents.*

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Baboos Sham Lall Mitter and *Mohendro Lall Seal*, for Appellant.

Baboo Jogendro Nath Bose for Respondents.

A Subordinate Judge has the power under the law to review the decision of his predecessor, although the power is one which should be exercised very sparingly.

Glover, J.—We do not see any reason to interfere with the decision of the Court below in this case. The objection taken by the pleader for the special appellant is simply as to the weight of the evidence and as to the inferences drawn by the Subordinate Judge from that evidence. A Subordinate Judge has the power under the law to review the decision of his predecessor; and, although this is a power which should be exercised very sparingly, there is nothing illegal in the exercise of it. This ground of appeal, therefore, fails. As to the evidence of possession, the Subordinate Judge has, after hearing the witnesses, come to the conclusion that the possession of the debtor-defendants was not as *koorfa* ryots of the plaintiff, and that their possession would not therefore prove the plaintiff's possession. The whole question appears to be one of fact with which there can be no interference in special appeal. The appeals are dismissed with costs.

The 20th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Jurisdiction (of Mofussil Small Cause Courts) —Suits under Registration Act XX of 1866, *s.* 53.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Jessore, dated the 10*th April* 1872.

Sreemunt Sen, *Plaintiff*,

versus

Gorai Gazee, *Defendant*.

Mofussil Small Cause Courts can take cognizance of suits brought under s. 53 of the Registration Act XX of 1866.

Case.—This is an application under section 53 of Act XX of 1866 on the part of the obligee Sreemunt Sen, plaintiff, to recover Rs. 30 secured under a bond, dated 6th Choitro 1276, executed by the obligor Gorai Gazee, the defendant in the cause, and registered under Section 52 of the said Act.

The question arises whether Small Cause Courts established in the Mofussil under Act XI of 1865 can take cognizance of such *quasi* suits as are contemplated under the above-mentioned Section 53. Before the passing of the decision in the case of Nil Comul Banerjee *versus* Modhoo Soodun Chowdhry and others, reported in page 479, Weekly Reporter, Volume XIV, no doubt was ever entertained as to the jurisdiction of the Mofussil Small Cause Courts to entertain such suits and enter judgments, when the amounts claimed were below Rupees 500: *Vide* Keshub Lall Mitter *versus* Mosabdy Mundul, page 11, Weekly Reporter, Volume IV, Small Cause Court References. It is only since the trial of the above case, doubts have arisen as to the competency of these Courts to try those cases, and the High Court, in its letter No. 634, dated 6th March 1872, has brought to the notice of this Court the above decision evidently with a view to direct the attention of this Court to the point under consideration.

Even after the passing of the decision above adverted to, I entertain no doubt as to the jurisdicton of this Court to take cognizance of suits brought under Section 53 of the above Registration Act. That Section empowers the obligee to present a petition within one year after the money became payable "to any Court which would have had jurisdiction to try a regular suit for such obligation for the amount secured thereby;" and such obligation is to be verified in the manner required by law for the verification of plaints. It is also further provided that on "the production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree," &c., &c., and lastly it is enacted "that such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure."

Now it is to be observed that this Court is the proper Court where a regular suit for a money-claim under any obligation must be instituted under Section 6 of Act XI of 1865, if the sum wanted to be recovered is below Rupees 500; and as the sum secured under the obligation now before the Court is Rupees 30 only, a regular suit for its recovery must be brought in this Court. Consequently, such a money-claim under the peculiar obligation registered under Section 52 must

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be brought in this Court under the provisions of Section 53. Further, this Court entertains suits under verified plaints and enforces its decrees under the provisions laid down in the Civil Procedure Code, and therefore it is fully competent to discharge all the duties enjoined in Section 53. Therefore, under the provisions of the law as laid down, no objection can be taken to the jurisdiction of this Court to entertain suits of the class provided for in Section 53 of the above Registration law.

Then let me see whether the decision of Nil Komul Banerjee *versus* Modhoo Suddun Chowdhry above referred to, is a precedent applicable to the Mofussil Small Cause Courts in reference to the cases under Section 53. That case was decided by their Lordships sitting in the original side of the Court on a refereuce from the Calcutta Small Cause Court, which is governed by the procedure laid down in Act IX of 1853. The Calcutta Small Cause Court can neither entertain suits under verified petitions nor can enforce its decrees under the provisions of the Civil Procedure Code, and is not therefore competent to discharge the duties to be observed in trying suits under Section 53, wherein plaints are to be verified and decrees to be enforced under the provisions of the Procedure Code. It is in consideration of these circumstances that their Lordships have held that the Calcutta Small Cause Court cannot take cognizance of suits of the nature provided for in the above Section of Act XX of 1866.

Thus, though I hold on the grounds stated above that this Court can entertain this suit, still as the question mooted is one of vital importance affecting the jurisdiction of the Mofussil Small Cause Courts, I beg most respectfully to submit the point for the consideration of the Honorable Judges of the High Court for an authoritative ruling on the point.

Contingent on the opinion of the High Court, I enter judgment for plaintiff under Section 23 of Act XI of 1865 for Rs. 31-10 against the defendant.

The Judgment of the High Court was delivered as follows by—

Couch, C. J.—The grounds of the decision in the case quoted are not applicable to the Mofussil Small Cause Courts. The letter of the 6th of March 1872 appears to have been founded upon an imperfect citation of the case in Mr. Broughton's work. We are of opinion that the suit can be entertained.

The 20th June 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Sale in execution of Decree—Auction-purchaser—Mortgage—Admission by Judgment-debtor—Estoppel—Evidence.

Case No. 13 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 5th October 1871.

Musst. Imrit Kooer and another (Plaintiffs), *Appellants,*

versus

Lalla Debee Pershad Singh and others (Defendants), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

The purchaser at a sale by auction in execution of a decree is not in the position of a person who takes a conveyance direct from the party, and is not therefore bound by a statement made by the judgment-debtor on some previous occasion in a mortgage to which the auction-purchaser was himself a party. The admission, so far as it can be considered as his, may at the utmost be used only as evidence against him.

Couch, C. J.—In this suit the case of the plaintiffs was that their husbands and the defendant No. 3 were living separately, and that the plaintiffs were the heirs of their husbands, and they claimed to be entitled to the husbands' shares of the property which had descended from the common ancestor, Brijo Lall Sahee. The defendants Nos. 1 and 2, it is stated in the plaint, had become the purchasers in execution of a decree which had been obtained against the surviving brother, Ram Bhunjun. That being the nature of the plaintiff's claim, and the presumption being that the three brothers were undivided, the burden of proof was upon the plaintiffs to show that they had become separate in estate.

Now the oral evidence which they gave for that purpose is in reality of no value. They called several witnesses, the first of whom only has stated that the brothers lived separately, one beegah apart, and they also had their food separately. He also stated that the rent collections were made according to each of their shares in the property. He described himself as one of their

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tenants, but he appears on cross-examination to have been a tenant not of the brothers but of Shib Sunkur Sahee, who was a four-anna sharer in the mouzah. That renders his statement about the way in which the collections were made by the brothers of little or no value, because it does not appear what means he had of knowing how the collections were made, nor does he speak so precisely about it as to render his testimony of no importance.

The next witness stated that the sons separated a year after the death of Brijo Lall Sahee, and when he was cross-examined, he said that they separated in his presence, that he did not see any deed of separation drawn up between them, but saw their household utensils divided.

The third witness said that "the brothers separated a year after the death of their father in food and house. They have divided all their property. This division took place in my presence. I cannot say in what shares the lands of Sessai were divided;" and then he said, "a deed of partition was drawn up between them in my presence. I cannot say whether it was registered. It was drawn up twelve years ago. I was not a subscribing witness to it." His account being then that he was present on the occasion and knew that they divided all their property, he cannot say in what shares they did it; and although a deed was drawn up, he was not a subscribing witness to it.

The fourth witness was Toolsee Tewaree, and he also says that the brothers separated a year after their father's death in food and property; but on cross-examination it appeared that what he knew of it was not from being present or any knowledge of his own, but his having heard of the division of the property: and another witness was called who stated in like manner that he heard that they separated a year after the father's death. Another witness makes a similar statement that they separated, a year after the father's death, in food and property, but he says that "there was no deed of partition drawn up when the sons of Brijo Lall separated. I cannot say to whose share that plot of land in Mouzah Sessai has fallen."

Thus we have one of the witnesses saying that he did not see any deed drawn up, although he was present at the separation, others saying positively that there was a deed, and a third saying that there was no deed: and then we have not only no deed produced, but apparently no attempt made to search for it or to account for its non-production. This is the evidence upon which the plaintiffs ask the Court to come to the conclusion that the three brothers separated in estate.

Then reliance is placed upon the mortgage to the defendants Nos. 1 and 2 in which the widow of one of the brothers joined, and it is said that there is a statement by the parties at the time which shows that there had been a separation.

Now, the defendants are not bound by statements made by those persons. They are purchasers at the sale by auction in execution of the decree. They are not in the position of a person who takes a conveyance direct from the party. They are, therefore, not bound by what the judgment-debtor may have stated on some previous occasion. At the utmost it would be nothing more than evidence; certainly, it would not conclude them. But they were also themselves parties to this mortgage, and on that ground the admission, so far as it can be considered as theirs, may be used as evidence against him.

We think it is of no real value and gives no assistance to the plaintiff's case, because we must look at the surrounding circumstances. Here was a mortgage made to the defendants for the purpose of paying off a debt due from the estate of the three brothers, and the defendants, if they could avoid coming to any decision as to what was the real state of the family, would be acting wisely in doing so. If the widow of the deceased brother was willing to join in the mortgage, the defendants were in the position that whatever the estate of the family was, whether it was joint or whether the brothers were separate, they got a conveyance which would give them a good title. It cannot be considered that they were making an admission as to the state of the family which would bind them for the future and prevent them from contesting the title of the widows which is now set up. The case which the plaintiffs make by the oral evidence would not justify the Court in coming to a conclusion in their favor and reversing the decree of the Lower Court in which it has been held that the three brothers were undivided and that the property descended, upon the death of the two, to the survivor. We think that was a right decree and ought to be confirmed with costs.

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The 20th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decree—Construction — Inheritance—Shradhs—Future Offerings of Jujmans—Existing Offerings.

Case No. 23 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 16th September 1871, reversing a decision of the Moonsiff of Kaleegunge, dated the 23rd May 1871.

Pudma Lochun Surma Agradanee (Defendant), *Appellant,*

versus

Goluck Chunder Surma Agradanee and others (Plaintiffs), *Respondents.*

Baboo Nullit Chunder Sen for Appellant.

Baboo Sreenath Banerjee for Respondents.

Where the Lower Appellate Court held that the plaintiffs (co-sharers) had established their claim *in right of inheritance* to certain share of the offerings of the *jujmans*—HELD that the effect of the Lower Appellate Court's decree was not to declare the plaintiffs entitled *in future* to obtain from the *jujmans* a share of the offerings to that extent, but only to a share of the existing offerings.

Kemp, J.—THIS is a suit brought by the plaintiff to recover a 7-annas 6 gundahs 2 cowries 2 krants share of certain articles and money held in deposit, being the offerings of the *jujmans* of both parties on certain occasions of *shradhs.* With the plaint a list of the articles in deposit is given, and the names of the parties in whose charge these articles are, are also given; the total value of the articles thus deposited being Rs. 143, of which the plaintiff claims, as already stated, a 7-annas 6 gundas 2 cowries 2 krants share, the suit being valued at Rupees 68 and some annas.

The first Court dismissed the plaintiff's suit. On appeal, the Subordinate Judge of Dacca has held that the plaintiffs have proved that their share is 5 annas 13 gundas 1 krant in right of inheritance, and the allegation of the defendant that he purchased an 8-annas share from Gour Chunder was held to be not proved. The Subordinate Judge says there is not the least proof in respect of that allegation, neither any documents nor any witnesses, in fact nothing at all, to show the same, whereas from the evidence of the plaintiff's witnesses it appears that the plaintiffs are co-sharers, and that the plaintiffs had established their right to a 5-annas 13 gundas 1 krant share. The plaintiffs, therefore, obtained a decree from the Subordinate Judge for the aforesaid share of the articles deposited with the aforesaid custodians.

We think that we cannot interfere with this finding of the Subordinate Judge; he has not passed a decree to the effect that the plaintiffs are entitled in future to obtain from the *jujmans* a share of the offerings made to the extent of 5 annas 13 gundas 1 krant; all that he has decreed is that the plaintiff is entitled to a share to that exent of the articles now in deposit with third parties.

There is another objection taken that all the witnesses for the defendant were not examined. We find that this objection was not taken by the special appellant before the Subordinate Judge, and we therefore cannot allow it to be raised now.

The special appeal must be dismissed with costs.

The 20th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint Hindoo Family—Act VIII of 1859 s. 2—Res Adjudicata—Fresh Cause of Action.

Case No. 171 of 1872.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 15th August 1871, reversing a decision of the Subordinate Judge of that district, dated the 8th August 1870.

Buroda Soonduree Dossee (Plaintiff), *Appellant,*

versus

Raj Bullub Sen and others (Defendants), *Respondents.*

Baboo Taruck Nath Sen for Appellant.

Baboo Motee Lall Mookerjee for Respondents.

A former suit brought by the daughter of one of four brothers of a joint Hindoo family against her uncles for a declaration of her right to a share in certain bond-debts due to the joint estate (in which suit she obtained a decree), is not identical, under Section 2 Act VIII of 1859, with a subsequent action brought by the same

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plaintiff against the same defendants for a distinct share in certain moneys which the defendants had since realized upon the bond-debts and had appropriated to themselves, a fresh cause of action accruing to the plaintiff from the time of such appropriation.

Glover, J.—THE plaintiff, who is the daughter of one of four brothers of a joint Hindoo family, brings the present suit to recover certain sums from the defendants, her uncles, on the ground that they have realized various bond-debts due to the family estate and have not paid to her her share of these sums. It appears that some time ago the same plaintiff sued the same defendants to have her right declared to a 4-anna share in certain debts due to the joint estate. and she got a decree in that case against her uncles. It does not appear that at that time any of the money said to be due on these bonds had been realized by these defendants, but since then it is alleged that the money has been realized, and that the defendants, although they have so realized it, have refused to pay her share of it to the plaintiff. The defence was that the plaintiff's case was barred by Section 2 and by Section 7 of Act VIII of 1859. There was also a plea that the money had not been realized as stated. The Moonsiff decided that Section 2 did not bar the case inasmuch as the defendants had since realized the money and appropriated a portion of it, which gave the plaintiff a fresh cause of action; he found also that Section 7 was partly applicable, and he gave the plaintiff a modified decree.

The Judge has not gone into the merits of the case, but has decided that the whole claim of the plaintiff was barred by the provisions of Section 2 Act VIII of 1859 as *res adjudicata*, and could not form the subject of a fresh suit.

It appears to us that the decision of the Judge is wrong. Section 2 says that the Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties.

The question is then: Is the present cause of action identical with the cause of action heard and determined in the former suit brought by the plaintiff? We have read the plaint in that case and find that that was a suit, amongst other things, for a declaration of the plaintiff's title to a one-third share in certain ancestral and acquired property, and the plaintiff got a decree for a one-fourth share; the difference being found not to belong to her.

Now, granting that that decree included a one-fourth share of the bond-debts, the realization of which forms the subject of the present suit, it is clear that at the time the money was not realized and the plaintiff could not have executed her decree for the same.

Since then the defendants have realized these bond-debts and have appropriated the money to themselves, and it appears to us that from that time the plaintiff had a fresh cause of action.

The former suit merely declared a right and the present suit is for a distinct share in certain sums of money which have since been realized. These two things are very different.

We think, therefore, that the case must go back to the Judge in order that he may first dispose of the objection under Section 7, and after that, if necessary, dispose of the case upon the merits. Costs to follow the result.

The 21st June 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Notice of Enhancement—Questions respecting the Form of.

Case No. 540 of 1872.

Special Appeal from a decision passed by the Judge of Bhangulpore, dated the 8th December 1871, *reversing a decision of the Moonsiff of Monghyr, dated the 30th June* 1871.

Mr. James Daniel McGiveran (Plaintiff), *Appellant,*

versus

Hurkhoo Singh (Defendant), *Respondent.*

The Advocate-General and *Baboo Amarendro Nath Chatterjee* for Appellant.

Mr. C. Gregory for Respondent.

The great strictness with which cases involving questions as to the form of notice of enhancement were dealt with has been relaxed in the later practice of this Court, and it has been held in the later rulings that a notice is good if, without containing the exact terms of the law, it states with sufficient precision the nature of the claim, the amount asked for, and the grounds on which the enhancement is sought, so that the ryot served with the notice may not be misled, and can clearly comprehend the case which he has to meet.

Ainslie, J.—THIS was a suit for enhanced rent after notice served under Section 14 Act VIII of 1869 B. C.

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It was dismissed by the first Court on three grounds: *firstly*, that the service was not sufficiently proved; *secondly*, that at the time that the plaintiff alleges he had served the notice, he had no title to do so; and, *thirdly*, that the notice, even if served, was not sufficiently specific.

On appeal, the Judge held that the plaintiff had made out his right to serve the notice, as also the fact of due service thereof; but with respect to the form of the notice, he was of opinion that, unless the defendant was a ryot not having a right of occupancy, the notice would be infructuous. He, accordingly, remanded the suit to the first Court for this issue to be tried whether the defendant was a ryot having a right of occupancy or not.

On the case coming back to the first Court, the Moonsiff held that the defendant had no right under Section 4 of the Act, a question which really did not arise upon the remand, though it was admittedly one of the questions raised in the first instance. As to the right of occupancy, the Moonsiff came to no finding whatever, but assuming that the notice was one which would be good, under Section 18 Act VIII of 1869 B. C., in respect of a ryot with a right of occupancy, he proceeded to consider whether the conditions of Clauses 1 and 2 had been satisfied, and he found that the conditions of Clause 1 had, but that those of Clause 2 had not been satisfied. In this decision he did not specifically find whether it was proved that the defendant was of the same class of ryots, with the other tenants, whose rents were established by the evidence. The result of the Moonsiff's finding, however, was that, if the notice was good against a ryot having a right of occupancy, *a fortiori* it was good against a tenant not having that right.

On appeal, the Judge has set aside the finding as to the rights of the parties under Section 4 as irrelevant, and has himself proceeded to find upon the evidence as to whether there was a right of occupancy. In the latter part of his judgment he makes certain remarks with reference to the effect of Clause 1 Section 9 Regulation VII of 1822, which appear to us to be incorrect. He also draws inferences from certain settlement-proceedings to the effect that they do not prove that there are no *gorabundee* tenures in the *deara*, but that is also not a question of any importance in this suit. The main question that he set himself to try was whether the defendant had a right of occupancy or not. On this point his finding is in these words:—"The defendants file various receipts signed by Mr. Dear, who was farmer from 1853 to 1858, and others signed by Mr. Bowstead, his successor. Durshun Lall Putwaree and other witnesses prove these receipts, and the more than 12 years' occupancy of the defendants." It has been suggested that this does not show that the occupancy was continued in the same lands, but there is a further passage from which it is quite evident that the Judge meant that the occupancy was continued in those identical lands; for he says, referring to certain settlement-proceedings, that "there is nothing in any of the proceedings which would give color to the idea that the original holdings of the ryots had been changed." This finding, based on the evidence of the witnesses and on the receipts, is perfectly distinct and in no way mixed with or dependent upon the other findings which follow, and any error made in the latter cannot be said to affect the decision on the former. The Judge, having determined the question of right of occupancy against the plaintiff, falls back on his judgment of the 24th March 1871, and dismisses the suit on the ground that the notice is bad in form.

It is contended that the appellant cannot now open the question decided in the remand order, but we are of opinion that, inasmuch as there is no final judgment or decree in this case, except the judgment of the 9th December 1871, and as that judgment is incomplete, unless we read the remand order as part of it, the plaintiff has a right to appeal against the whole of that judgment and against any portion of the former judgment which must necessarily be read as a complement of the present judgment. The point was not distinctly raised in the grounds of appeal, but we consider it absolutely necessary for the ends of justice that the plaintiff ought to be allowed to raise the question, for there is no doubt that the great strictness with which cases involving questions of such notices were dealt with has been much relaxed in the later practice of this Court, and it has been held in the later rulings that a notice is good if, without containing the exact terms of the law, it states with sufficient precision the nature of the claim, the amount asked for, and the grounds on which the enhancement is sought, so that the ryot served with the notice may not be misled, and can clearly comprehend the case which he has to meet. Looking to the objections taken by the defendant in his written statement in this case, it can hardly be said that he did not understand what the

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case of the plaintiff against him was, and therefore could not make a proper defence.

It is then urged that there is an admission by the pleader for the plaintiff before the Judge by which he is concluded, but we are not prepared to say that is a binding admission. It appears that, when the Judge took a certain view of the law which we consider overstrained, and held that the notice was not good, unless it was served on the defendant as a ryot not having a right of occupancy, the plaintiff's pleader admitted that the notice was served as a notice on a non-occupancy ryot. His admission, however, was not one which operated to preclude the opposite party from tendering evidence. On the contrary, the question as to whether the defendant was a tenant-at-will, or a ryot with a right of occupancy, was distinctly put in issue and found against the plaintiff on evidence submitted to the Court.

Under the circumstances above stated, we think that the objection of the defendant as to the notice under Section 14 ought to be overruled, consequently the case must go back to the Lower Appellate Court, and the Lower Appellate Court will have to come to a finding upon the evidence on the record and upon such other evidence as the parties may choose to adduce as to whether the plaintiff has made out his case, as stated in the 1st Clause of Section 18 Act VIII of 1869 B. C. It is admitted by the learned Advocate-General, on behalf of the appellant that the grounds of enhancement on the 2nd Clause canot be sustained.

The case is accordingly remanded for retrial by the Lower Appellate Court on the above issue.

The 21st June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Case No. 131 of 1872.

Sale of whole Tenure—Co-sharers—Unregistered Transfer—Onus probandi.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 20th September 1871, *affirming a decision of the Subordinate Judge of that district, dated the 29th April* 1871.

Pitamburee Chowdhrain (Defendant), *Appellant,*

versus

Nobin Kristo Mookerjee (Plaintiff), *Respondent.*

Mr. Fergusson and *Baboos Grija Sunkur Mojoomdar* and *Taranath Chuckerbutty* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

Where the whole of a tenure was sold in execution of a decree for rent against the recorded proprietors and purchased by special appellant, and one of the recorded proprietors had previously sold her share to special respondent, but no mutation of names in the zemindar's sheristah took place, in a suit brought by special respondent to recover possession of his purchased share of which he had been dispossessed by special appellant,—HELD that special appellant was bound to show that the whole tenure passed under his sale as alleged by him, and not only the rights and interests of the judgment-debtor, as alleged by special respondent and as concurrently found by both the Lower Courts.

SPECIAL respondent had purchased and was in possession of Nobo Coomaree's share in a mokurrurree ijara. No mutation of names in the zemindar's sheristah took place, and the names of Nobo Coomaree and two other co-sharers continued to appear in the zemindar's books as tenants. Subsequently to special respondent's purchase and in consequence of his default, the whole property was put up to auction-sale in execution of a decree for rent obtained by the zemindar under Act X of 1859, and purchased by special appellant, who, in taking possession thereof, dispossessed special respondent. Special respondent thereupon brought this suit to recover possession with wasilat. The Subordinate Judge gave him a decree, which was affirmed in appeal by the Judge.

Kemp, J.—WE think it unnecessary to call upon the respondent's pleader in this case. The defendant is the special appellant. Both Courts have found that the whole tenure did not pass under the sale which was brought about at the instance of one of the co-sharers, namely, the sharer of a 2½ anna share, but that only the rights and interests of the judgment-debtor passed.

The main ground of special appeal is, that the whole of the tenure was sold in execution of the decree for arrears of rent against the proprietors thereof, and that therefore the plaintiff who purchased the share of one of the former proprietors cannot obtain a decree for possession of his share. No sale certificate is on the record; we have not been informed what passed under the sale, and the

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Courts have found as a question of fact that simply the rights and interests of the judgment-debtor passed under the sale.

A decision in Vol. XV, Weekly Reporter, page 6, was referred to by the pleader for the special appellant, which we think is against him; and we observe that the Subordinate Judge quotes this very decision in support of his judgment in favor of the plaintiff.

In that decision the learned Judges held that under Section 108 of Act X of 1859 a sharer in an undivided talook after obtaining a decree for money due to him on account of his share of the rent can bring the whole tenure to sale under certain circumstances, namely, that if he first proceeds against and exhausts any moveable property which the judgment-debtor may possess within the district in which the suit was brought, and the sale of such property be insufficient to satisfy his decree, he may then proceed to sell the whole tenure. But, as already observed, we have not been shown what passed under the sale, and it was the bounden duty of the defendant in this case to show that the whole tenure passed under it, and not only the rights and interests of the judgment-debtor, as was concurrently found by both the Lower Courts. We must, therefore, uphold the decision of the Lower Courts and dismiss this appeal with costs.

The 24th June 1872.

Present:

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Transferable Tenure—Suit for Rent—Decree—Sale—Ejectment — Act X of 1859. *s.* 78—*Mortgage—Res Adjudicata.*

Case No. 11 of 1872.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 8th September 1871, *reversing a decision of the Moonsiff of Buxar, dated the 15th June* 1871.

Tirbhobun Sing and another (Plaintiffs), *Appellants*,

versus

Jhono Lall and others (Defendants), *Respondents*.

Baboo Romesh Chunder Mitter for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where in a suit for arrears of rent of a transferable tenure, to which a person claiming as mortgagee was no party, a decree for ejectment under Section 78 Act X of 1859 was made instead of a decree for sale, HELD that the decree for ejectment could not confer upon the decree-holder (the purchaser in execution of a decree against the mortgagor) the right to avoid the mortgage by the ejectment of the mortgagor, and was no bar under Section 2 Act VIII of 1859 to a suit by the mortgagee to question the validity of that decree, and to show that the Collector had no power under Act X of 1859 to make a decree for ejectment.

Couch, C. J.—THE suit was brought for confirmation of possession of the plaintiffs in respect of 16 *beeghas* of *gazashta* land according to the boundaries mentioned at the foot of the plaint, and based upon three deeds of mortgage dated the 23rd of Assar 1272, the 13th of Sawun 1273, and the 1st of Assar 1276.

The case of the defendant was that he was entitled as the purchaser under a decree which had been obtained against the mortgagor, and which had been executed.

The Moonsiff says, as to the 1st and 2nd issues which were raised, that, "on a reference "to a copy of a decision of the Collector "dated the 14th April 1869, it appears that "the defendant No. 3, the *ticcadar* of "Mouzah Dobhapore, having sued Rughoo "Nundun Singh, defendant No. 4, on account "of arrears of rent, obtained an *ex parte* "decree, and under Section 78 Act X of 1859 "an order was passed for the resumption "of the *kasht* land of the defendant aforesaid, "which was mentioned in the plaint as con-"sisting of 44 *beeghas* and 9 *dhoors*."

Then, after considering the question of the application of Section 2 Act VIII of 1859, he says:—"When the *gazashta* right of the "plaintiffs, mortgagors, was not proved to the "Court, and their lands are not found trans-"ferable, and an order was passed for eject-"ment from the *kasht* under Section 78, then, "by the mere passing of such an order by a "competent Court, the transfer made on "behalf of the mortgagors, defendants, 3rd "party, became illegal, and the right of the "transferree was not found transferable and "undefined. On the contrary, when the "mortgaged land lawfully passed out of the "possession of the mortgagors, the possession "of their temporary *locum tenens* also passed "out of their hands. Under such circum-"stances, the plaintiff ought to have preferred "a claim only in respect of the money covered

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"by the mortgage, and not for confirmation of "possession." He accordingly dismissed the suit.

When the case came before the Judge of Shahabad on appeal, he said in the short judgment which he gave :—"I note that the transferable nature of the *jote-gazashta* is not denied." The Moonsiff appears to have considered, and to have found, that the lands which were the subject of the suit were not transferable; but we must take it that the Judge, to whom the appeal from the Moonsiff lies, is right when he says that the transferable nature of the jote was not denied, and that the lands in this case were transferable.

Then the Judge says "that the only "question in this case is, can the plaintiffs, "mortgagees of defendants 4 and 5, retain "possession of part of the transferable tenure "that has been entirely sold under a duly "carried out execution of a decree of a proper "Court?" The Moonsiff stated that the decree was not a decree for sale, but an order for ejectment under Section 78, and it was admitted by the pleader for the respondent that it was, and that the Judge was mistaken in considering that there had been a sale of the tenure under a decree for sale.

Therefore the facts appear to be that this was a transferable tenure that might and ought, according to the provisions of Act X of 1859, to have been sold; but instead of the Collector making the proper decree, namely, a decree for sale, a decree of ejectment under Section 78 Act X was made. Now the present plaintiff, the mortgagee, was not a party to those proceedings. If he had been, the proper course would have been to question the validity of the decree for ejectment under Section 78 by an appeal; but having been no party to those proceedings, the plaintiff is now, we think, at liberty to question the validity of that decree, and to show that, in fact, the Collector had no power, under Act X of 1859, to make a decree for ejectment.

Without determining the question, whether by purchasing such a decree, the defendant would obtain the right of the decree-holder to eject the tenants (which it is not now necessary to do), it is sufficient to say that this is a decree which could not confer upon the decree-holder the right to avoid the mortgage by the ejectment of the mortgagor. The ground upon which the Moonsiff decided the case was an erroneous one; he seemed to think that the Court would have power to make such a decree, and he was right upon the view which he took of the tenure not being transferable. Then the Judge seems also to have decided the case and confirmed the decree, dismissing the suit on equally erroneous ground, for, although he considered the tenure was transferable, he made a mistake as to the nature of the proceedings in the Collector's Court, and thought that the tenure was properly sold, which it was not.

The decrees of both the Lower Courts must be set aside, and inasmuch as no issue was raised by the present respondent as to the execution of the mortgage, or the right of the plaintiff under it, supposing the defendant failed to make out his case under the proceedings in the Collector's Court, there ought to be a decree for the plaintiff according to the prayer of the plaint. The plaintiff will be declared entitled to the possession of 16 beeghas of land as described in the plaint according to the deeds of mortgage which are mentioned in the plaint. The plaintiff will have his costs of the suit in all the Courts.

The 24th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Procedure—Act VIII of 1859 *s.* 119—*Act X of* 1859 *s.* 58—*Act III of* 1870 *(B. C.)—Re-hearing—Ex parte—Default.*

Case No. 125 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 19*th January* 1872, *affirming an order of the Moonsiff of Behar, dated the* 9*th September* 1871.

Oodwunt Mahtoon (Judgment-debtor), *Appellant*,

versus

Bidhee Chund Chowdhry (Decree-holder), *Respondent*.

Baboo Nil Madhub Sen for Appellant.

Baboo Kalee Kishen Sen for Respondent.

In any case in which judgment was passed *ex parte* or by default by the Revenue Courts before the passing of Act III of 1850 (B. C.), the application for the re-hearing of the case is governed by the procedure prescribed by s. 119 Act VIII of 1859, and not s. 58 Act X of 1859. Decision in 16 W. R., 255, explained.

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Couch, C. J.—It is possible that the Judge may have been misled by a passage in the judgment, in the case in the XVI Weekly Reporter, 255, where it is said that the application for the re-hearing of the case under Section 58 Act X of 1859 could be heard, and he may have supposed that the Court was laying down that the application was one under Section 58 Act X of 1859, and must be dealt with according to that Act. But Mr. Justice Macpherson was there only describing the application in the terms in which it had been made by the party. It had been erroneously made to the Moonsiff under Section 58 Act X of 1859, when it ought to have been made according to the provisions in Section 119 Act VIII of 1859, because it was by that Act that the procedure in the transferred suits was to be regulated.

The provisions of the law appear to me to be clear. In the first instance, the suits which were pending in the Revenue Courts were not transferred to the Civil Courts, but suits which were brought after Act VIII of 1869 came into force were to be brought in the Civil Courts, and to be regulated by Act VIII of 1859. The suits which remained in the Revenue Courts were naturally allowed to be regulated by the practice of those Courts. The Act of 1870 provided for the transfer from the Revenue Courts of the suits which had been allowed to remain there; and it having been provided by the Act of 1869 that the new suits should be regulated by the Code of Civil Procedure, it was natural that the Bengal Legislature should say that all future proceedings in the transferred suits should be regulated in the same way, and that the Civil Court should not apply to the transferred suits a procedure to which it was not accustomed. The provisions appear to me to be quite consistent. In this case the application was governed by Section 119 Act VIII of 1859, and the period allowed by that Section ought to have been given to the party.

We must reverse the order of the Lower Court, and remand the case for re-hearing. The appellant will have the costs in this Court, pleader's fees being fixed at 16 rupees.

Ainslie, J.—I wish to add that, in the order granting the rule reported in XVI Weekly Reporter, the only question before Mr. Justice Macpherson and myself was what Court had jurisdiction to try the case. We did not consider what procedure was to be applied by the Court that might eventually have to try the case, and it was not intended to decide that Section 58 Act X of 1869 would apply.

The 24th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ejectment (under Act VIII of 1869 *B. C.)—Land for Building Purposes—Contract to give up when required—Res Adjudicata—Act X of* 1859 *s.* 25.

Case No. 169 of 1872.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 21*st September* 1871, *affirming a decision of the Moonsiff of Serampore, dated the* 7*th July* 1871.

Ramnarain Mitter (Plaintiff), *Appellant,*

versus

Nobin Chunder Moordafarash (Defendant), *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Sham Lall Mitter for Respondent.

The only suits for ejectment contemplated by Act VIII of 1869 B. C. are those consequent on the non-payment of arrears of rent, but not a suit for ejectment from land assigned for building purposes brought upon a contract (a kubooleut) by which the defendant had bound himself to give up the land when required by plaintiff to do so on receipt of a year's rent and the cost of carrying away the building materials; and such a suit is not barred under s. 2 Act VIII of 1859 by reason of an order for ejectment obtained upon an application brought under s. 25 Act X of 1859, such an application not being a suit.

Glover, J.—THE plaintiff in this case sued to eject the defendant from 7 cottahs of land on the ground that, by the terms of a kubooleut entered into between the parties, the defendant had bound himself to give up the land whenever required by the plaintiff to do so. The plaintiff required the land for himself and called upon the defendant to vacate. The defendant refused, and hence this suit.

The defendant pleaded in the first place that the hearing of the suit was barred under Section 2 Act VIII of 1859, inasmuch as the plaintiff had failed to execute a former decree for ejection obtained in the Court of the Deputy Collector against him under Act X of 1859; *secondly,* that he had executed no kubooleut to the plaintiff; and, *thirdly,* that the holding was a "mowrosee" one from which he could not be ejected.

The Moonsiff held the suit not to be barred by Section 2. On the merits, he found that the plaintiff had failed to prove the kubooleut,

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and had, by permitting the defendant to remain on the land, waived his right notwithstanding the former decree, and could not now eject the defendant and take possession of the house in process of eviction, although the defendant had failed to establish his right of occupancy.

The Judge, on appeal, was of opinion that the suit had been improperly brought under Act VIII of 1869, it not being on an engagement between a cultivating ryot and his tenant, but for ejectment from land assigned for building purposes. He dismissed the appeal.

We think that the Judge was right in holding that a suit of this nature could not be brought under Act VIII of 1869. The only suits for ejectment contemplated by that Act are those consequent on the non-payment of arrears of rent. In this case there is no question of arrear, and the suit was brought on a contract by which the defendant is said to have pledged himself to give up the land, when required by the plaintiff to do so, on receipt of a year's rent *plus* Rs. 8 on account of coolie hire for carrying away the "awlat" or building materials. The lease was undoubtedly a binding one.

But we think it by no means clear that the plaintiff did bring his suit under Act VIII of 1869. His plaint does not say so, and as the Moonsiff's Court would be the Court having jurisdiction to try the suit whether brought under Act VIII of 1859 or Act VIII of 1869 B. C., we are left in doubt as to the Act which the Moonsiff considered to govern the case; the more so as the Moonsiff fixed no issue which required the application of the Rent-Law. He tried whether the suit was barred, whether the kubooleut was genuine, whether the plaintiff required the land for his own purposes, and if so, whether he could eject the defendant, and what was the value of the house built by the defendant. There was no issue such as there ought to have been had the suit been tried under Act VIII of 1869, and the mere fact of the suits being by some mistake of the office probably registered in the book of Rent-suits, ought not, we think, to conclude the plaintiff in the way the Judge had concluded him.

It would, however, be a clear waste of time to send the case back to the Judge, if the decision he has recorded touching the kubooleut can stand. The Judge says that, in a suit between these same parties, the kubooleut was held to be proved. If this be so, the plaintiff could sue to re-enter on the contract made by the kubooleut. The case in question was brought under Section 25 Act X of 1859, and the Deputy Collector holding that the defendant had not proved a right of occupancy, ordered him to be ejected. The plaintiff, however, took no steps to enforce his decree, which has from that time to this admittedly remained a dead letter.

Section 2 Act VIII of 1859 forbids a Civil Court from taking cognizance of a "suit" brought on a cause of action, &c., &c. Now, the Full Bench in Phillips *versus* Shibnath Moitro, Special No. W. R., 118, has ruled that an application to eject, brought under Section 25 Act X of 1859, is not a suit. There has been, therefore, no previous suit determined as between these parties, and Section 2 would not bar.

The decision of the Deputy Collector therefore, in the suit under Act X of 1859 would only be a piece of evidence in favor of the kubooleut, which the defendant would be entitled to rebut in the present suit. The Moonsiff has found the kubooleut not proved, and the plaintiff has, we think, the right to have the Judge's opinion on the point.

We think that the case should be remanded to him for that purpose.

The 25th June 1872.

Present:

The Hon'ble F. B. Kemp, A. G. Macpherson, and W. Ainslie, *Judges.*

Decision of English Committee—Power of Division Bench to re-consider, review, or set aside — Removal of Moonsiff — Appeal—Letters Patent, s. 15.

Case No. 2 of 1872.

Appeal under Section 15 *of the Letters Patent, dated the* 28*th December* 1865, *from an order of the Hon'ble Sir Richard Couch, Kt., Chief Justice, dated the* 1*st March* 1872.

Hurrish Chunder Mitter, *Petitioner.*

Baboo Amarendranath Chatterjee for Petitioner.

Upon an appeal under Section 15 of the Letters Patent from the decision of the Senior Judge of a Division Bench (differing in opinion from the Junior Judge) dismissing a petition of a late Moonsiff complaining of his removal from office by the English Committee,—HELD, that no Division Bench has any power to re-consider or review or set aside a decision of the English Committee,

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or to order the Judges of the English Committee to re-consider or review or set aside their decision.

Quære.—Whether an appeal lies under Section 15 of the Letters Patent from the decision of the Senior Judge in such a matter.

THIS was an appeal, under Section 15 of the Letters Patent of 1865, from the decision of the Chief Justice, the Senior Judge of a Division Bench, who differed in opinion from the Junior Judge, Mr. Justice Dwarkanath Mitter, in the matter of a petition of the late Moonsiff of Burdwan complaining of his removal from the office of Moonsiff by a Resolution of the English Committee dated the 15th September 1871, in the exercise of the power vested in the Court by Section 33 of the Bengal Civil Courts Act VI of 1871.

The judgments of the Division Bench were as follows :—

Couch, C. J.—Mr. Woodroffe made an application to this Division Court, that we should re-consider and review a decision of the English Committee, which was made on the 15th of September 1871, by which the applicant was dismissed from employment for (as Mr. Woodroffe described it) abuse of his judicial position.

The grounds upon which the application was made were similar to those upon which a like application was made to the Court in the case of the Moonsiff of Pollâs.

The application of that Moonsiff has been heard by a Court composed of five Judges, and judgment has been given that the application should be refused. The reasons which the Court gave in that judgment, I think, are applicable to the present case. I see no distinction between the two cases; and for the reasons given in that judgment, which it does not appear to me necessary to repeat now, it having been seen by Mr. Justice Mitter, I think the application in the present case ought to be refused.

Mitter, J.—The petitioner in this case was the Moonsiff of Burdwan, and was removed from his office by an order passed by the Judges of the English Committee of this Court on the 15th of September 1871.

He now applies to us for a re-consideration of his case, urging, among other grounds, that the Judges of the English Committee had no authority to pass the order above referred to, and that the said order is otherwise invalid, inasmuch as it was made without hearing him through his counsel, notwithstanding that he had asked for leave to be so heard.

I am of opinion that this contention is valid, and that the petitioner is entitled to a re-hearing.

The power of the High Court to remove a Moonsiff from his office is derived from the 33rd Section of the Bengal Civil Courts Act (VI of 1871) which consists of the following paragraphs :—

I.—"The High Court may appoint a Commission for enquiring into the *alleged misconduct* of any Moonsiff."

II.—"On receiving the report of the result of any such enquiry, the High Court may, if it thinks fit, remove the Moonsiff from office or suspend him, or reduce him to a lower grade."

III.—"The provisions of Act XXXVII of 1850 (for regulating enquiries into the behaviour of public servants) *shall apply to enquiries under this Section, the powers conferred by that Act on the Government* being exercised by the High Court."

IV.—"The High Court may also, previous to the appointment of *such Commission*, suspend any Moonsiff, pending the result of the enquiry."

V.—"The High Court may, without appointing any *such* Commission, remove or suspend any Moonsiff, or reduce him to a lower grade."

It is true that this Section contemplates two classes of cases,—one, where the High Court may dismiss or suspend or degrade a Moonsiff, after appointing a Commission for enquiring into the alleged misconduct with which he is charged; the other, where the High Court may dismiss or suspend or degrade a Moonsiff without appointing any *such* Commission. But I apprehend that, in the latter class of cases also, there must be some enquiry of some kind or other before the High Court can exercise the powers mentioned above. The last paragraph of the Section says, it is true, that the High Court may remove or suspend a Moonsiff from his office, or reduce him to a lower grade without appointing a Commission, but there is nothing whatever in that paragraph to warrant the conclusion that, if the High Court thinks fit to dispense with a Commission, it can dismiss, or suspend or degrade a Moonsiff without holding any enquiry of any kind. It is true that the Moonsiffs are officers removable at the pleasure of the Government, but there is nothing in the Section under our consideration, at least as I read it, to support the proposition that they are removable at the pleasure of the High Court also.

The above conclusion appears to be fully borne out by the nature of the ground upon which a Moonsiff is liable to be removed or suspended or degraded from his office by the

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High Court. Section 33, it should be observed, forms part of Chapter V, which is headed "*Misfeasance*," and it is I apprehend only when the Moonsiff is found guilty of some *misfeasance*, that the High Court can exercise the powers vested in it by that Section. This view is fully supported not only by the two previous Sections of that Chapter,—namely, Sections 31 and 32,—but also by a comparison of the first and last paragraphs of Section 33, which embrace the two clases of cases above referred to. Section 31 says:—"Any District Judge, Additional Judge, Subordinate Judge, or Moonsiff, may, for *any misconduct*, be removed or suspended by the Local Government." Section 32 merely gives the power to the High Court to suspend a Subordinate Judge from his office, subject, however, to the condition of forthwith reporting the circumstances of the suspension to the Local Government for final orders. It is true that the word "*misconduct*" is not expressly used in this Section; but if we read it by the light of the preceding Section, as well as by that afforded by the character of the Chapter to which it belongs, there can be no doubt whatever that the power of suspension thereby vested in the High Court can be exercised only when the misconduct of which the Subordinate Judge is thought guilty by that Court is of such a nature as to render his immediate suspension from office, pending the result of a reference to the Local Government, urgently necessary. Lastly, when we come to the two paragraphs of Section 33, to which I have already referred, the point is placed beyond all controversy. The first paragraph authorizes the High Court to remove or to suspend or to degrade a Moonsiff after causing an enquiry to be made into his "*alleged misconduct*," by a Commission duly appointed for the purpose. The last paragraph authorizes the High Court to exercise similar powers "without appointing any *such* Commission." Now, if we substitute for the word "*such*" the words for which it stands, this paragraph would read as follows:—"The High Court may, without appointing *any Commission for enquiring into the alleged misconduct of a Moonsiff*, remove or suspend him or reduce him to a lower grade." The true construction of these two paragraphs, therefore, is that the High Court may or may not appoint a Commission for enquiring into the alleged misconduct of a Moonsiff according to its own discretion in each particular case, but the Moonsiff must be found guilty of some *misconduct* or *misfeasance* before the High Court can exercise the powers vested in it by either of those paragraphs. There is nothing whatever in Section 33 to justify the contention that the High Court is authorized by that Section to remove, or to suspend, or to degrade a Moonsiff on the ground of mere incompetency, unless incompetency is included within the word *misconduct*, which I think it cannot be. A Moonsiff holds his appointment directly from the Local Government, such Government being vested by the 6th Section of the Act with the exclusive power of appointing Moonsiffs after satisfying itself upon the nomination made by the High Court, as to whether or not the nominee possesses the necessary qualifications, that is to say, the qualifications prescribed by it with the sanction of the Governor-General in Council; and although the Local Government may, for any cause, and without holding any enquiry, remove or suspend a Moonsiff, or reduce him to a lower grade, but under powers other than those vested in it by the 31st Section, which refers to misconduct only, there is no law that I am aware of on the strength of which it can be held that those powers have been delegated to the High Court, or that the said Court can remove or suspend a Moonsiff, or reduce him to a lower grade, either for incapacity or for any other cause not amounting to misconduct. No doubt, if the High Court finds that a Moonsiff is not competent to discharge the duties of his office, it may, if it thinks fit, bring the matter to the notice of the Government; but if the Government chooses to retain the Moonsiff in his post, notwithstanding such report, the High Court must abide by the decision. The power of the High Court to remove or to suspend a Moonsiff from his office, or to reduce him to a lower grade, depends entirely upon Section 33 of the Bengal Civil Courts Act; and as that Section refers to misconduct and to misconduct only, I am unable to see how the High Court can proceed against a Moonsiff upon any other ground than that of misconduct.

The argument drawn from Section 25 Act XXXVII of 1850, is rather in support of, than opposed to, my view. It is true that the words "the powers conferred by that Act (namely, Act XXXVII of 1850) on the Government being exercised by the High Court" are to be found in the 3rd paragraph of the 33rd Section of the Bengal Civil Courts Act. But on turning to Act XXXVII of 1850, I find nothing in it to justify the conclusion that the authority of removing or

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suspending any public servant for any cause and without holding any enquiry referred to in Section 25, was "*conferred on the Government by that Act.* On the contrary, Section 25 expressly says :—'*Nothing in this Act* shall be construed *to affect* the authority of Government for removing or suspending any public servant for any cause without holding any enquiry under this Act.' These words clearly refer to a *pre-existing* authority not created by Act XXXVII of 1850, and show, conclusively, at least to my mind, that that authority was not '*conferred* on the Government by that Act;' and as the 3rd paragraph of the 33rd Section of the Bengal Civil Courts Act merely says that the High Court is to exercise the powers *conferred by Act XXXVII of* 1850 *on the Government*," the conclusion is irresistible that the authority in question, namely, that of removing or suspending or degrading a Moonsiff *for any cause and without holding any enquiry under Act XXXVII of* 1850, has not been vested in the High Court by that paragraph. Indeed, the very wording of this paragraph clearly shows that the *only power* of Government which has been delegated to the High Court is that which was *conferred* on the Government by Act XXXVII of 1850, namely, the power of removing or suspending or degrading a Moonsiff after holding an enquiry under that Act, which is called an Act for enquiring into the *behaviour* of public servants ; for the said paragraph expressly says, " that the provisions of Act XXXVII of 1850 *shall* apply to *enquiries* made under this Section, that is to say, under Section 33 of the Bengal Civil Courts Act." The first and last paragraphs of Section 33 are both of them parts of that Section ; and it follows therefore that the High Court must make an enquiry in the mode prescribed by Act XXXVII of 1850 before it can exercise the powers vested in it by either of those paragraphs, unless we are prepared to hold that that Court is authorized by the last mentioned paragraph to find a Moonsiff guilty of misconduct, without holding any enquiry of any kind whatever. Whether the enquiry is to be delegated to a Commission, or to be made by the High Court itself, is a matter entirely in the discretion of that Court ; but because the paragraph in question says that the High Court may remove or suspend or degrade a Moonsiff *without appointing a Commission* for enquiring into the misconduct with which he is charged, it by no means follows that that Court would be justified in so doing without holding any enquiry at all. Such a power is, on the very face of it, of a too arbitrary and capricious character to be claimed on behalf of a Court of Justice ; and I see nothing whatever either in the Bengal Civil Courts Act, or in any other law in force, to give the slightest support to the contention that it has been vested in the High Court.

If the foregoing observations are correct as far as they go, or, in other words, if I am right in holding that the High Court is bound to make *some enquiry* into the alleged misconduct of the Moonsiff, before it can exercise the powers conferred on it by either of the paragraphs above referred to, that enquiry, whether made through the assistance of a Commission or otherwise, must be of a strictly judicial character, and it must, therefore, be conducted in the mode in which all other judicial enquiries are conducted, that is, after giving to the party interested in its result every reasonable opportunity to defend himself either in person or by counsel as he shall prefer. The words "*High Court*" used in the 33rd Section of the Bengal Civil Courts Act ought to be interpreted to mean the High Court acting in its *judicial* capacity ; and the very nature of the ground upon which alone that Court can proceed against a Moonsiff, clearly shows that every action taken by it under that Section must be taken in a strictly judicial manner. To find a person guilty of misconduct otherwise than in a judicial manner, is not the province of a Court of Justice ; nor do I see any reason whatever why the High Court exercising the functions of a Court of Justice, as it must do in every case which comes before it under the Section above referred to, should find a Moonsiff guilty of misconduct, and then remove him from his office, without giving him every reasonable opportunity to be heard by his counsel if he wishes to be so heard. I have already shown that, whether the enquiry is made with or without the assistance of a Commission, the procedure adopted must be that prescribed by Act XXXVII of 1850 for regulating *enquiries* into the *behaviour* of public *servants ;* and if this is conceded, the right of the Moonsiff to defend himself by counsel would seem to follow as a necessary consequence. If the High Court delegates the enquiry to a Commission in the first instance, there can be no doubt whatever that the Moonsiff would be entitled to appear before the Commissioners either in person or by counsel as he shall think convenient. Sections 11—13 and 15 of Act XXXVII of

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1850 appear to me to be conclusive on this point. Nor do I see any reason why the same privilege should not be conceded to him when his case comes before the High Court after the Commissioners have submitted their report. Whether the Government would allow such a privilege or not appears to be a different question altogether; but as the High Court is bound to decide the case judicially, all its proceedings must be of a strictly judicial character. The report of the Commissioners might be either in favor of the Moonsiff or against him, but in either case it is for the High Court to pass the final decision which may be either in accordance with or contrary to that report. Why then are we to hold that the Moonsiff is not entitled to be heard by counsel when his case is taken up by the High Court for final disposal, contrary to the rule which is invariably adopted in all other cases in which a Commission is appointed by a Court of Justice? A pleader of the Moonsiff's Court cannot be deprived of his right to practise without being allowed to defend himself by counsel both in the Lower Court and in this Court; and it was only the other day that Mr. Justice Macpherson and myself were obliged to follow that rule in four cases which were sent up by the Judge of Chittagong, with his report recommending the dismissal of some of the pleaders of his Court. The same rule holds good in the case of Attorneys and Advocates; and I see no reason whatever why a Judicial Officer occupying the position of a Moonsiff should be removed from his office upon the report of a Commission, without being permitted to show by his counsel that that report, which is by no means final and conclusive, ought not to be acted upon by the Court. Suppose, for instance, that the report of the Commissioners is in favor of the Moonsiff, there is nothing whatever in the Bengal Civil Courts Act to prevent the High Court from taking a different view of the case, the whole record of which must be sent up to that Court by the Commissioners under the express provisions of the 21st Section of Act XXXVII of 1850. Can it be contended that even in such a case the Moonsiff would not be entitled to be heard before the High Court by his counsel if he wishes to be so heard? As for the other class of cases in which the High Court may not think fit to appoint a Commission, the Moonsift's right to be heard by counsel appears to be beyond all question. All enquiries made by the High Court in such cases must be made by it in the mode prescribed by Act XXXVII of 1850 under the express provisions of the 3rd paragraph of the 33rd Section of the Bengal Civil Courts Act; and the Moonsiff would, therefore, be entitled to defend himself either personally or by counsel according to the 11th, 13th, and 15th Sections of the former Act, which have been already referred to in an earlier part of this judgment. The independence of the judicial office, whether high or low, is one of the most essential elements of success in the administration of justice; and if a pal try case of Special Appeal worth a few rupees cannot be disposed of by a regularly constituted Division Bench, and without giving every reasonable opportunity to the parties concerned to protect their respective interests either personally or by counsel as they shall think fit, I am wholly unable to see why the same mode of procedure shall not be adopted in a case involving the dismissal of a Moonsiff, when it is beyond all question that such dismissal is a matter of the gravest importance not only to the Moonsiff himself, but also to the public at large. If a Moonsiff is to be found guilty of misconduct without being allowed the fullest opportunity to defend himself in the mode in which all other persons similarly accused are allowed to defend themselves before the Court by which they are tried, the result would inevitably be to deter the best men from accepting the post, and such a result would, in my opinion, be nothing less than a public calamity.

Applying the preceding observations to the facts of the present case, the order complained of by the petitioner appears to me to have been made without authority and in a manner contrary to law. I do not wish to express any opinion upon the merits of the case, but I feel myself constrained to say that the learned Judges of the English Committee had no power to pass the order in question. The functions vested in the High Court under the Bengal Civil Courts Act are, as I have already shown, of a strictly judicial character; and I do not see how the English Committee, which was appointed by the Court for the discharge of certain ministerial duties, could exercise those functions, particularly in the mode in which they have been exercised by it in the present case, that is to say, without hearing the petitioner by his counsel, notwithstanding his application for leave to be so heard. It is true that "the High Court may," under the 13th Section of the 24 and 25 Vic., c. 104, "provide *by its own rules* for the exercise by

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one or more Judges, or by Division Benches constituted by two or more Judges of the said Court, of the Original Appellate Jurisdictions vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice." But there was no rule made by this Court authorizing the English Committee to exercise the judicial powers vested in the Court by the 33rd Section of the Bengal Civil Courts Act, or to exercise them in the manner in which they have been exercised by that Committee in this particular case, namely, without hearing the petitioner by his counsel notwithstanding that he desired to be so heard. I do not mean to say for one moment that it is at all necessary for the due administration of justice that cases of this description should be heard by all the Judges of the Court. Such a course would be extremely inconvenient. Nor do I see any reason for its adoption when cases of equal or even of greater importance are daily heard and determined by Division Benches of this Court constituted by two Judges only. Were it, therefore, merely for the absence of a formal rule, empowering the learned Judges who sat in the English Committee to exercise the jurisdiction vested in this Court by the Bengal Civil Courts Act, I would have felt great reluctance to question the validity of their order. But the case assumes, in my opinion, quite a different aspect when it is borne in mind that those learned Judges did not deal with it in the mode in which it would have been dealt with by a duly constituted Division Bench of this Court, that is to say, in open Court, and after due opportunity being given to the petitioner to defend himself either in person or by his counsel according to the practice invariably observed in all judicial proceedings. I am by no means prepared to accede to the proposition that the mode in which parties interested in such proceedings are entitled to be heard is a matter entirely in the discretion of the Court. I take it to be a general rule of law that every such party is entitled to be heard by his counsel, if he wishes to be so heard, unless there is some positive legislative provision to the contrary; and I, therefore, think that no Division Bench of this Court can refuse to hear counsel in any case which comes before it judicially accordingly to its own views of expediency and convenience. Conceding, however, that the mode of hearing is in the discretion of the Court, that discretion can be exercised only by the general body of Judges of which the Court is composed, and it must further be embodied in some rules framed by the Court at large under the powers vested in it by the 13th Section of the 24 and 25 Vic., c. 104, which has been already referred to in a preceding part of this judgment. I have already said that there is no reason, in my opinion, why a Moonsiff who is charged with such misconduct as would render him liable to be removed from his office, should not have the same privilege in the matter of hearing as that which is conceded to a pleader of his Court. But if any distinction is to be made in this respect between the two cases, that distinction can be made only by the Court at large, and not by the English Committee which was appointed by it merely for the discharge of certain duties of a purely ministerial character.

I am aware that a similar point has been decided in a different way in the case of the Moonsiff of Pollâs which has been recently heard by a Bench of five Judges; but, with the greatest deference to those learned Judges, I feel myself bound to say that, for the reasons above stated, I am unable to concur in the view taken by them. I wish merely to add that there is no authority, that I am aware of, which renders it obligatory upon me to follow that decision when I am not prepared to accede to the grounds upon which it is based.

The matter came on for argument on the 19th June 1872.

Macpherson, J.—What are we to consider to be the nature of the present proceeding; and what is the nature of the order sought from us? Suppose the Court were now to make an order in favor of the petitioner, how is it to be carried out? The prayer of your petition was that the Court "will be pleased to re-consider and review their said resolution." The resolution is one of four Judges of the Court. What power has a Division Bench either to review or set aside their order?

Ainslie, J.—If you say that this was an application for a review, it is not appealable by virtue of the decision in XII Weekly Reporter, 459, where it was held that an order passed by the Senior of two Judges of a Division Bench who differed in opinion, dismissing an application for the review of their judgment, is not appealable, such an order not being a judgment within the meaning of Section 15 of the Letters Patent.

Macpherson, J.—The Moonsiff has been removed from the service of Government. No order can now be made by the Court.

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Baboo Amarendranath Chatterjee.—Your Lordships can make this order that the proceedings of the English Committee are illegal.

Macpherson, J.—Under what law has any Division Bench power to review the decision of the English Committee?

Baboo Amarendranath Chatterjee.—I do not mean to say that matters which come generally or properly before the English Committee would be open to review before a Division Bench.

Ainslie, J.—The Division Bench gets its power in appellate cases only. This was not an appeal.

Macpherson, J.—What order would you wish us to make?

Baboo Amarendranath Chatterjee.—That the Moonsiff was entitled to be heard by counsel.

Ainslie, J.—Where is the authority for a Division Bench interfering with an order of the English Committee in such a case?

Macpherson, J.—In the case of the Moonsiff of Pollâs a different course was followed. The Moonsiff of Pollâs having been dismissed by the English Committee, an application was made to the Chief Justice and Mr. Justice Glover who were sitting as a Division Bench, and who were two of the Judges who formed the English Committee. The Chief Justice brought the whole of the English Committee to sit with him when he heard the application, and that application was accordingly heard by the whole English Committee. They, being the Committee who actually made the order, were fully competent, if they thought it necessary, to review their order. But that is quite a different course from what is now proposed.

Baboo Amarendranath Chatterjee.—Your Lordships will see from the judgments of the Chief Justice and of Mr. Justice Mitter that, in deciding the case, they felt no doubt as to whether they had jurisdiction in the matter or not.

Ainslie, J.—Why should we say that the Division Bench consisting of the Chief Justice and Mr. Justice Mitter had more jurisdiction than the Division Bench consisting of the English Committee?

Macpherson, J.—I cannot conceive what order we can make. You forget the circumstances under which this application was entertained by the Chief Justice.

Baboo Amarendranath Chatterjee.—Suppose the English Committee, not having power to deal with the case, assumed that power and dismissed a Moonsiff from office, would not he have power to apply to a Division Bench to quash that order?

Ainslie, J.— It would appear from Broughton's Civil Procedure, p. 704, that Division Benches were appointed to the regular appellate work of the Court. I maintain that no Division Bench has any jurisdiction in the matter, or, at all events, can at present entertain this question.

Baboo Amarendranath Chatterjee.—There is nothing in the law or in the rules of this Court by which the Judges can delegate or have delegated such a power to the English Committee.

Macpherson, J.—The English Committee may not have jurisdiction. At the same time the Division Bench has no power to interfere. What could be the possible result of this application? We have no power to order him to be restored.

Baboo Amarendranath Chatterjee.—There are several cases in which persons removed from office have been restored.

Macpherson, J.—What difference is there between the powers of a Division Bench and those of the English Committee? The point of objection is whether one part of the Court has power to interfere with another.

Baboo Amarendranath Chatterjee.—The English Committee is not such a part of the High Court. No such power has been delegated to it. The functions delegated to it do not embrace this power of removing a Moonsiff.

Kemp, J.—Then you contend that the whole of the Judges are to sit in every case in which a Moonsiff is concerned.

Baboo Amarendranath Chatterjee.—I do not say the whole of the Judges, but a Bench of the Judges.

Ainslie, J.—But may not this Bench be the Bench ordinarily known as the English Committee?

Baboo Amarendranath Chatterjee.—I contend that the English Committee is not a Bench of the Court, and that all orders of dismissal made by it are unwarrantable.

Macpherson, J.—That may be so; but, as I have already stated, we have no power to interfere.

Ainslie, J.—The moment you say that your application before the Chief Justice and Mr. Justice Mitter was one for a review of judgment, it is clear that there is no right of appeal. As a matter of fact, under Act VIII of 1859, Mr. Justice Mitter was debarred from expressing any opinion. But admitting that he had the power, we have no power to interfere, because it has been ruled that no appeal will lie in such a case.

Baboo Amarendranath Chatterjee.—Then

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the effect of your Lordships' order will be to quash the whole of the proceedings.

Ainslie, J.—The effect will be to quash this appeal.

Baboo Amarendranath Chatterjee.—If your Lordships will treat this as an application for review, then, of course, I have nothing to urge against the conclusion of your Lordships that no appeal will lie.

Ainslie, J.—Then in what other light do you say we should look upon the application? The case in the XII Weekly Reporter, 459, decided that, upon a difference of opinion on a review, there was no appeal under Section 15 of the Letters Patent.

Baboo Amarendranath Chatterjee.—I contend that the appeal will lie. Whether your Lordships treat this as a judgment upon an application for review, or as a judgment upon a substantive application, it was a judgment within the meaning of Section 15. There being therefore a judgment, and there being a difference of opinion between the two Judges who tried the case, an appeal lies to this Court.

Macpherson, J.—Where is the law which gives a Division Bench power to review an order of the English Committee?

Baboo Amarendranath Chatterjee.—The law which gives the High Court power to set aside any illegal order. Then again, when the appeal was registered, no objection was taken. [*Ainslie, J.*—By whom was no objection taken; by the Deputy Registrar?] No, these appeals under Section 15 are laid before the Chief Justice. I do not think that this application should be treated as a review within the meaning of Act VIII of 1859; and my view will be supported by the fact that the contention before the Division Bench that the English Committee had no jurisdiction would be *primâ facie* incompatible with the notion that this was an application for a review. Besides, ordinarily, an application for review under Act VIII is made before the same Judges who tried the case; and although the word *review* happens to be mentioned in the petition, your Lordships ought not to consider that, simply because of the use of that word in the petition, it was a petition of review.

Macpherson, J.—What do you mean by *review?*

Baboo Amarendranath Chatterjee.—A re-consideration of the matter. I will admit that the word *review* is not properly used. But a mere inaccuracy in the use of a word ought not, I submit, to determine the fate of this application. The questions raised by your Lordships are, 1st, whether, this having been a petition of review, and the Judges having differed, an appeal will lie from the decision of the Senior Judge; 2ndly, whether a Division Bench of this Court consisting of two Judges can review an order of the English Committee? As to the 1st question, I contend that the application before the Chief Justice and Mr. Justice Mitter was not an application to review a judgment of the English Committee. Although a strictly literal construction of the terms of the petition may favor that view, yet if your Lordships will look at the real nature of the contention before the Division Bench, and consider that that contention was that the English Committee had no jurisdiction to decide this case, I am confident that your Lordships will agree with me that this was not a petition of review in an ordinary case between party and party under Act VIII. It was a substantive application complaining that the English Committee had taken upon themselves and assumed a jurisdiction not under the law; that their whole proceedings were *ultra vires;* and that their order should be declared a nullity; and that the Court would appoint a Division Bench to try this particular case. There had really been no Division Bench charged with the duty of deciding these cases by virtue of the power given to this Court under s. 33 Act VI of 1871. The English Committee was not so charged.

Kemp, J.—You had better first get over the point that no appeal lies, and then go into the question of the functions of the English Committee.

Baboo Amarendranath Chatterjee.—That will depend upon the way in which your Lordships look at the application. If your Lordships look at it as a substantive application, then I submit that an appeal will lie.

Kemp, J.—Both the Chief Justice and Mr. Justice Mitter treat it as an application for re-consideration and review.

Baboo Amarendranath Chatterjee.—But it was an application to re-consider and review a resolution, and was in no way an application for a review of judgment within the technical meaning of Act VIII.

Ainslie, J.—But suppose that this was a substantive application, and you got an order, how can it be carried out? The former order of dismissal has been carried out.

Baboo Amarendranath Chatterjee.—The Court of Queen's Bench has often issued a *mandamus* to restore a person who has been illegally removed.

Macpherson, J.—Do you mean to say that

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one Judge of the Court of Queen's Bench has issued a *mandamus* to restore a person who has been removed by the order of another Judge of the same Court?

Baboo Amarendranath Chatterjee.—I do not know how that may be. But I will not further detain your Lordships. My principal ground is that the contention before the Division Bench was that the English Committee had no power to remove my client; that the application was not one for review, but was a substantive application; and that even if it could be treated as a petition of review, the decision in the XII Weekly Reporter, pointed out by Mr. Justice Ainslie, will not apply to the case, because this is a case which is removed from the ordinary classes of cases.

The judgment of the Court was delivered as follows on the 25h June 1872, *by*—

Macpherson, J.—By an order made on the 15th of September 1871 by "the English Committee," consisting of four Judges, of whom the late Officiating Chief Justice was one, Baboo Hurrish Chunder Mitter, the Moonsiff of Burdwan, was removed from his office of Moonsiff.

Baboo Hurrish Chunder Mitter subsequently presented a petition to the Court praying that the "Court will be pleased to re-consider and review their said resolution."

This petition was presented to and heard by the first Bench, a Division Court, then consisting of the Chief Justice and Mr. Justice Dwarkanath Mitter; and judgment was reserved. Shortly thereafter, a similar application was made to the same Bench (which on that occasion consisted of the Chief Justice and Mr. Justice Glover) in the case of the Moonsiff of Pollâs, who also had been recently dismissed under an order of the English Committee. The application of the latter Moonsiff was eventually heard by a Court composed of five Judges, and it was refused by the unanimous judgment of the Court.

The Chief Justice subsequently held, in Baboo Hurish Chunder Mitter's case, that the reasons which the Court gave in its judgment in the case of the Moonsiff of Pollâs, applied to the case of Baboo Hurish Chunder Mitter, and that his application also ought to be dismissed. Mr. Justice Mitter held that the English Committee had no authority to pass the order of removal; that the order was invalid; and that the petitioner was entitled to a re-hearing.

In accordance with the decision of the Chief Justice, the application was dismissed; and the petitioner now appeals claiming the right to appeal under Section 15 of the Charter.

Putting on one side the question whether the decision of the Chief Justice in this matter is a judgment within the meaning of Section 15 from which an appeal lies, it appears to us that there is another and fatal preliminary objection to the whole application of the petitioner, which renders the proceedings he has taken wholly bad, and makes it unnecessary for us to enter now into the merits of the questions he desires to raise before us.

Having been removed from his office by a resolution or order of four Judges of the Court (the English Committee), the petitioner has applied to a Division Bench consisting of two other Judges of the Court, praying the Court to review and re-consider the resolution which removed him. But it is quite clear that no Division Bench has any power to re-consider or review or set aside a decision of the English Committee, or to order the Judges of the English Committee to re-consider or review or set aside their decision; and that no order which the first Bench could have made, or which we now can make, could by any possibility restore the appellant, or render it incumbent on the English Committee to review their proceedings. That being so, the petitioner's application is wrongly conceived, and must be wholly infructuous. We therefore decline to enter into the merits of his case.

It is said that the Chief Justice, by hearing the petitioner, showed that he considered the application was one which the petitioner was entitled to make. But if the circumstances under which the application was heard are borne in mind, it will be seen that no such inference can fairly be drawn from the fact of the petitioner having been heard. Before expressing any opinion on the case of Baboo Hurrish Chunder Mitter, the Chief Justice, in the matter of the Moonsiff of Pollâs, in order that the question of the regularity or otherwise of the proceedings of the English Committee might be finally determined, referred the application to a Court of five Judges consisting of himself and the four surviving members of the English Committee by whom the Moonsiff of Pollâs had been dismissed. That Bench, being composed of the members of the English Committee, whose decision was objected to, could and would, of course, have reviewed their decision, if they had thought any injustice had been done.

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The Chief Justice considering (as is usually considered by the Judges of this Court) that the unanimous decision of a Bench of five Judges must be taken as conclusive on the questions disposed of by it, and considering (as is the fact) that the application of the present petitioner was clearly governed by the decision of the five Judges in the Pollâs Moonsiff's case, simply decided that, for the reasons given in the Pollâs Moonsiff's case, the application must be dismissed. It never became necessary for the Chief Justice to consider what order in particular the Division Court, of which he was a member, could make which would benefit the appellant. There is nothing therefore in the mere fact of his having heard the petitioner before he dismissed the application, which in any degree shows that the Chief Justice meant either directly or indirectly to decide that a Division Bench could make any order setting aside or altering a decision of the English Committee, or could compel the English Committee to review their proceedings.

It is urged that we ought not to deal with this matter strictly, or to treat it as if it were supposed to be technically an application for review of judgment such as may be made under the Civil Procedure Code. But whether we look at the case strictly or otherwise, we find that the petitioner's object is always one and the same, to obtain a re-hearing of his case, and a re-consideration of those matters which have already been considered by the English Committee of four Judges, who, having considered them carefully and fully, ordered the petitioner to be removed from office. Whether the procedure of the English Committee and their final order were legal and valid, or otherwise, there the order is; and there is nothing in the Charter which authorizes us, or any other Division Court, to review or re-consider it, or to set it aside.

Supposing we were to say that the appellant should have been dealt with in a manner differing from that in which he was dealt with, in what respect would he be benefited? His position would be exactly what it is now, and he would be no nearer restoration than he is at present.

The petitioner's application being entirely wrongly conceived and inofficious, we dismiss this appeal.

The 25th June 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Lease—Forfeiture—Damages—Suit— Waiver—Receipt of Rent — Evidence — Objection — Appeal to High Court—Amount or Value below Rs. 5,000.

Case No. 171 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 15*th May* 1871.

Chunder Nath Misser and another (Plaintiffs), *Appellants,*

versus

Sirdar Khan and others (Defendants), *Respondents.*

Mr. Woodroffe and *Baboos Kalee Mohun Doss* and *Doorga Mohun Doss* for Appellants.

The Advocate-General and *Baboos Chunder Madhub Ghose* and *Nullit Chunder Sen* for Respondents.

There is nothing incompatible in the two remedies of damages and forfeiture for breach of the conditions of a lease.

Where there is an obligation (as in this case by a lessee) to do several successive acts, the obligation is broken if any one of the acts is omitted when the time for its performance comes. The lessee is not obliged to wait until the expiration of the term; nor is the lessee liable to several successive suits for each partial breach of the condition, and then to one general penalty for the whole. Nor is it usual, when a penalty is provided for breach of condition, to bring two suits—one to enquire into the existence of the breach, and the other to enforce the penalty.

Receipt of rent is not *per se* a waiver of every previous forfeiture; it is only evidence of a waiver.

The High Court declined to entertain the objection (not taken until the appellant's argument was concluded) that no appeal lay to it in this case, inasmuch as the amount or value did not exceed 5,000 rupees, even if it had been clear that the amount or value was below 5,000 rupees.

Markby, J.—This was a suit to recover possession of certain mouzahs let to the defendant, Sirdar Khan, in farm by the proprietor, the father of the plaintiffs, for a term of ten years, from the 19th Pous 1274, at an annual rent of Rs. 3,402-1; the plaintiffs alleging that they had put an end to the lease for breach of its conditions, as by its terms they alleged they were entitled to do.

The pottah which is translated at page 28 of the paper book is granted upon a great number of conditions, amongst others, that the defendant "shall correctly and faithfully

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"file every year in my (*i. e.* the lessor's) "office, the annual fixed *jummabundee* and "*pydawaree* papers, and at the expiration of "the term the kubooleuts of the ryots and "the *chitta* of the entire land; that if they "be not filed, then, according to the law in "force or that may hereafter be in force, "measures shall be taken for the realization "of those papers, and the loss which such "withholding of the said papers shall cause "shall be paid annually to the extent of the "aforesaid *jumma* as compensation by you "(*i. e.* the lessee) and your heirs without "any objection." Then follow other conditions, and then it is said "that, if you act "contrary to any of the aforesaid condi-"tions, then I shall be at liberty to cause a "resumption of the *ijarah mehals*, or let "them in *ijarah* to others, to which you "shall not be able make any objection or "claim with regard to the unexpired portion "of the *ijarah* term; if you do, the same "shall be rejected."

This clause gives the plaintiffs a clear right to put an end to the lease upon breach of any of the conditions to which the clause refers, and the questions we have to decide are, (1) whether this clause refers to that condition which has been set out; and (2) whether, if so, that condition has been broken; and if both these questions are answered in the affirmative, then (3), whether the plaintiffs can, under the circumstances, take advantage of the clause for forfeiture.

As regards the first question, the Advocate-General for the defendant, Sirdar Khan, contends that the clause of forfeiture only applies to those conditions to which no special penalty is attached; and that when there is such a special penalty, it has no application. But this is a construction which does violence to the language of the pottah which says that "if you act contray to any of the said conditions," then the consequences are to follow, and we should not be at liberty to resort to such a construction, except for very cogent reasons. We do not think it is a reason sufficiently cogent to enable us to do violence to the language of the pottah, that the lessor would thereby have two remedies; a remedy by way of damages, and a remedy by annulling the lease. The Court of King's Bench in England saw nothing incompatible in these two remedies in the case which has been referred to (4 Barn. & Adol., 403), and neither do we.

Then has the condition been broken? This involves the construction of the condition: Mr. Woodroffe contends that the true construction of the clause is that the lessee is bound to deliver the papers specified on demand; that upon his neglecting to do so, the penalty of one year's rent attaches, which may be recovered without prejudice to the lessor's right to recover the papers also; and that if neither the papers are filed, nor the penalty paid, then the lease may be annulled under the clause above set out. The Advocate-General, on the other hand, contends that, if there were a neglect to deliver the papers of any one year, that would give a right to compensation for the injury which accrued thereby, but that there would not be a breach of condition to which the money penalty or forfeiture would apply, until all the acts which were to be done under this condition had been omitted to be performed; and further that what was contemplated was that legal proceedings would be first taken to ascertain whether or no there had been a breach of the condition, and that the lessor could not annul the lease, or claim the penalty merely upon his own assertion that the condition had been broken.

Of these two constructions, that suggested by Mr. Woodroffe appears to us to be by far the most reasonable. If there be an obligation to do several successive acts, the obligation is broken if any one of the acts is omitted when the time comes for its performance; and it is not at all likely that the lessor intended to tie up his hands until the expiration of the term. Indeed, it was to escape this conclusion that the Advocate-General suggested that legal proceedings for compensation might be at once taken; but it does not seem to us at all probable that the lessee would submit to successive suits for each partial breach of the condition, and then to one general penalty for the whole. Nor when a penalty is provided for breach of condition, is it usual for there to be two suits, one to enquire into the existence of the breach, and the other to enforce the penalty. The lessor always proceeds to enforce the penalty, whether in the shape of liquidated damages or forfeiture, at once, but the lessee can of course put him to proof that a breach has been committed.

Adopting, therefore, Mr. Woodroffe's construction as the right one, let us see whether a breach of condition has been committed in this case. On the 2nd Magh 1277, a notice was given by the plaintiffs to the defendant stating that papers had been repeatedly called for under the condition and not delivered, and that "you are hereby

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"directed to make over the papers called for "within five days from this date; that if "you do otherwise and fail to make over "all those papers called for within the "specified time, then legal measures shall "be adopted for the recovery of the said "papers." On the 18th Magh 1277, another notice was served which, after referring to the default of the defendant in not filing the papers called for, proceeds thus:—"Hence "you are bound to pay the sum of Rs. 3,402-1, "the *jumma* for one year, as a compensa- "tion for loss, which too you have not "paid, and you have also violated the other "conditions of the kubooleut; therefore "you are hereby informed that you must pay "to us the aforesaid sum of Rs. 3,402-1, "within 15 days; otherwise the condi- "tions being infringed, and your right and "interest in the *ijarah* having ceased, you "can no longer hold the said lands in your "possession thereof. Accordingly, on tak- "ing back the said mehal from you, we shall "hold direct possession thereof." This seems to us to be all the notice that the defendant could require, nor has there been any complaint that it was insufficient. The defendant never complained that the papers were not sufficiently specified, or that he had not had sufficient time to prepare them, or made any other reasonable excuse of that kind for not complying with the demand. As far as we can discover, he made no reply at all to these repeated notices, apparently treating the whole matter with contempt; he only says in paragraph 6 of his written statement that "it is not intended that such claims would be enforced or acted up to." The Subordinate Judge has not given any countenance to such a direct violation of the terms of the pottah, and we can find nothing on which it can be for a moment rested.

It only remains, therefore, to consider whether the plaintiffs can, under the circumstances of this case, take advantage of the forfeiture. It is said that they cannot, first, because the forfeiture has been waived; and, secondly, because it would be inequitable to allow it to be enforced. It is said to be waived because, up to the 29th Pous 1277, the plaintiffs accepted rent. It is true that they did so, but we do not think their doing so constitutes a waiver. There would be no waiver, unless rent were accepted for a time subsequent to the forfeiture, and in our opinion there had been no forfeiture when the last instalment of rent was paid. No specific time being fixed for the filing of the papers; we do not think there was a default until the papers had been demanded, and not delivered. But even if there were in strictness a default as the Advocate-General contends, as soon as a reasonable time had elapsed for the preparation of the papers, still receipt of rent is not in itself a waiver of every previous forfeiture; it is only evidence of a waiver, and we should certainly not infer that the plaintiff, by accepting an instalment of rent, intended to waive his right to demand, and to receive all papers deliverable up to that date. Such papers as those, though useful and even necessary to the landlord under some circumstances, would not ordinarily be delivered until asked for, or asked for until wanted, and we can see no reason whatever why, if the lessee was bound to deliver them *before* the last instalment of rent was received, he was not just as much bound to deliver them *afterwards*; and there is not a suggestion that the defendant could not have done so, had he chosen. It is contended that the whole rent of 1277 has been accepted, and that the defendant at any rate has therefore a right to remain till the end of the year. But upon the evidence we do not think it appears that the *whole* rent has been paid for that year. The Subordinate Judge does not find this expressly, nor does the defendant say it in his written statement, and the *dakhilahs* relied upon do not show it. The instalment paid on 21st Choitro referred to in the *dakhilah* of 5th Pous 1277, was paid in the last month of 1276, and undoubtedly belongs to that year.

The defendant lastly throws himself upon the equitable consideration of the Court, but with very little claim to do so. Unless we are prepared to say that forfeitures cannot be enforced in this country at all, which seems to us impossible in face of such legislative provisions as Clause 5 Section 23 Act X of 1859, we must at least require that the defendant who is in default, and who seeks to escape the consequences to which he has himself agreed, should shew that his own conduct is such as entitles him to relief. Has the defendant done this? It seems to us that he has not. He has never offered the slightest explanation of why he omitted to comply with what appears to us to be both a reasonable and a just demand. He has never made any offer, or expressed any willingness to comply with that demand. He has contested and still contests the plaintiff's right to eject him, making allegations (especially in the 7th paragraph of his written statement) which he has not even attempted to support. So far from deserving any consideration, we

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think the defendant's conduct has been vexatious and unwarranted.

This disposes of the case on the merits. We have not noticed in detail the judgment of the Subordinate Judge, because it appears to us that he has failed to perceive the true nature of the defendant's plea of waiver, and only dismisses the plaintiff's suit, because the conditions of the pottah are indefinite and ambiguous. We cannot come to this conclusion. We think they clearly give the plaintiffs a right to annul the lease for breach of this condition, and that the plaintiffs have not waived their right to take advantage of the forfeiture.

It was contended by the Advocate-General that no appeal would lie to this Court, the amount or value in dispute not exceeding Rs. 5,000. We should very much doubt if the amount or value is anything like what the plaintiffs state in their plaint, but still it may considerably exceed Rs. 5,000. But under any circumstances we should not give effect to this objection. The case is one which from its importance we should be fully justified in calling up to this Co rt, and the objection was not taken until the u argument on the part of the appellants was concluded and the respondent was called upon to support the judgment of the Court below. Having full jurisdiction over the parties and the subject-matter of the suit, we should not be justified in sending them before another tribunal.

The decree of the Lower Court is set aside, and the plaintiffs will have a decree for possession of the lands specified in the plaint. They are also entitled to costs both in this Court and in the Court below, with interest at 6 per cent.

The 27th April 1872.

Present:

The Rt. Hon'ble Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Nattore Raj—Adoption—Registration—Presumption.

*On Appeal from the High Court at Calcutta.**

Rajah Chundernath Roy Bahadoor,

versus

Kooer Gobindnath Roy, Ranee Shebessuree, and others.

The Privy Council, after a very careful consideration of the evidence in this case, came to the conclusion that the judgment of the High Court was perfectly right; that there was direct evidence of the execution of the *onoomottee pottro* and of the *kottrito pottro*, which was, if not so clear as to remove all doubt, at least so satisfactory that, in the absence of contrary evidence or very strong presumptions to the contrary, it ought to prevail; and that whilst the direct evidence was satisfactory, the presumptions which existed on the one side and on the other, when they come to be weighed, very strongly preponderated in favor of the execution of these deeds.

Their Lordships observed that it would be very much for the interest of proprietors in India if, when they executed deeds giving their widows after their death power to adopt, they would take the precaution to register the deeds.

In this case the widow did not adopt a son until 6 or 7 years after the Rajah's death, and an inference was sought to be drawn therefrom hostile to the adoption with reference to the obligation upon the widows to act upon the power given to her by her husband as speedily as possible, and its great importance as a religious duty. But the Privy Council considered that the presumption against the adoption arising from the neglect of duty by the widow was not so great as the presumption in favor of the Rajah having the power to adopt, because the stronger the duty to adopt a son, the stronger was the presumption that the Rajah would not like to die without leaving power to his widow to make the adoption.

In these appeals the title to the succession to the large and ancient Raj of Nattore on the death of the Rajah Gobindchunder is involved, and it has been thought convenient to determine it before proceeding to deal with the other questions in the suits.

The issue raised on the title is, whether Gobindnath, the respondent, is entitled to the succession as a son by adoption of the late Rajah Gobindchunder. The adoption was made by his widow Shebessuree, and the power to make it is alleged to have been by a deed *(onoomottee pottro)* executed by the late Rajah on the eve of his death. He is alleged to have made at the same time another deed *(kottrito pottro)* giving his mother Kistomonee, or rather his adoptive mother, the management during the infancy; and the whole question on this issue turns upon the validity or invalidity of these two deeds.

Their Lordships do not think it necessary to go into the history of the long and complicated litigation which has arisen out of this succession, though parts of it may be incidentally referred to; and the facts which introduce the period when these deeds were executed are few.

It appears that Gobindchunder died in 1836, having the raj in full right and possession.

* From the judgment of Steer and Seton-Karr, JJ., dated 30th April 1863, Special No. (Full Bench Rulings), W. R., 106.

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He died, leaving his mother Kistomonee, his wife, who was then about the age of 20, and an infant daughter about two years old; and it is material to bear in mind this state of his family in weighing the presumptions which arise from the subsequent conduct of the parties.

The Rajah Gobindchunder had himself been adopted into this family by Kistomonee in the year 1814, and he came of age in 1829. During his minority Kistomonee managed the property, and there were disputes between the Rajah and his adoptive mother, which, when he came of age, led to what has been called by the learned counsel for the appellant exasperated litigation. There can be no doubt that there was fierce litigation between the mother and the adopted son. In that litigation insults were heaped by one upon the other; and the fair result of the evidence seems to be that they continued for a considerable time in a state of hostility. From conversation held with the Rajah himself, it appeared that only a short time before his death, he was not on visiting terms with his mother. She had left the palace at Nattore, and had gone to live at Saidabad, on the other side of the Ganges. But although that state of hostility between the mother and son is proved beyond all dispute by the evidence, it is also proved, and with equal certainty to the minds of their Lordships, that on the eve of his death the Rajah became sincerely desirous of seeing his mother and becoming reconciled with her. He was taken ill for few days before the 9th of December. On the 9th of December, or as one witness says, on the day before the 9th, he was told that his illness was serious; and on the morning of the 9th, when several family physicians were present, when one of his relatives, Hurree Pershad, the father of his wife, was also present, the evidence is that the deeds which are now in dispute were executed, attested, one by nine, and the other by eleven witnesses, and the deed of adoption (*onoomottee puttro*) given by the Rajah to Hurree Pershad, who at once delivered it to his dauther, the Rajah's wife, who was behind the screen in the same room. The other deed the Rajah put in his seal-box intending himself to take it to his mother.

The direct evidence of the execution of the deeds is that to which attention should first be called; and, of course, if that evidence fails to establish that those deeds were executed, the case of the respondent must fail.

Their Lordships having given very careful consideration to the evidence in this case, have come to the conclusion that the judgment of the High Court is perfectly right; that there is direct evidence of the execution of the instruments, which is, if not so clear as to remove all doubt, at least so satisfactory that in the absence of contrary evidence or very strong presumptions to the contrary, it ought to prevail. Their Lordships also think that, whilst the direct evidence is satisfactory, the presumptions which exist on the one side and on the other, when they come to be weighed, very strongly preponderate in favor of the execution of these deeds.

Several witnesses have been called who were present when these deeds were executed; and in considering the witnesses who were called. and the absence of witnesses, the length of time which had elapsed from the period when the deeds were executed to the time of the enquiry must be borne in mind. The deeds were executed in December 1836, and these witnesses were examined before Mr. Jackson in 1860, twenty-five years after the event.

It is unnecessary to say which of the parties is responsible for the delay. Undoubtedly, when the conduct of Anundnath comes to be considered, there will appear considerable delay on his part; but without casting the responsibility of that delay on the one side or the other, the fact of the delay is certainly important when we come to consider the evidence which was given, and that which, if the case had been heard at an earlier period, might have been expected to be given. Of the witnesses who have been called, without adverting to the others, three appear to be in a respectable position in life, and one of them is a witness whose interest is apparently opposed to the deeds supposed to have been forged, and which he must, if he is saying that which is untrue, be assumed to have assisted in fabricating. This witness, Hurree Pershad Roy, was an old man when he was examined, and the father of Sbebessuree, the widow of the Rajah. He says he was present when these deeds were executed. He gives a long account of the way in which it was done, and he gives the names of the writers. He says "Bhoyrub Sircar wrote the *onoomottee* "*puttro*, and Kisto Dhone Mozoomdar wrote "the *kottritto puttro*." Both these persons are dead. He also gives us the name of the officer of the Rajah who drew the will, Hurrish Chunder Khan, who appears to have been the chief dewan in the Rajah's house, and therefore a person very likely to have

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been consulted. Hurrish Chunder Khan prepared the deeds and read them over. If this witness is to be believed, Hurrish Chunder Khan read them over to the Rajah; then they were executed, and one delivered to Hurree Persbad himself to be given to his daughter in the way which has been already described.

In addition to that witness there is Needan Chunder Roy, a cousin of the Rajah living with him, and therefore a person who would naturally be present upon an occasion of this kind, and Monomohun, the Court physician, one of the numerous doctors who were in attendance upon the Rajah. Those witnesses were not subscribing witnesses; and undoubtedly that which is least satisfactory in this part of the case is that these respectable persons were not subscribing witnesses, and that only one subscribing witness was called upon the enquiry in 1860. But it appears that, upon a trial which took place before the Principal Sudder Ameen in the year 1852, two attesting witnesses were called. The deposition of one of them has been read, and the other (to adopt the phrase used at the Bar) has in some way dropped out of the record. It appears to have been the deposition of one of the physicians. Other witnesses had died before the inquiry in 1860.

Therefore their Lordships find a considerable number of witnesses called to prove the execution of these documents. They do prove them in the most direct way, and if any credit is to be given to their evidence, these deeds were executed by the Rajah, and one of them was delivered by his own hand to Hurree Pershad.

On the other side there is no direct evidence, but it is sought to impeach this testimony in favor of the deeds by admissions which were supposed to have been made by the Rajah himself and by his mother the Ranee Kistomonee about the time when it is supposed that these transactions took place. The Rajah himself expressed his desire to be carried to the Ganges to die. His mother lived near the Ganges. In the course of his journey, which apparently was a journey of about 60 miles, he stopped at Rampoora, and there he was seen by a witness, Haradhun Sanyal a mooktear, who from his own statement had been employed by several members of this family in transacting their legal business. His evidence appears in the second record, and he is the only witness called by the appellants whose evidence goes very seriously to impeach the testimony as to the execution of the deeds. It is no doubt very important, and is entitled to be very carefully considered, because, undoubtedly, if what he says is taken literally and is true, it is difficult to suppose that the Rajah had executed these two deeds before he had started on his journey. He says he saw the Rajah at Rampoora, and had a conversation with him: and he says: "I told the Rajah that "you are unwell, you give a permission "for holding of the house; upon which he "told (me), 'I have an intention of giving "permission. It is not written. I cannot "do so until I see my mother. I will go to "the banks of the Ganges. Get a boat for "me.' Upon which I told him, 'You "present a petition intimating the said per-"mission.' He said, 'Let me go to my "mother and I will write it. There is no "need of giving any information. Get me a "boat and cross me over.'"

Undoubtedly, if that evidence is entitled to credit and to be entirely relied on, it is inconsistent with the execution of the deeds having then taken place. But there are various circumstances which tend to impeach this evidence. Haradhun Sanyal, it appears from his own statement, had quarrelled with Kistomonee; she had in some way withdrawn her confidence from him, and he admits that he then took part with Rajah Anundnath. But what appears still more to throw doubt upon his evidence is this: he says that, although he had had this all-important conversation with the Rajah, upon the question which must have agitated the family for many years, although he was acting for Anundnath and in constant communication with him, he never told him of this conversation until after the commencement of this suit. That does appear to be utterly incredible, and to throw not only doubt but discredit upon his testimony.

It is also to be observed that, even if that testimony be true, and although, if the Rajah is assumed himself to have been sincere, his expressions indicate that the deeds had not been executed; yet it is possible that, as he had not employed this man in preparing them, he might not for that reason or for others have chosen to tell him of what he had done; again, supposing the evidence to be entitled to any credit, two circumstances appear from it extremely favorable to the case of the respondent; one is that the Rajah had the intention to give the power of adoption to his widow, and the other is that he was going to see his mother; and from his expressions, as given by this witness, it is plain that he was going not only to see but to consult her, and act according to her advice and wishes. Those

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two circumstances are strongly in favor of the presumptions of intention on which the respondent relies.

A great deal of evidence appears to have been given in the suit before Mr. Jackson, to show that Kistomonee and Shebessuree had fabricated these deeds, in order to compromise a quarrel between themselves. The learned counsel, Mr. Field, who very fully and strenuously argued this case, has not ventured to rely upon that evidence. His main support was the judgment of Mr. Jackson, and as Mr. Jackson himself did not believe that story, Mr. Field probably exercised a wise discretion in not relying upon it. But it is perfectly plain that the appellants had set up a case of fabrication of documents, which entirely broke down and failed to obtain credit. The endeavor to do so, and in a very systematic way, throws great discredit upon the whole of their case.

Anundnath himself was examined, and it appears to their Lordships, as it did to the High Court, that his evidence is very strongly in favor of the validity of these deeds, because it appears that he recognized, by the giving of presents, both the adopted children. He recognized the two sons who were in succession adopted ; and the only way in which he gets rid of that damaging fact is by saying that he was not aware that they were adopted under a valid power given to the widow. He says he thought they were merely children about the house brought up by Shebussuree : but their Lordships think that such an explanation is entirely incredible. He was living in the palace at the time the Rajah died. These deeds had been publicly notified to the Collector, and had been filed. He must have known of the deeds and of the attesting witnesses to them ; and to suppose that this gentleman believed that these children had not been adopted is really impossible.

A letter was put in evidence when he was examined, which, if it be genuine, is decisive to show that he treated the first child as the legally adopted son of Gobindchunder. The letter is this :—"Having received the letter "conferring blessings, I cannot express the "mental agony I feel on hearing the news of "the death of my brother's son." Nothing can be more precise than that expression. In the mind of a Hindoo, when it was used, it must have been perfectly clear that the child who was just dead could only be his "brother's son" by a legal adoption. There could have been no adoption in this case by the widow, unless by virtue of deeds executed by the Rajah before his death.

A question was made whether that letter was really Anundnath's writing or not. The evidence seems to be in favor of its authenticity. Mr. Jackson says he only faintly denies it. He was examined before that Judge, who had an opportunity of seeing him. The other circumstances referred to in the examination go a long way to show that it was a genuine letter. A man would not "faintly deny" such a letter if he could have denied it honestly ; and the faintness probably arose from the feeling that he could not with a safe conscience say that it was not his own letter.

Upon the whole of the evidence, therefore, which their Lordships have considered, but to which it is not necessary to advert in all its parts, their Lordships have come to the conclusion already intimated. But this case has arrived at its present stage, and the litigation has been prolonged, not so much by the result which ought to be drawn from the evidence given on both sides directly applicable to the facts, as from this, that the learned Judge, Mr. Jackson, drew from circumstances not given in evidence in the case, and from general knowledge, inferences, and presumptions hostile to the direct evidence. It appears to their Lordships that some of those inferences are of a strained character, and some of the presumptions unsound ; but the Judges of the High Court, who went very carefully through the evidence, have disposed of those inferences and presumptions to a considerable extent, and have made presumptions from the evidence with which their Lordships are very much disposed to agree.

The main presumption which has been relied on in favor of the appellants against the deeds arises from the state of feeling which existed between his mother Kistomonee and the Rajah. Undoubtedly that state of feeling is entitled to be considered. It has already been stated that it existed. But there is surely nothing contrary to the ordinary workings of human nature in the supposition that on the eve of his death he was desirous of reconciliation, and that an entire revulsion of feeling had come over him.

It is said, Why should he entrust the management of this important *raj* to his mother who had managed it so much to his own dissatisfaction ? It appears that the dissatisfaction was that she preferred to manage it herself, and would not let him have the control of it ; and he may have thought that, when he left a young wife and an infant child,

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the mother who was so perfectly capable of managing, was the best manager whom he could select. But that he did desire reconciliation, and was anxious to consult her is perfectly clear; and that he went out of his way when the hand of death was upon him for the very purpose of seeing and consulting his mother is equally clear.

The next inference suggested as hostile to the deeds arose from their non-publication by the Rajah before his death, or by Kistomonee immediately afterwards. Unquestionably it is most satisfactory when documents of this kind are registered, and it would be very much for the interest of proprietors in India if, when they execute deeds giving their widows after their death power to adopt, they would take the precaution to register the deeds. It might save great litigation, which very frequently wastes the property they desire to preserve. However, it was not done in this case; it was not compulsory on the Rajah to do it; and the time when these deeds were executed, the circumstances under which they were executed, the fact that the transaction was not fully completed until he had taken the deed of management to his mother, and she had accepted the trust, may all account for his not having published them before his death.

Then it is said, Why did not Kistomonee, who, when passing through Rampoora, saw some of the old retainers of the family, tell them, and proclaim that she had the management? It would have been better perhaps that she should have done so; but still the delay in publishing the deeds was not very great. About six weeks after the death of the Rajah, she presented a petition to the Collector, in which the two deeds are referred to, and the evidence appears to be that they were then produced to the Collector. At all events, whether produced or not, they were specifically referred to, and in the following June, six months after, they were regularly filed.

Again it is said, and an inference is attempted to be drawn hostile to the respondent from the circumstance, that the adoption of a son did not take place until six or seven years after the Rajah's death. That appears to be explained and accounted for by the circumstance that the Rajah had left a daughter. If she had lived and had married and given birth to a son, that son would have become the representative of the family; he would have been able to have performed the religious rites of the family and of the Rajah, although not to the same full degree that an adopted son might have done; still those circumstances would reasonably account for the adoption not having taken place. Mr. Doyne forcibly pointed out the obligation upon the widow to act upon the power given to her by her husband as speedily as possible, and its great importance as a religious duty. The widow may have neglected her duty, but the presumption against the deeds does not seem very strong from that circumstance; whereas the presumption that the Rajah would leave the power to adopt is very great. The stronger the duty to adopt a son, the stronger is the presumption that the Rajah would not like to die without leaving power to his widow to make the adoption. That he should have postponed it to the eve of his death is a circumstance that does not weigh against the probability of the deeds, for he was only of the age of 24 or 25, having a wife younger than himself.

These seem to be the presumptions which have been most relied on against the deeds, but the presumptions in favor of them are not only strong but almost irresistible.

The theory of the appellants must be that these deeds are forgeries; and if they are forgeries, Shebessuree and her father Hurree Pershad must have been engaged in them. It was clearly against the interest of the widow that there should be an adoption, for she would have been entitled to the raj and all the property for life, and her daughter, if she had married and had had a son, would have continued the succession. And her father certainly could have had no interest in fabricating a deed which would give Kistomonee the management, because if such a deed had not existed, and his daughter had had her life-estate in the property, he would have been the natural person, as her protector, to have had the management of it. Therefore the presumption against forgery, arising from the interest of these two persons who are supposed to be implicated in the fabrication of the deeds, is very strong.

Then there is the presumption to which allusion has been already made, arising from the duty to have a son by birth or adoption, strengthened by the presumption arising from the usage in this family, in which for 150 years, with only one exception, there has been a series of adopted children. It is very unlikely that the late Rajah should have wished to drop that usage. At all events there is a strong probability that he should have desired to act in accordance not only with the general law, but with the custom of his own family.

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The last presumption to which their Lordships think it necessary to refer, is that arising from the conduct of Anundnath himself. It has been already incidentally adverted to, but is so strong that their Lordships desire again to direct attention to it at the close of the observations. Anundnath was a man apparently of wealth and position. He recognized the two children who were adopted in succession, and it is not until the year 1849 that he first comes forward, not directly to put forward his claim, but to intervene in another suit which had been brought by Kistomonee, on behalf of the adopted son, to recover some property from third persons. It would appear from the proceedings which took place before the Principal Sudder Ameen, in which it is now said that the validity of these deeds was in question, that, if that was so, Anundnath brought forward then no witnesses to impeach them, and certainly did not put forward Haradhun Sanyal, the mooktear, now his strongest witness. It seems that that proceeding, which was a suit to recover property belonging to the raj, took this course; evidence having been given of these deeds by one or two witnesses, and no evidence having been called on the other side, it was supposed that enough had been done to establish the title. That may have been a misapprehension. It may have been that the Sudder Dewanny Adawlut were right in their first judgment in thinking that the matter was fully in issue, and that if that were so, sufficient evidence had not been given to establish the validity of the deeds. It certainly looks as if the case had proceeded very much in the way in which an ejectment proceeds in this country, where an heir brings an ejectment to recover possession from a stranger of property belonging to his estate, he introduces a *primâ facie* case, and unless there is evidence given on the other side, it is considered to be sufficient.

However that may be, the Sudder Dewanny Adawlut upon review considered that there had been a misapprehension; that there was an issue which had not been properly tried; and so they sent the case down again.

It is important to observe that, upon that first enquiry, the trial was either treated as one where *primâ facie* evidence was sufficient, or if it was treated as one where both parties were to bring forward all their evidence, Anundnath did not bring forward any; and certainly did not bring forward the mooktear on whom he now so strongly relies.

Their Lordships having come to the conclusion that the judgment of the High Court on the question of succession is right; that decision will dispose of the two appeals of Rajah Chundernath Roy. They will therefore advise Her Majesty to dismiss those appeals with costs. They will also advise Her Majesty wholly to affirm the decree of the High Court made on appeal in the suit originally brought by Anundnath Roy, No. 28 of 1861, and also to affirm the decree of the High Court made on appeal in the suit originally instituted by Kistomonee Dabee against the Collector of Moorshedabad and others in 1849, in which Anundnath Roy intervened, so far as the question of succession is concerned.

The 8th June 1872.

Present:

The Rt. Hon'ble Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Nattore Raj—Deeds of Gift—Construction—Presumption — Hindoo Usage — Endowment of Idols.

*On Appeal from the High Court at Calcutta.**

The Collector of Moorshedabad,

versus

Ranee Shebessuree.

From the insertion of an express power of alienation in a subsequent *hibbanamah*, no intention to restrain alienation can be inferred from the omission of such a power in a former *hibbanamah*, unless the two deeds are parts of one design or form a connected series so as to be construed as a whole.

The PRIVY COUNCIL did not consider that the presumption arising from general Hindoo usage, that endowments of idols are usually made by Hindoos with the object of preserving the *Sheba* or worship in families rather than of conferring a benefit on individuals, was sufficient of itself, in the absence of any language denoting the intention of the donor that the gift should belong to the family, to impress that construction upon it.

Exposition of the manner in which the Privy Council construed two deeds; one as denoting an intention to perpetuate the worship in the family, and the other as intended to make an absolute gift to the donee, with full dominion over the property and worship.

THE remaining question in the appeal in the above suit relates to the effect to be given to four out of five *hibbanamahs* executed by the Maharanee Bhobanee in favor of Joy-

* From the judgment of Steer and Seton-Karr, JJ., dated 30th April 1863, Special No. (Full Bench Rulings), W. R., 112.

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money, one of the wives of her grandson Bissonath Roy. The appellants contend that, although Gobindnath has established his title as heir by adoption to Bissonath and to the Raj of Nattore, the properties comprised in these deeds did not descend upon him, because, as they allege, Joymoney acquired under them an alienable estate. It is admitted that, in point of fact, Joymoney in her lifetime gave the properties comprised in four of the above deeds to Doorga Chunder, who has since died, and is represented by Koylas Chunder Roy, the minor appellant, and the property comprised in one deed to his wife Kaseesoondree, the other appellant. The question is whether Joymoney had power to make these alienations.

A decision hostile to the validity of an adoption of Doorga Chunder by Joymoney, under an alleged authority from her deceased husband Bissonath Roy, was given in the course of the protracted litigation referred to in the record: so that he must be regarded as a stranger to the family of her husband Bissonath.

Maharanee Bhobanee, in consequence of minorities, managed for many years the Raj of Nattore, but the property comprised in the deeds in question was acquired by her in her own right. Some part of it, once forming part of the estates of the Raj, was purchased by her at auction sales, when it was sold for the debts of Bissonath Roy. The respondents indeed do not dispute that the property was held by the Maharanee Bhobanee as her *stridhun*, nor her power of dealing with it as she chose; but their contention is, that she dedicated it to religious worship in such a manner that it became inalienable by Joymoney, and descendible only to her heirs.

There is no sufficient evidence that the idols mentioned in the deeds were ancestral or family idols, or that the property, before the Maharanee acquired it, was devoted to religious purposes. The dedication to such uses, whatever may be the nature and extent of it, appears to have been made for the first time by herself, and she must be considered as the founder of the endowments.

With regard to one of the deeds (No. 4), dated 27th August A. D. 1802, no question arises. It contains no reference to worship, and has an express power of alienation. The Courts in India have concurred, and as their Lordships think rightly, in treating it as an absolute gift of the property to Joymoney with all the rights of unrestricted ownership.

Their Lordships consider also that little difficulty arises with respect to another of the deeds (No. 2), dated 19th July 1802, relating to the "auction purchased zemindary Hoodda Burranagore." That *hibbanamah* contains an absolute gift of the estate to Joymoney; and the words "you will do virtuous actions, &c., from the profits," do not appear to their Lordships to contain any specific direction or trust capable of being enforced. They appear to be simply recommendatory of a moral duty, and do not qualify the absolute character of the gift. The clause "you shall enjoy it with your "sons and grandsons; if at any time any "heir of mine should make any claim, that "will be null and void," ought not in their Lordships' view, to be construed as a limitation to the sons, and consequently as a restraint on alienation. It may have added to express the absolute and irrevocable nature of the gift.

The High Court considered that the absence of an express power of alienation led to the presumption that the gift was limited; and, apparently disregarding their own rule, that each deed should be interpreted by itself, they infer from the insertion of such a power in the subsequent deed (No. 4), and the omission of it in this, an intention to restrain alienation. Their Lordships think that the subsequent deed cannot properly be referred to for this purpose. If it had appeared expressly, or by reasonable implication from the contents of the deeds, that they all formed part of one entire design, then the construction of any one could properly be aided by the dispositions made and the language found in the others; but it cannot be inferred from these deeds that they are parts of one design, or that they form a connected series to be construed as a whole. Their Lordships consider that this *hibbanamah* No. 2, construed by itself, contains an absolute and unrestricted gift of the property comprised in it to Joymoney, and consequently that the judgments given by the Courts in India in favor of the respondents, on the ground that she had no power to alienate, cannot be sustained.

The three other deeds, No. 1, No. 3, and No. 5, are different in their character from the two hitherto discussed. They contain provisions for the endowment and support of idols and their worship, which are in the nature of trusts impressed on the property to be performed by the donee. In the case of a bare trust leaving no beneficial enjoyment to the donee, there would be strong ground for the implication that the property was not

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alienable, and was to descend to the donee's heirs as trustees in succession. But it was contended that in these grants the trust is coupled with an interest, giving the donee a right to the enjoyment of the surplus usufruct of the property, after making due provision for the sustentation of the idols and their worship, and therefore that there is a beneficial ownership capable of alienation.

The case of Sonatun Byaack *v.* Sreemutty Juggutsoondree Dossee, 8 Moore, I. A., p. 66 was cited to show that such a beneficial interest may exist as a secular right in property dedicated primarily to the worship of idols. In that case, it is true, a disposition of the surplus was expressly made by the will of the donor; but their Lordships do not doubt that cases may occur where, from the nature and terms of the gift, the intention of the donor to confer a beneficial and alienable interest in property so dedicated may be inferred.

The question arising for decision on these several deeds is, whether it can be collected from their language that the donor Maharanee Bhobanee intended to make such a gift, or whether she meant that the worship and the endowments should remain in the family of Joymoney.

It would unquestionably be more consonant with the genius and spirit of Hindoo law and usages that endowments of this kind should be made to a family, by whose members in succession the worship might be performed, than to an individual who might sell or give them to a stranger.

The following cases were referred to on this subject during the argument:—1. S. D. A. Reports (1807), 180; 4 *Idem* (1829), 343; 5 *Idem* 1832), 210; 5 W. R., 202; 7 *Idem*, 266.

There is considerable difficulty in arriving at the intention of the donor in the present case, in consequence of the peculiar position of this family, and the vague and varying language of the several grants. The Raj of Nattore was from its nature an impartible estate, descending on a single heir; and the Maharanee certainly does not seem to have intended to annex this property and worship to the *Raj*. She clearly also did not desire that they should go to her grandsons, Bissonath Roy and Sheebnath Roy. It may be inferred from the *hibbanamahs* that she intended one of two things: either to make an absolute gift to Joymoney, giving her full dominion over the property and worship; or to vest them in her, and her heirs, as family property and *sheba* in such manner that the succession should be to her heirs, passing over her husband Bissonath and his brother. It is important to observe that Joymoney at the time of these deeds was the mother of two sons.

Bearing in mind, whilst construing these *hibbanamahs*, the presumption already adverted to, that endowments of this nature are usually made by Hindoos with the object of preserving the *sheba* in families, rather than of conferring a benefit on individuals, their Lordships have been led to the conclusion, with regard to the *hibbanamah* No. 1, that upon the right construction of that deed, Joymoney had no power to alienate the property contained in it. In that *hibbanamah*, dated 8th November 1798, the Maharanee Bhobanee says:—"I have certain property for "the service of the gods worshipped by me "at Mamoodpore, &c. * * My eldest "grandson is Rajah Bissonath Roy; his un-"derstanding is unsettled, he is incapable "of managing the property, and the zemin-"dary in his hands is gradually diminishing. "My second grandson, Koer Sheebnath Roy, "is a minor, and disobedient to my com-"mands; by neither of these two can the "service of the gods be performed."

She thus declares her motive desiring to exclude her immediate heirs, but that motive does not afford a reason for a desire to allow the *sheba* to go entirely out of her family.

The deed goes on:—"Knowing you are the "wife of my grandson, and the mother of a "son; moreover you are always employed "in taking care of me, you will be able to "take care in a very good way of the service "of the gods, and my property will remain "intact."

The above passages which refer to Joymoney being the mother of a son, and to her ability to take care of the service of the gods, and the conclusion the Maharanee draws from these facts, seems strongly to indicate an intention "that the property should remain intact" in the family.

The deed goes on:—"For these reasons the "worship of the aforesaid gods, and their *de-*"*butter* pergunnahs (naming them,) the orna-"ments of the gods, and all the property ap-"propriated to the worship of the gods, I make "over to you, by a gift. Having caused your "name to be enrolled in the *shebaettee*, you "will take possession of the *debutter*, &c., and "continue to perform the prescribed wor-"ship of the gods from generation to gener-"ation. You have the power to appoint a "*shebaet* for the worship of the gods."

The power to appoint a *shebaet* is perhaps

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consistent with either construction. The words "from generation to generation" may, in some cases, mean no more than to express the absolute character of the gift; but, considering the subject-matter, it seems more probable that in this deed they were used in their natural sense to denote an intention to perpetuate the worship in the family.

The words "I and my heirs have no concern with it," were strongly relied on by the learned counsel for the appellant, and they undoubtedly favor his construction; but their Lordships consider, although not without some doubt, that those words may be satisfied by referring them to the intention of the Maharanee to exclude her grandsons, who were her immediate heirs, and that they are not sufficient to rebut the construction derivable from the other parts of the document.

The judgment on this deed will therefore be in accordance with the decision of both the Courts in India.

Their Lordships have come to an opposite conclusion with respect to the *hibbanamah* (No. 3), dated the 12th August 1802. It contains no words of succession, nor any reference to family or descendants. In it the Maharanee says she has in her Burranagore house the worship of the idol Sree Sree Ishwur, that her daughter was *shebaet*. "I worship now." She goes on:—"For the "purpose of worship there is *turruff*, &c., "and the ornaments, &c." I give it to you as "a gift; you will take possession in accordance with the *hibba*; you will always "perform the worship of the gods; you will "cause your name to be written as *shebaet* "in the Government records, and will always "pay the revenue. Therefore I give this "deed of gift."

No words occur to limit the completeness of the gift to Joymoney, subject to her making due provision for the worship of the idol. It may be that the Maharanee Bhobanee intended that Joymoney should enjoy this property and worship as fully and in the same manner as she herself had held them; and their Lordships do not consider the presumption already referred to arising from general Hindoo usages is sufficient of itself, in the absence of any language denoting the intention of the donor that the gift should belong to the family, to impress that construction upon it. Their Lordships, therefore, with regard to this deed (No. 3), disagree with the judgment of the High Court, which reversed the decision of the first Judge (Mr. L. Jackson).

The construction of the last deed (No. 5), dated 5th September 1802, depends very much on the same considerations and reasons as those which determine, in their Lordships' view, that of the *hibbanamah* No. 1. These deeds are substantially to the same effect. The Maharanee in the last says:—"The *sheba* "of Sree Sree Doorga is mine; of that "*sheba* I had a desire to make a gift to a "daughter-in-law, Ranee Sunkary." She then refers to having purchased property sold for arrears due from Bissonath, and paid the value in the name of the goddess, and to the death of Sunkary, and then goes on:—"For this reason I make a gift of the same "*sheba* to you (Joymoney), who are my "grand-daughter-in-law, of the entire talook, "*turruff*, &c., and the ornaments of the god-"dess, and all the *sheba*. You will have "your name registered as *shebaet*, and take "possession of the mehuls through your "men, and continue to perform the worship "of the gods from son to grandson, and so "on. For this reason I give this deed of "gift."

Their Lordships do not think it necessary to repeat the reasons already given in commenting upon the first deed, which led them to the conclusion that the Maharanee intended that the endowments and worship should remain in the family of Joymoney. They think the declaration of the donor that the worship should continue "from son to grandson, and so on," and that for that reason she made the gift, construed with the aid of the presumption arising from the nature of it, sufficiently indicates this intention. Their Lordship must therefore hold, in accordance with the judgments of both the Courts below, that the alienation made by Joymoney of the property comprised in this last deed cannot be supported.

It was not disputed, in the end, that the respondent Gobindnath Roy, having established his title as heir by adoption to Bissonath Roy, became also heir to Joymoney, and entitled to recover such of the properties comprised in the *hibbanamah* as should be held to be inalienable by her.

In the result their Lordships will humbly advise Her Majesty in the appeal of the Collector of Moorshedabad in the suit originally brought by Kistomonee Dabee in 1849, as follows, that is to say, that, with respect to the properties comprised in the *hibbanamahs* Nos. 1 and 5, the appeal be dismissed, and the judgments of the Courts below affirmed; that with respect to the property in the *hibbanamah* No. 2, the appeal

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be allowed, and the judgments of both the Courts below reversed, and the suit, so far as it relates to this property, dismissed ; and that with respect to the property in the *hibbanamah* No. 3, the appeal be allowed, and the judgment of the High Court reversed, and that of the judge of Rajshahye affirmed.

The parties to the last-mentioned appeal will bear their own costs of that appeal; and their costs in the Courts in India should be apportioned according to the course of those Courts in cases where the plaintiff is only partially successful.

The 3rd June 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Evidence—Purdah Nusheen Women—Examination by Commission.

Case No. 880 of 1871.

Special appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 21st April 1871, *affirming a decision of the Moonsiff of Parcole, dated the 28th December* 1870.

Nusrut Banoo and others (Defendants), *Appellants,*

versus

Mahomed Sayem (Plaintiff), *Respondent.*

Moonshee Mahomed Yusoof for Appellants.

Mr. R. E. Twidale and *Moulvie Syed Murhumut Hossein* for Respondent.

The examination by commission of a *purda nusheen* woman is not necessary where she can be examined in Court in a palkee or otherwise on a proper identification.

Bayley, J.— Two pleas have been taken in this special appeal : –

First.—That the Lower Courts were wrong in not exaimining Nusrut Banoo by commission. Now, we find it stated in the judgment of the first Court, that the Court considered it not necessary to examine her, and that her non-appearance would not interfere with the proper adjudication of the case. But it is obvious that she ought to have been examined in Court. A *purda nusheen* lady is frequently examined in Court in a *palkee* or otherwise on a proper identification, and there in the presence of the parties and the pleaders and with all the advantages attending the examination of the witness in open Court, she, at whose command was the best knowledge of the facts, could have been examined in a full and satisfactory manner. There should have been no examination by commission in such a case as this, and it was a discretion judicially exercised to refuse a commission.

The plea now in special appeal is that Nusrut Banoo should have been examined, but a petition was put in by her objecting to being examined at all. Further, it is to be remarked that it was not Nusrut Badoo herself who offered her own evidence to the Moonsiff, but it was the Moonsiff who asked for it. The complaint, therefore, coming from her is entirely misplaced.

The next plea urged is as regards the age of Nusrut Banoo. According to the evidence of one of the plaintiff's witnesses, Baser, and adding to it a part of the evidence of Golam Hossein, one of the witnesses for the defendant, it is pleaded that Nusrut Banoo was 15 years old. It is to be observed on this point that a distinct and clear finding of fact has been arrived at both by the first Court and the Lower Appellate Court upon a full consideration of the evidence, that the witnesses for the defendant are not trustworthy as regards her age. The pleaders here take one bit of the evidence of one witness and add it to the bit of evidence of another witness, a process which cannot be accepted.

On these grounds we dismiss this special appeal with costs.

Mitter, J.—I concur in dismissing this appeal with costs.

The 12th June 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Sale of Minor's Property—Suit for Damages (by Purchasers against Vendors)—Costs.

On Appeal from the Sudder Court at Agra.

Bhoopnarain Chowbey and another,

versus

Rughoonath Gobind Roy and another.

It is not for the public benefit that, where two parties knowingly deal with the sale and purchase of property of infants who have not by law the power of sale, one of the parties (the purchasers) who obtain possession of the property in a manner calculated to injure the infants should be able to sue the other party (the vendors) for damages. The Privy Council even refused to give costs to either party, considering them both *in pari delicto.*

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THE circumstances which give rise to this case are as follows: In 1845 some land was sold which belonged at that time to a joint Hindoo family consisting of five brothers, to the plaintiffs in the suit, who are the appellants. It appears now that at the time of this sale three of those brothers were minors, and therefore incapacitated from being parties to it. The deed of sale is not before their Lordships. It would appear, according to the statement of the defendants in this suit, that it purported to be executed by all the brothers, and there is reason to suppose that it purported to be executed by each on his own behalf, inasmuch as there is a finding in a suit, which will be subsequently referred to, of the three brothers against the present plaintiffs, that "the deed of sale in dispute "has not been executed through a guardian "on the part of the minors but by all the "sellers themselves; its execution, in good "faith or otherwise, is not a point for con-"sideration." At all events it purported to be executed by all the brothers, either each executing on his own behalf or the two executing on behalf of the other three.

It appears that this transaction was regarded by the plaintiffs as well as by the two elder brothers as open to question, for it was thought necessary at the same time to take an ikrarnamah, executed by the two brothers in favor of the plaintiffs, which states,—"We, "the two elder brothers, are owners of "the property which is sold;" and further: "We have unconditionally sold our own "respective rights and interests in this estate "and those of Balka Gobindroy, Balkurum "Gobindroy, and Byjoo Gobindroy, to Ram-"dial Chowbey, son of Moteeram Chowbey, "for Rs. 5,500, and have executed the deed "of sale and receipt for the sale price on the "part of all the five brothers, and have de-"livered them to the purchaser." The reason of the non-execution by the younger brothers is thus explained: "Balka Gobind-"roy and others could not come to this city "for the execution of this deed of sale as "they were not at leisure." This is obviously a false excuse for the non-execution by the brothers, whose non-execution was owing to their being incompetent to execute the deed, and probably they were altogether unaware of this sale.

As soon as the younger brothers came of age they instituted a suit against the present plaintiffs to recover their share of this property, and they succeeded in that suit. It may be as well to observe what were the issues which were framed and the judgments which were then given as far as they are material to the present case. That suit was decided on the 6th of December 1861. One of the issues is, "whether at the time of the exe-"cution of the deed of sale the plaintiffs "were minors, and Rughonath Gobindroy "and Balka Gobindroy were the only two of "the sellers who had attained majority;" and then it goes on: "and the deed of sale in "dispute was executed by collusion of the "adult sellers with the insertion of the plain-"tiffs' names, or whether at the time of exe-"cution of the deed of sale, all the plaintiffs "had attained their majority and were living "together, and the deed of sale in dispute "was executed without collusion and in good "faith." Collusion between the defendants and the elder brothers appears to have been one of the issues, perhaps not very formally stated. Upon that issue there was this finding: "Whereas the deed of sale in dispute "has not been executed through a guardian "on the part of the minors but by all the "sellers themselves, its execution in good "faith or otherwise is not a point for con-"sideration. All that requires to be deter-"mined in this case is whether the plaintiffs, "at the time of the execution of the deed of "sale, had attained their full age or not, and "as their minority has been proved, the deed "as to the sale of their share is to be con-"sidered null and void, and there is no "doubt that the execution of the sale-deed "was effected collusively by the purchasers "and the adult sellers." Upon an application for a review of this judgment, the Judge, Mr. Swindon, also finds this: "There is no doubt that the sellers, who "were adults, did, in collusion with the pur-"chasers, sell the plaintiffs' share with their "own." There appear, therefore, to have been findings in that suit, both in the Court of first instance, and in the Court of Appeal, that the sale was fraudulent and collusive on the part both of the vendors and the purchasers. In the present suit the finding of the Court below is very much to the same effect. The Principal Sudder Ameen finds that, "although the defendants' total denial "of the agreement relied on by the plain-"tiffs, which is registered and has been "proved by witnesses, is utterly false and "dishonest, all proceedings of plaintiffs also "from first to last are not free from the "taint of bad faith. For in the first place "Ramdial, the plaintiffs' father, made defend-"ants execute in his favor a sale-deed in "their own names jointly with those of "Balka Gobindroy and others, three minor

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"brothers, without making any mention of "the fact of their minority, with the object "of appropriating the whole village, and took "possession of the whole, in which un-"lawful act the defendants took part with "him." Then he goes on to say: "He "made defendants also execute an ikrar-"namah as a pre-contrivance, and in order "to conceal the fact of minority of the de-"fendants' brothers he caused the following "clause to be entered therein, *viz.*, 'that for "want of leisure Bulka Gobindroy, &c., can-"not come to this city to execute and com-"plete the sale deed,' whereas the sale was "not completed by registration, while the "agreement was registered." He also adverts to this, that instead of registering the deed of sale in the ordinary manner, a fictitious suit was instituted against all five brothers, and that what may be called a fictitious confession of that suit appears to have been given in the names of all five.

Such is the finding of the Court below in this case, a finding which is in substance confirmed by the Court above. The main difficulty which has pressed upon their Lordships has been this: whether in this suit the question of collusion between the vendors and purchasers with a view to defraud the infants was raised as distinctly as it ought to have been by way of plea or statement by the defendants, or whether at all events it was raised with sufficient distinctness in the issues in the cause. Unquestionably the defence on which the defendants have succeeded, and on which the judgment of both Courts proceeded, is not raised as clearly as would be required in pleadings in this country by the statement of the defendants, nor by the issues which were framed in the cause. The only issue at all referring to this question appears to be the second, which is in these terms: "In the "event of the plea in bar being overruled, "are the plaintiffs entitled to recover from "the defendants Rs. 3,300 principal, and "Rs. 3,300 interest, being the portion of the "purchase-money due on account of three-"fifths share of Bijjo Gobindroy, and other "brothers of defendants, under the ikrarna-"mah dated 3rd June 1845; or, as pleaded by "defendants, is the ikrarnamah alleged by "plaintiffs false, and did the plaintiffs cause a "sale-deed to be executed by defendants and "their brothers without any mention of the "minority of the latter?" It is only under those words that, according to their Lordships' view, this question, if it could be raised at all, was raised in the suit below. At the same time it is to be borne in mind that the learned Judge of the Court below does appear to have considered that this question was in issue, and it is further to be observed that in the grounds of appeal the plaintiffs do not contend that his finding was beyond his powers on the ground that it was not. If they had so contended, it is possible that the High Court might have framed an issue distinctly raising it.

Under those circumstances, although their Lordships undoubtedly cannot regard as satisfactory the form of the issue in this case, they are not disposed to take upon themselves to reverse the finding of the two Courts upon a question of fact, which both appear to have supposed to be before them, and which neither party seems to have denied to be before them.

With respect to the evidence in support of this finding, it is not for their Lordships to deal with the case as a Court of first instance. It is enough for them to say that they are unable to declare that the Courts below were not justified by the evidence in coming to the conclusion at which they arrived. It appears certain that the present respondents, at the time of the transaction in question, in 1845, were minors. It is probable that the present appellants knew this. It is certain that they knew that the transaction was one liable to be impeached, otherwise they would not have thought it necessary to take an indemnity. That indemnity shows that they themselves had notice that three of the brothers were unable for some reason to execute the deed of sale. If they knew that they were minors, they must have been aware that the reasons alleged for their non-execution of the deed of sale was a false one; and the further proceeding of obtaining a fictitious judgment against five brothers, and getting the three minors to confess that judgment, instead of the ordinary course of registering the deed, is certainly a proceeding of a suspicious character.

Their Lordships therefore are unable to say that there was no evidence to support a finding, which appears to be in fact a finding of four Courts. In the ejectment suit two Courts have found that there was collusion between the vendors and purchasers. In the present suit the Court below and the Court above have found substantially to the same effect, though not precisely in the same language.

Under these circumstances it appears to their Lordships that the decree of the Court below ought to be supported. It is not for the public benefit that a party engaged in a

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transaction such as this must now be taken to be, wherein both vendors and purchasers are aware that they are dealing with the property of infants, who have not by law the power of sale, and that they are obtaining possession of this property in a manner calculated to injure those infants, should be able to sue another party to the transaction for damages.

For these reasons their Lordships will advise Her Majesty that this appeal should be dismissed ;. but considering the circumstances which have been alluded to, the nature of the defence, the absence of a distinct plea raising this question, and above all the fact that both parties must be considered *in pari delicto*, their Lordships are of opinion that neither party should have the costs of this appeal.

The 15th June 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Practice of Privy Council—Questions of Fact—Authority of Agents.

On Appeal from the High Court at Agra.

Baboo Lall,

versus

Luttoo Ram.

Where the sole question raised in both Courts in India was whether or not certain documents purporting to be an allowance of plaintiff's accounts by the defendant's agent were signed by the agent, the PRIVY COUNCIL declined to allow the defendant to raise before them the question as to the authority of the agent to bind him (the defendant).

THIS was a suit by a sub-contractor against a contractor with the Government for work and labor done. The defence was that the defendant had been fully paid, and indeed overpaid. The questions raised were all questions of fact, and those questions of fact have been found in the plaintiff's favor by the Court of first instance, and by the Appellate Court in India.

Under these circumstances the rule of their Lordships not to interfere with a decision of two Courts in India on a question of fact at all events *primâ facie* applies.

It is, however, contended that this case does not fall within the rule, or is taken out of the rule upon the following grounds :—

First, it is said that certain documents, which purport to be an allowance of the plaintiff's accounts by one Mahomed Khan, the overseer of the defendant, were improperly received in evidence. The objection to their reception is that Mahomed Khan was not shown to have had any authority from the defendant to make a statement of accounts binding upon him. It is to be observed, however, that this defence was not taken in either Court. The sole question raised in the Court below was this, whether or not the documents referred to were in point of fact signed by Mahomed Khan, and the defendants put Mahomed Khan in the box to deny his signature. The Judge, however, disbelieved him, and believed the witnesses who affirmed the documents to be genuine, and now it is not contended but that that finding is right. It is further to be observed that, in the reasons given for the appeal which was preferred to the superior Court in India, none is to be found to the effect that Mahomed Khan had not authority from the defendants to bind them, but the same issue is again raised, namely whether or not Mahomed Khan actually signed these documents? If the question of Mahomed Khan's authority had been raised, then it is possible that the plaintiff might have been prepared with evidence for the purpose of supporting that issue, but his attention was not called to that, and it certainly would appear to have been understood by the Courts, and it probably was understood by both sides that if, in fact, Mahomed Khan signed these documents, he had authority to sign them on the part of the defendants, for whom undoubtedly he was acting, and whose overseer he was

Secondly, it is contended that there was a miscarriage in the rejection of a document put in by the defendants. In order to contradict the rate of charges which are allowed by Mahomed Khan in these documents which must now be taken to be genuine, the defendants put in what they declared to be the original agreement, under which these works were executed, whereby a different rate of charges is agreed upon ; and they contended that that being taken as the rate of charges, the plaintiff had been paid in full. Whether that be so in point of fact, supposing the document proved, does not distinctly appear. The plaintiff's case, on the other hand, was that the original agreement had been fraudulently abstracted by Mahomed Khan, and that the document produced and sworn to by him and one or two other witnesses was a

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fabrication. The Judge below has adopted that conclusion. Undoubtedly the defendant called one or two of the witnesses attesting that document to prove its genuineness, and they gave evidence to that effect. But it appears that the document purported to be attested by Mr. Brown, an Englishman; the defendants called two witnesses to prove his signature: one of them gives no clear evidence on the subject, and the other, Captain Whish, gives his opinion that the signature which appears in that document as that of Mr. Brown is not his. It is to be observed that, assuming the accounts signed by Mahomed Khan to be correct, which they must now be assumed to be, and that Mahomed Khan was the agent of the defendants, and therefore not probably disposed to allow the plaintiffs a higher rate of charges than they were entitled to, undoubtedly some suspicion is raised against a document which places the rate of charges on a different footing from those agreed to by Mahomed Khan. On the other hand, an observation was made by the learned counsel for the appellants entitled to a great deal of weight, that it does not appear that the Court below called upon the plaintiff, or that the plaintiff put himself forward or his witnesses to prove that this document was false. Undoubtedly, this issue can scarcely be said to have been tried quite satisfactorily; and if this board were sitting as a Court of first appeal from the decision of the Court below, it is possible that their Lordships might have thought it necessary to remit the case for further investigation. But it is to be observed that this finding of the Court below upon the question of fact that this agreement put in by the defendants was a fabrication is in substance, though not in precise terms, affirmed by the judgment of the Court above. The Court above, dealing generally with the evidence, say that they see no reason to believe the defendant's witnesses more than the plaintiff's, and in fact did not think it necessary to interfere with the judgment of the Court below, which proceeded upon the general ground that the plaintiff's case was substantially correct, and that the defendant's case was a false one. It must be assumed now as clear that the defendant's case, as far as regards the signature of those documents by Mahomed Khan, was entirely a false one.

But then, thirdly, it is said that even, assuming these documents, purporting to be signed by Mahomed Khan, to be genuine, nd putting aside the agreement, there was no evidence whatever on the part of the plaintiff of the rest of his demand. If that were so, the question would become one of law. Their Lordships, however, without saying that the evidence on this subject was of a satisfactory character, are unable to say that there was no evidence upon which the Court below was justified, if it thought fit, in acting with respect to this part of the claim.

Three witnesses are called, who speak in general terms, certainly, not in a manner most satisfactory, to the whole of the work which the plaintiff claims as having been done, and to the prices which he charges for it. And it is to be observed that, as far as their Lordships understand, the actual measurements are not disputed. It is further to be observed that the Judge of the Court below appears to have come to a conclusion, as a question of fact, that the plaintiff's charges were reasonable, and he refers to a comparative account prepared in his office showing the amount of profit the plaintiff would derive, and therefore having some bearing on the reasonableness of the charge. It would appear that the Judge of the Court below did enter into some investigation of this case, and that some account was prepared, which is not before their Lordships. It would also appear that Mahomed Khan himself in his evidence speaks of some work to the value of upwards of Rs. 5,000 done by the plaintiff before December, and it is only after December that his certificates apply.

Under these circumstances, their Lordships are not able to say that there was no evidence upon which the Court below was justified in coming to the conclusion that the plaintiff had made out the whole of his demand; and inasmuch as the High Court have affirmed the judgment of the Court below on what, after all, does appear to their Lordships to resolve itself into a question of fact, their Lordships have come to the conclusion that this appeal must be dismissed.

The 26th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and W. Ainslie, *Judges*.

Enhancement—Act X of 1859—*Lands used for Building Purposes.*

Case No. 1 of 1872.

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Appeal preferred under Section XV of the Letters Patent of 28th December 1865 *from a judgment of the Hon'ble F. A. Glover, differing from that passed by the Hon'ble Dwarkanath Mitter, dated the 22nd January* 1872, *in Special Appeal No.* 728 *of* 1871, *from a decree of the Zillah Court of Jessore, dated the 22nd March* 1871.

Ranee Doorga Soonduree Dossee (Plaintiff), *Appellant,*

versus

Bibee Oomdutoonissa (Defendant), *Respondent.*

Mr. W. A. Montriou and *Baboos Ashootosh Dhur* and *Ohhoy Churn Bose* for Appellant.

Mr. R. E. Twidale for Respondent.

Lands used for building purposes are not liable to enhancement under Act X of 1859.

THE judgments of the learned Judges of the Division Bench before whom the case was originally heard are printed in 17 W. R., 151. The case was argued before the Appellate Bench on the 17th June 1872.

Mr. Montriou (*for appellant*). — The objection in this case is one which has been raised by the Court, and not in the written statements. [*Mr Twidale* referred to the 5th issue which was framed in the first Court, and which was as follows :—" The land being entirely occupied as building ground, will a suit for arrears at enhanced rates lie in the Revenue Court ?"] But it was not raised in this Court. In 15 W. R., 463, Norman, J., laid down that, where a suit was brought for rent of land, it would be a defence to say that a house stood upon the land. The marginal note was as follows :— " A suit by a zemindar against a *putneedar* or *ijaradar* for rent is cognizable in a Collector's Court under s. 23 Act X of 1859, although there may be houses on the land demised. The price for the use of land in its improved state is rent which can be sued for in the Collector's Court, whether the improvement consists in the clearance of jungle, draining, fencing, accessibility by means of roads made upon or leading to it, contrivances for irrigation, or buildings erected upon the land. Where the principal subject of occupation is a building or buildings, when the rent is substantially the price of such occupation, the land on which the buildings stand being a merely subordinate matter, the rent cannot be truly described as 'the rent of land either *kherajee* or *lakheraj*.'" That ruling, so far as the question of jurisdiction is concerned, is now immaterial, since Act VIII of 1869 B. C. gives the jurisdiction exclusively to the Civil Courts. But in that case the building was held to constitute the value of the land. It is not so here. No doubt, the land has a considerable value ; but they are two distinct things. [*Ainslie, J.*— That was a suit for rent upon a *kubooleut.* This is a suit for enhancement.] That is a distinction which may be drawn, but it certainly has not been drawn by Glover, J. Then, although it is a suit for enhancement, it is still a suit for rent. My argument is really included in Mr. Justice Mitter's judgment, and the object of the appeal is only to decide between the views of Glover, J., and Mitter, J.

It has been decided in 8 W. R., 250, by Bayley and Phear, J.J., that Section 6 Act X of 1859 does not apply to *bastoo* land ; and similar decision by L. S. Jackson and Markby, J.J., appears in 11 W. R., 183. In 14 W. R., 252, the Judges differed in opinion, L. S. Jackson, J., holding that Act X did not apply to a suit for arrears of rent where the land is not occupied agriculturally, or in the neighbourhood of lands occupied agriculturally, and Mitter, J., seeing no ground for the distinction between lands used for agricultural and lands used for other purposes. In 17 W. R., 178, L. S. Jackson and Glover, J.J., held that a suit to assess rent at an increased rate upon the defendants and for a decree for rent at such rate in respect of land situated in a town and upon which either a house or shop stands, is not a suit for rent within the meaning of s. 6 Act XI of 1865 and is maintainable in the ordinary Civil Courts and not in the Small Cause Courts. [*Bayley, J.*—But before you go to that case, there is the case in the 16 W. R., 216, where it was held by Bayley and Paul, J.J., that a suit for enhancement of rent on the ground of increased value of the land by reason of the existence of a distillery, the said increase of value not being attributable to any of the causes specified in s. 17 Act X of 1859, will not lie under Act VIII of 1869 B. C.] Then there is the case in 17 W. R., 183, where it was held by E. Jackson and Mitter, JJ., that a suit can be brought under Act VIII of 1869 B. C. for arrears of rent due on account of land used for building purposes. [*Bayley, J.*—That decides nothing.] Then it has been held by Kemp and Glover, J.J., in 17 W. R., 441, that lands used for other purposes than agriculture and

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horticulture are not liable to enhancement under Act X of 1859 s. 17 or Act VIII of 1869 (B. C.) s. 18. The question of jurisdiction is shortly whether or not, when land was originally *ryottee* land, the circumstance of the ryot having built a house or shop upon it takes the case out of the jurisdiction for that peculiar class of cases for which Act X was passed.

Baboo Aushootosh Dhur (on same side).—The question before your Lordships is one of construction of Act X of 1859. In Chapman's Act X Rulings, 47, it appears that, on the 28th June 1862, the Sudder Court held that, where the rent of the land could not be separated from the rent of the house, the suit could not lie in the Revenue Courts. In the Gap No. of the W. R., Act X Rul., 102, it was held by Steer and Levinge, J.J., that a suit to determine the rent of a bit of land with a house on it did not lie in the Civil Court. In 1 W. R., 223, Bayley and Macpherson, J.J., held that, if a house and two parcels of ground were held and enjoyed together, forming as it were one compound or set of premises, the suit as to the whole was cognizable by the Civil Court; but that, if one of the parcels of land lay at a distance or was wholly separate and distinct from the other, the suit as to the former was not cognizable by the Civil Court. Here the question whether or not the land was used for agricultural or horticultural purposes did not arise. Those decisions only go to establish the principle that a suit for the rent of a house and land could not lie in the Revenue Court. Then see 9 W. R., P.C. 6. [*Bayley*, J.—Can you show a single case in which a decree has been given for the enhancement of *bastoo* land on which a house has been built?] I would refer your Lordship to the decision in 12 W. R., 140, where it was held by Loch and Macpherson, J.J., that *bastoo* land, when it is a part of a ryot's *jote* or holding, is as liable to enhancement of rent as any other kind of land, and comes equally under the provisions of Act X of 1859. The case in 8 W. R., 251, which is there referred to, was one in which the question arose whether a right of occupancy could be claimed in respect of *bastoo* land, and not whether rent could be claimed in a Revenue or Civil Court. That decision was followed by the one in 9 W. R., 552, where it was held by Phear and Hobhouse, JJ., that Revenue Courts have no jurisdiction in a suit to recover arrears of rent at an enhanced rate for a tenant to whom land had been leased for the express purpose of building a school and a church; and by the decision in 11 W. R., 183, where L. S. Jackson and Markby, J.J., held that Act X of 1859 did not apply to a suit for the enhancement of rent of land which was situated in the midst of land used for building purposes and on which defendant's house is built. And now I shall refer your Lordships to decisions of a contrary nature. In 2 W. R., Act X Rul, 9, it was held by Norman and Pundit, J.J., that a suit lies under Act X of 1859 for the enhanced rent of land let for the purposes of a factory including the dwelling-house of the proprietor of the factory, it being immaterial for what purposes the lands were demised. Then it was held by Morgan and Pundit, JJ., in the Gap No. W. R., Act X Rul., 46, that the class of cases made cognizable by a Collector under cl. 4 s. 23 Act X of 1859 was described in terms wide enough to extend his jurisdiction in suits for rent to cases not strictly agricultural, provided the subject of the lease is land and the rent issues out of the land and is due on account of and for the use of the land, whatever may be the purpose for which the surface of the land was used.

Ainslie, J.—Could the Collector give a decree for enhancement?

Mr. Montriou referred to 5 W. R., Act X Rul., 33, where it was held that a lease granted for building purposes by a party having the power to grant it, may protect the tenant from enhancement; but, if granted by a person with a limited right in the estate, or a life-tenant, cannot relieve the tenant from a claim to enhancement made by a party succeeding to the life-tenant.

Baboo Aushootosh Dhur concluded by submitting that this suit, being one for arrears of rent at an enhanced rate, will lie under Act X, but that the point was one on which contrary decisions had been passed.

Mr. Twidale (*contra*).—None of the cases which have been cited state that suits for enhancement of the rent of land used for building purposes can be brought under Act X. In 3 Agra H. C. Rep., 49, it was held by a Full Bench that a suit for the delivery of a *kubooleut* in respect of land occupied by a building used as an ordinary dwelling-house, manufactory, or shop, is not cognizable in the Revenue Court under Act X of 1859. Looking at the spirit, and the whole scope and tenor of Act X, it is clear that the intention of the Legislature was to provide a procedure in suits between owners and cultivators of land, but not to cases of contract land in a town constantly changing, sometimes

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occupied as a shop, and sometimes as a manufactory, and where it would be impossible to apply the provisions of Section 17 to suits like these. None of the Clauses of Section 17 could be meant to apply to any case of this kind. In fact, the Deputy Collector himself says :—"It is extremely difficult to apply to bazar lands, occupied merely as building ground, the provisions of Section 17 which are manifestly intended to be applied to the rent of lands used for agricultural purposes." There is a case published in 1 Indian Jurist, 426, in which it was decided by Phear, J., that, where A leased to B a *loha mehal* or iron mine, and B used it as such and erected smelting furnaces, a suit by A against B on the covenant in the lease to recover arrears of rent was properly brought in the Civil and not in the Revenue Court, and that "land," as understood in reference to Act X of 1859, had a limited signification, and referred to such as was made use of for the purposes of vegetable or animal reproduction. I may draw special attention to that learned Judge's remarks on the words "the like." Referring to Mr. Marindin's contention that the rent for land used as a mine came into the class designated as "rent due on account of any rights of pasturage, forest-rights, fisheries, or the like, his Lordship remarked :—"It is observable at once that the specified rights of *pasturage, forest-rights, and fisheries* are partial users of the land only, not amounting to the taking of exclusive possession. So far they resemble the right of mining. But, further, each of these modes of partial enjoyment is an instance of the use of land as an agent of vital reproduction. Mining and smelting and converting ore into material is clearly not the 'like.' In short, the rights mentioned may be said to be portions of the general agrarian cultivation and user, to which 'land, as contemplated by this Act, is considered to be devoted ;' and I think 'the like' must not be taken to extend beyond the same limitation."

In 11 W. R., 547, decided by L. S. Jackson and Markby, J.J., those learned Judges seem to have taken it as an admitted fact that the suit would not lie. Then in 12 W. R., 404, it was held by Markby and Glover, JJ., that Act X was not intended to apply to any land, except land of which the main object was cultivation. The only case cited which goes against my view is that decided by Norman and Loch, J.J., in 15 W. R., 463. [*Couch, C.J.*—Norman, J., does not appear to have considered the particular question that is now before us.] Then I contend that no decision against my view has been quoted on the other side.

Mr. Montriou (in reply.)—It has been held by the Division Bench in this case, as expressed by the Senior Judge himself, that, "if land, originally leased out as an ordinary agricultural tenure, becomes afterwards covered with buildings in consequence of a town or bazar growing up round about it, I apprehend that, under the rulings of this Court, it loses its agricultural character, and cannot form the subject of an enhancement suit under the Rent Law." The same principle is laid down in 12 W. R., 404, by Markby, J., who says :—"In numerous cases decided by this Court relating to various provisions of Act X, this Court has come to the conclusion upon the general frame of the Act that, though not restricted in express terms to any species of land, it was not intended to apply to any land except land of which the main object was cultivation." These, I think, are admirable expositions of the principle which your Lordships must lay down if you decide this case in conformity with the judgment of Glover, J. There are views of a narrower kind enunciated by Norman, J., and Mitter, J. It is clear that the two classes of views most materially differ. Seeing also that the narrow view has been adopted by Sir Walter Morgan, who was the Clerk of the Council when this Act was passed, and looking at Act X as an English lawyer, it seems to me that the principle with which it is now sought to override that Act, is something quite new. It is introducing a new principle into the Act not to be found in it. When the Act says "all suits upon *kubooleuts*," it would be introducing a new principle to say that it should apply only to lands used for agriculture. Then, although for some purpose this land may come under the operation of Act X, you cannot bring a suit for enhancement under Act X. Is there not a little fallacy in that? Is that not mixing up the question of jurisdiction with the question of liability to rent?

The Court took time to consider its judgment, which was delivered as follows on the 27th June 1862 by—

Couch, C.J.—This suit was brought in the Court of the Deputy Collector of Jessore under Clause 4 Section 23 of Act X of 1859 for arrears of rent at an enhanced rate of land held by the defendant in the Jessore bazar. The land was occupied by a building which was admitted to be the property of the defendant, and no part of the rent claimed was

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alleged to be due on account of the building. When or under what circumstances the building was erected does not appear.

The Deputy Collector made a decree for rent at an enhanced rate, which was reversed by the Officiating Judge of Jessore, on the ground that the suit should not have been brought under Act X of 1859. He seems to have considered it as a suit for the rent of a house which it was not, but possibly he may have meant the rent of the land upon which the house stood.

On special appeal to this Court, the learned Judges, by whom the case was heard, were divided in opinion, Mr. Justice Glover holding that the rent of land used for building purposes cannot be enhanced by a suit under Act X of 1859, and Mr. Justice Mitter holding that a suit for arrears of rent of land, although it was occupied by a building was within Clause 4 of Section 23 apparently assuming that, if a suit for rent would lie, a suit for enhanced rent would.

And if by land in that Clause is meant land occupied by a building, I do not see how the conclusion that a suit for a higher or enhanced rent of such land may be brought in the Collector's Court can be avoided. The erection of a building upon the land, with the consent of the landlord, does not give to the occupant a right to hold the land perpetually at the same rent. If his rent was liable to be raised before, it would be so still unless the circumstances amounted to an implied contract on the landlord's part that he should always hold at the same rent, or in fact to the grant of a perpetual tenancy at a fixed rent which would be determined by the Court in a suit between them. If, as Mr. Justice Mitter thinks, Section 6 of Act X applies, and a ryot holding such land for 12 years has a right of occupancy, Section 17 must also apply so far as the grounds for enhancement can be made applicable.

But I think that, in determining what is the meaning of land and holding land in Act X, we must look at all the provisions of the Act. It may be assumed that it was not intended that one part of it should apply to one kind of land, and another part to another, and that land in Section 23 should have a different meaning from what it has in other Sections. The Deputy Collector says with truth that it is extremely difficult to apply to bazar lands occupied merely as building ground, the provisions of Section 17 which are manifestly intended to be applied to the rent of lands used for agricultural purposes.

And these are not the only provisions in the Act of which that may be said. Section 112 and the following Sections can only apply to land used for cultivation. The intention of the Legislature is to be deduced from the whole Act, and a construction which makes the whole of it consistent is to be preferred. I think this is the ground of the decisions in this Court that lands used for building purposes are not liable to enhancement under Act X.

And when we consider that a right of occupancy of land used for building purposes at a permanent rent may depend in some cases upon the terms of the original letting or upon equities arising out of the landlord's conduct, the suit for a higher or enhanced rent seems to be properly cognizable in the ordinary Civil Courts. I, therefore, think the decree should be confirmed.

Ainslie, J.—I concur.

Bayley, J.—I am of opinion that the suit for enhancement under the circumstances of this case will *not* lie under Act X of 1859, and the current of decisions is to that effect.

The 26th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Lease (by Purda Nusheen Lady)—Evidence—Registration.

Case No. 275 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 29th August 1871.

Doolee Chand (Defendant), *Appellant*,

versus

Musst. Oomda Khanum (Plaintiff), *Respondent*.

Buboos Unnoda Pershad Banerjee and *Kalee Mohun Doss* for Appellant.

Mr. C. Gregory for Respondent.

The mere registration of a lease is no proof of its genuineness, especially in the case of a lease which was first produced as a valid instrument nearly nine years after its execution, and which was alleged to have been granted by a *purda-nusheen* lady, but no satisfactory evidence was given that she had put her signature and seal to it, and that she did so with a knowledge of the nature and contents of the instrument.

Couch, C.J.—THE plaintiff sued to recover arrears of rent from the beginning of 1275 to Bysack 1277 due in respect of a

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lease which had been executed to the father and predecessor of the defendants on the 1st of May 1856.

The defence by Doolee Chand was, that the plaintiff had, as he says, in revival of the lease to Himmut Ram of the 1st of May 1856, granted a fresh lease dated the 10th of October 1860, taking effect from the beginning of 1268, to Moorlee Sahoo, the brother and co-sharer of the former lessee, Himmut Ram, and that to him, and after his death to Baboo Dindyal Lall, his son, she gave receipts.

The plaintiff put in a written statement in which she said that the lease of the 10th of October 1860 was never executed by her nor were the receipts which were alleged to have been given executed by her, and that it was not a *bonâ fide* instrument.

The case was tried by the Subordinate Judge, and was, on appeal to this Court, remanded. The real issue which was raised is to be found in the proceedings of the Subordinate Judge after the remand, and was, "whether without disturbing the former "lease in favor of Himmut Ram, father of "the defendants, plaintiff executed a fresh "farming lease, dated 10th October 1860, in "favor of Moorlee Sahoo, own brother and "co-parcener of Himmut Ram, and received "her rent from Moorlee Sahoo, and after "his demise, from Deen Dyal, or the defend-"ants are liable for the rent in suit."

Upon this issue, it was necessary for the defendant to satisfy the Court that the plaintiff, a *purda-nusheen* lady, not merely put her signature and seal to the lease of the 10th of October 1860, but that she did so, knowing what the instrument was and being acquainted with its contents, otherwise she could not be said to have executed it. That is the nature of the proof which was required from the defendant upon this issue, and to support the case which he had set up. Otherwise, as there was no question as to the existence of the lease of 1856, he would be liable to pay rent under it.

Now there are one or two very material circumstances, about which there is no dispute, to be first considered. This lease was said to have been made on the 10th of October 1860. It is alleged by the present defendant in the grounds of appeal, and, also, as we understand it, in his written statement, that, at that period, and for some time afterwards, Himmut Ram and Moorlee Sahoo were undivided. The lease, however, of 1856 was in the name of Himmut Ram, and the alleged lease of the 10th of October 1860 was taken in the name of Moorlee Sahoo; and according to the defendant's case, both parties were interested in those leases.

In 1862, a decree was obtained by Doolee Chund against the plaintiff, the provisions in which cannot be reconciled with the existence of the lease of 1860. It is founded upon the lease of 1856, and purports to be in conformity with its provisions with regard to the application of the rent. So that, in 1862, Doolee Chund obtained a decree against the plaintiff, not merely taking no notice of this alleged lease of October 1860, but taking a decree which was an improper one, if that lease was in existence and was valid. And so far as we can see, that decree has been acted upon and rent has not been paid to the plaintiff for some years. The first mention of the lease of the 10th October 1860 is in the petition of the 13th of April 1869, and the document is first produced by the parties as a valid instrument nearly nine years after its execution. It is true it was registered at the time it is said to have been executed, and at that time there was some document to which the signature and seal of the lady was attached when it was registered; but as we have remarked the parties must have known perfectly well that if it was their intention at some future time to put forward a fresh lease, extending the term and giving benefits to the lessee, a member of the same family being the brother of Himmut Ram, it would have been useless for them to think of doing such a thing unless they registered it. The mere fact of the non-registration of a document produced after so many years would have been fatal to it. But the fact of its being registered does not show that it is really the lease of the plaintiff; by which we mean an instrument which she not only put her signature and seal to, but which she understood, when she did so, to be a lease.

Then, besides the fact of this lease not having been brought forward for so many years, there is no evidence of what there would and ought to have been if it were a genuine instrument, namely, the payment of rent to Moorlee Sahoo, because if it really was to operate, as is stated by the defendant, from the time it was made, the rent under the lease of 1856 should have been paid to him. The lease of 1860 would, until the lease of 1856 expired, operate as a lease of what in English Law is called the reversion, a lease of the right which the lessor had, and entitle Moorlee Sahoo to receive the

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rent from the first lessee. There is no evidence whatever of any payment of rent such as there would have been if this had been a real transaction.

With those circumstances, we come to consider the evidence which the defendant has given in support of this instrument, and it is of such a nature as to be quite consistent with this lady not having been aware of what she put her signature and seal to, if she did put her signature and seal to any such instrument. The observations of the Judicial Committee of the Privy Council which were quoted to us apply to this case. Here, we think, it is necessary to show, not merely that there are the signature and seal which are believed to be hers, but that the matter was properly explained to her. Some person should have been produced who could speak to that having been done. There is no witness who can be said to be a friend of the lady or of her own rank, or a person with whom she would be likely to have any confidential communication. The witnesses are persons of quite a different rank and position, and what seems to us the most extraordinary part of the transaction is that these witnesses were most of them not present when she acknowledged that it was her signature and seal and attested the document at a request contained in some letter which purported to have been signed by her, but which may not have been ; and even if signed by her, the signature may have been obtained without her knowing what the document was that the witnesses were asked to attest. The whole of the evidence, which it is unnecessary for us to comment upon in detail is most unsatisfactory, when we come to consider what it is necessary to establish in a case of this kind. The decision in the Judicial Committee should be followed ; and applying to the present case the doctrine there laid down, it is impossible for us to say that it has been satisfactorily proved that this lady did execute the lease of the 10th of October 1860.

An objection was taken in the first ground of appeal with regard to the application for processes to be issued against the witnesses not being complied with. It appears that the petition, which was not complied with, was not the petition of the defendant. It appears to us clear that it was nothing more than a continuation of the attempt to make Deen Dyal a defendant in the suit, and give an appearance of right to the transaction, and supply the want of evidence on the part of the defendant Doolee Chund ; it is not an objection which ought to be allowed to prevail.

Therefore, the decision appealed from must be confirmed with costs.

The 26th June 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Fictitious Sale by Lessor for Arrears of Rent—Fraud against Lessee—Rights of Purchaser—Act VIII of 1865 *B. C.*

Case No. 168 of 1871.

Regular Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 14*th April* 1871.

Sreenath Ghose and others (Defendants), *Appellants,*

versus

Hurnath Dutt Chowdry (Plaintiff), *Respondent.*

Mr. Woodroffe and *Baboos Romesh Chunder Mitter, Doorga Mohun Dass, Rash Behary Ghose,* and *Kashikant Sein* for Appellants.

Mr. Kennedy and *Baboos Unnoda Pershaud Banerjee, Kalee Mohun Dass, Chunder Madhub Ghose,* and *Ram Charan Mitter* for Respondent.

If a lessor enters into an agreement with another person to get rjd of his lessee by means of a fictitious sale for arrears of rent and to share the profits of the transaction, that is a fraud against the lessee. The person with whom such agreement is made, must not be considered as having the rights of an auction-purchaser under Act VIII of 1865 B. C., but only those of a private purchaser.

Markby, J.—In this case the plaintiff sued certain persons named Beparee to recover possession of a 12-anna share in certain land, claiming under a purchase at a sale for arrears of rent under Act VIII of 1865, and the plaintiff asked the Court to set aside certain under-tenures which the defendants claimed, but which the plaintiff alleged to be invalid.

The Beparees contended (with other matters not now material) that no notice or proclamation had been issued by the plaintiff; that they had been in occupation for more than twelve years ; that the sale to the plaintiff had been set aside by the Commis-

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sioner; that the sale had been advertized to take place under Act VIII of 1835, and not under Act VIII of 1865; that proper notice of the sale had not been given; that plaintiff was a relative of Sreenath Ghose the former proprietor, and that Sreenath Ghose had, in collusion with the plaintiff, caused the tenure to be put up to auction and sold, and had purchased it himself in the benamee of the plaintiff, and that the plaintiff being a mere benamdar could not be entitled to possession free of incumbrance created by the former proprietor; that the proceedings in respect of the auction-sale were not according to law, and that a purchaser at such a fraudulent sale ought not to receive the assistance of the law; and, lastly, that the land in dispute was held by them, defendants, under a good and valid title derived from the ancestor of Sreenath Ghose which could not be disturbed.

It is stated by the District Judge that on the 21st March a fresh set of persons appeared, namely, Sreenath Ghose (the person spoken of by defendants as former proprietor), Ram Narain Ghose, and Gour Chunder Bose, and alleged that the plaintiff had bought the tenure from them, they being, with others, the original proprietors for whose arrears it had been sold; and that the sale having been set aside by the Commissioner, they (the old proprietors) were the rightful owners. These persons were put upon the record as defendants.

The issues were drawn as follows:—

"*First*,—Whether the sale of the Ousut talook Lukhee Narain Ghose to the plaintiff and Chundra Coomar Dass on the 27th September 1866 is now in force?

Second,—If it is in force, then, 1*st*—Is plaintiff the real purchaser of the Ousut talook, or did he purchase benamee for the previous holders, Sreenath Ghose and others?

2*nd*,—If he is the real purchaser, then is he competent to avoid the defendant's alleged howlahs and take (khas) possession or not?"

The facts of the case seem to be as follows:—

Sonamonee, the zemindar, had a decree for rent for a large amount against Sreenath and his co-sharers who held what is called an Ousut talook in the zemindary, and a sale of the tenure was threatened.

Umbica Churn, the agent of Sonamonee, and the plaintiff Hurnath were each of them desirous to purchase the tenure provided they could make some favorable arrangement for that purpose with Sreenath, who had the management of the whole affair, his co-sharers not interfering at all.

The arrangement that Umbica Churn desired was that the decree-holder should have half, himself one-fourth, and Sreenath Ghose one-fourth: he and the decree-holder were to find the funds; and the decree-holder and Sreenath were to arrrange that the biddings should be kept down.

Umbica Churn hoped that he had secured this arrangement, and he went to the sale prepared to bid up to Rupees 80,000 and make the deposit. If he could have carried out his plans, he would have got one-fourth of the property for Rupees 27,000, which, as the evidence shows, is 13 or 14 years' purchase. Hurnath, however, had before that date gained over Sreenath and made an arrangement with him that, if the property were sold to him for Rupees 40,000 or 45,000, Sreenath should have half.

This is no doubt on the face of it a far less favorable arrangement for Sreenath; but for some reason of his own he accepted it, probably because he could more easily secure Hurnath's co-operation than Umbica Churn's in his design to appropriate the whole of the surplus proceeds for himself to the exclusion of his co-sharers. If the property went for more than Rupees 45,000, Sreenath's share was to be settled afterwards.

However, as the District Judge says, things did not go so smoothly as was expected. Another person stepped in, the Moholanuvis, as he is called, and through Chundro Coomar commenced an active bidding on his own behalf, and Umbica Churn, being altogether excluded from the arrangement, began, as the decree-holder's agent, to threaten to postpone the sale. The competition of the Moholanuvis was, however, got rid of by giving him a one-fourth share in the sale, and it was obviously impossible at that time, when upwards of Rupees 60,000 had been bid for the property, for Umbica Churn to stop the sale without Sreenath's consent. But Sreenath had then made up his mind to hold by Hurnath, and stoutly protested against the postponement, threatening to appeal to the Court if any attempt was made to postpone; and the property was accordingly knocked down to Hurnath for Rupees 64,000. Subsequently the arrangement between Hurnath and Sreenath turned out to be (when exactly it was made does not appear) that Sreenath was to get one-fourth of the property, Hurnath was to get half, for which, as the District Judge calculates, he paid Rupees 24,000: and in some way or other Sreenath got into his

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hands Rupees 25,000 out of the purchase-money, which he appropriated to his own use, not a rupee (as the District Judge finds) going to his co-sharers.

These are the facts stated by Umbica Churn, and Nundo Coomar; they are for the most part so found by the District Judge, who believes these witnesses and considers them worthy of credit; and we see no sufficient reason for coming to any other conclusion. It is said that they are contradicted both by Hurnath and Sreenath, but we think we ought not to reject the evidence of Umbica Churn and Nundo Coomar on this account. The District Judge has disbelieved both Hurnath and Sreenath, and it is easy to see what motives they might have to conceal the truth, and to give each his own version of the transaction. Then it is said that there was no reason why Umbica Churn should not have gone on and bid for the property instead of making an ineffectual attempt to postpone the sale. But we do not think it at all appears that Umbica Churn was prepared to purchase the property alone, and for its full value, or that he could have found the large amount necessary for that purpose had the property been honestly sold. We do not think it can be inferred that he ever contemplated a transaction of that kind. A more important circumstance is the fact that Nundo Coomar, one of the witnesses on whose evidence these facts are found, was the vakeel who filed the written statement of the Beparees, which written statement does not set out these facts, but on the contrary states in accordance with Sreenath's evidence that the plaintiff was a "mere benameedar." There would be nothing in the Beparees not knowing these facts; they might assume from Sreenath having been in possession, or they might have been told by Sreenath that he was the real purchaser; but it is not quite so easy to see why Nundo Coomar did not inform the Beparees of the real facts, so that they might be stated in their written statement. This, however, only affects the credit of Nundo Coomar; and upon the whole we do not think it would be safe to reject his evidence on this account. It is not unlikely he was reluctant to come forward and tell what he knew; but we should not be willing to infer from this reluctance that his evidence was false, especially when he has had no opportunity of explanation, for there does not appear to have been any suggestion in the Court below that this silence on the part of Nundo Coomar casts suspicion on his evidence.

It is further said that it is extremely improbable that Sreenath would consent to an arrangement by which he got so small a share, and that it would have been better for him to let the property go for what it would fetch. There was, however, scarcely any real *bonâ fide* competition for the property, nor would be a sale to the highest bidder have answered Sreenath's purpose, unless the purchaser would assent to Sreenath's plans for getting hold of the purchase-money. As the District Judge points out, it required a good deal of caution to secure to Sreenath all the advantages which he desired.

Upon the whole, we agree with the District Judge in his finding that Sreenath came to terms with the the plaintiff, and that the purchase was made by the plaintiff on the understanding that a one-fourth share should be subsequently handed over to Sreenath, and that "Sreenath was to aid the sale in his capa-"city of debtor by refusing to allow postpone-"ment if the decree-holder wished to stay "the sale, by assisting a postponement if "there was danger of other parties becoming "purchaser;" and that Sreenath got a one-fourth share as a reward for the service which he performed for the plaintiff by securing to him the property at a low price.

The question then arises upon these facts, whether the plaintiff can annul the under-tenure and oust the Beparees. The District Judge thinks he can, because he is the real purchaser notwithstanding his arrangement with Sreenath. But the District Judge has altogether omitted to consider the question which is fairly raised in this case by the allegations of the defendants, and by the facts found on the evidence whether this was not as against the Beparees a fraudulent transaction. If it was, and the plaintiff was a party to it, his suit as against the Beharees must be dismissed.

Now we take it to be clear that if a lessor enters into an agreement with another person to get rid of his lessee by means of a fictitious sale and to share the profits of the transaction, that is a fraud as against the lessee. That would be a far stronger case than that of Nuzzur Ally Khan *versus* Ojoodya Ram Khan,* where it was held to be a "gross fraud" in a mortgagee to attempt to deprive his mortgagor of his right of redemption by means of a fictitious sale of the property for arrears of revenue. The question, therefore, is whether there was such an agreement in this case. Now it is quite true, as pointed out by

* 5 W. R., P. C., 83.

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Mr. Kennedy, that in the case of Nuzzur Ally Khan there was, when the agreement was made, the deliberate design to create the arrear of revenue in order to get the estate sold, whilst in the present case there was an actual arrear of rent, for which a decree had been obtained and execution threatened, before any negotiation took place. But then it is found, and we think rightly found, that Sreenath had, if notabsolute control over the sale, at least a considerable voice in bringing it on or postponing it. Now, we are by no means sure that it is not the duty of a lessor under such circumstances to do hisutmost to postpone the sale, and so to protectthe interests of his lessee; that is certainly what an upright and honest man would do under the circumstances; and it is a rule of English law which seems to be founded on broad principles of equity which are applicable here also, that an intermediate landlord is bound to protect his own tenant from all paramount claims. See Graham *versus* Allsop, 3rd Exchequer Rep., 186. At any rate we cannot doubt that it is gross fraud in the intermediate landlord to use his influence to urge on a sale for arrears of rent in order to secure to the purchaser the advantages of such a sale under the Act; the intermediate landlord at the same time bargaining to receive as a reward for his services a share in the advantages thereby secured. And if this be a fraud, then to this fraud the plaintiff was a party; and the sale being part of the machinery by which this fraud was effected, we think it ought to be put entirely on one side in considering the question now before us, and that, as between the plaintiff and the Beparees, the plaintiff ought to be considered, not as having the rights of an auction-purchaser under the Bengal Act VIII of 1865, but only as having the right of a private purchaser. It seems to us that if we were to give the plaintiff a decree in this suit we should be making the Collector and the Court instruments in the hands of the parties to carry out a gross fraud upon the Beparees—a fraud in which we regret to observe more than one person was prepared to assist. It was scarcely denied by Mr. Kennedy that if a superior landlord, protected by an ordinary clause for forfeiture in case of non-payment of rent, were to enter into a contrivance with his lessee to get rid of the under-tenants by putting the forfeiture in force that would be a fraud on the under-tenants, of which the superior landlord could not take advantage. And it seems to us to make no difference that the right to cancel the under-tenures is given by legislative enactment, and that the right is given not to the superior landlord but to the purchaser of the tenure. The fraud in both cases is that of the intermediate tenant who seeks to destroy his own under-tenants, to which fraud the superior landlord in one case and the purchaser in the other has become a party.

This being so, the plaintiff's suit cannot be maintained. The plaintiff cannot take advantage of his own fraud to oust the Beparees who hold under a valid grant from Sreenath and his co-sharers or their predecessors. It is unnecessary, therefore, to consider the two points of a more technical character suggested by Mr. Woodroffe, namely, first, whether the sale having been set aside by the Commissioner, it is now in force at all; and, secondly, whether the Deputy Collector of Perozpore, who sold the property, was the Collector within whose jurisdiction the lands lay within the meaning of Section 3 of Act VIII of 1865 of the Bengal Council. With regard to the first point, however, we may say that, having heard Mr. Woodroffe's argument, we are not disposed to give our assent to his contention that an order made by a Commissioner is irrevocable by his successor. No doubt this is a step which every officer would hesitate to take, and which he ought not to take except under very special circumstances; but here Mr. Simson, in cancelling Mr. Buckland's order and confirming the sale which had been set aside, acted under the express directions of the Board of Revenue, and we are not prepared to say either that Mr. Simson should have disobeyed those directions, or that his acts done in obedience thereto were void.

Upon the other point which has not been fully argued, we express no opinion.

The decree of the District Judge so far as it relates to the Beparees must be reversed, and the plaintiff's suit as against these defendants dismissed with costs both in this Court and the Court below.

We are asked by Mr. Kennedy to declare the rights of the plaintiff as against Sreenath. We think we ought not to do this. Though Sreenath has been made a party in this sense that his name has been ordered to be added to the list of defendants, there has been no attempt in the Lower Court to deal with the case separately as against him; the plaintiff asked for no relief as against Sreenath, and he has nowhere stated what the rights are which he wishes to have declared. Sreenath was in this case no more than a witness who volunteered to assist the defendants for his

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own purpose, and we are wholly at a loss to see why the District Judge made him and his co-sharers defendants. We decline to enter into any question as to the rights of the plaintiff as against Sreenath Ghose or Ram Narain Ghose or Gour Chunder Ghose, the defendants subsequently added; and the proper course will be to order the suit as against them to be dismissed, not on the merits, but on the ground that there is nothing at issue between them and the plaintiff in this suit. These three defendants will bear their own costs.

The 27th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Construction—Lease—Solehnamah—Default—Forfeiture—Re-entry.

Case No. 12 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 23rd September 1871, *reversing a decision of the Additional Moonsiff of that district, dated the 31st May* 1871.

Massamut Ruhmoonissa and another (two of the Defendants), *Appellants*,

versus

Massamut Soopun Jan (Plaintiff), *Respondent*.

Mr. C. Gregory for Appellants.

Baboo Doorga Mohun Doss for Respondent.

Where a ease of 1847 contained two provisions, one for the payment of Rs. 1,300 as rent, and the other was a stipulation for forfeiture and re-entry on default of payment, and by a *solehnamah* of 1848 that rent was put an end to, and in lieu thereof the lessor received back a portion of the land leased in 1847, but by a subsequent *solehnamah* of 1858 the lessees agreed to pay Rs. 334 as rent, but no new provision was made for re-entry, and no fresh stipulation for forfeiture,—HELD that the clause of forfeiture and re-entry, in respect of the Rs. 1,300 under the lease of 1847, did not apply to the Rs. 334 under the *solehnamah* of 1858.

Couch, C. J.—THE lease of the 30th November 1847 contained two provisions, one applicable to the rent of Rs. 300, and another to the Government revenue. The provision applicable to the rent of Rs. 1,300 was that, in default of payment of three instalments, the lessor should be at liberty to take possession of the share of the mouzah as *seer*. In 1848, the lessor received back five and a half annas of the property which was leased in 1847, and released the lessees from the payment of the rent of Rs. 1,300.

We think there can be no doubt that that was really the nature of the transaction. It is not shown in any way that the rent of Rs. 1,300 was paid in that period, and the words of the *solehnamah* show clearly that that rent was in 1848 put an end to, and the plaintiff got back five and a half annas instead of continuing to receive the rent.

Then it would seem that she having, as it is said, in 1848, found that she had been imposed upon by these parties, and that they had got a lease on much more favorable terms than they ought to have had, an arrangement was come to by which it was agreed that the lessees should pay the Rs. 334.

Now it is said that, by the *solehnamah* of 1858, the terms of the lease of 1847 were to remain in force; but supposing it was so, the terms of the lease were that there should be a re-taking of possession in default of the payment of the Rs. 1,300; and if it was intended that there should be a provision of that kind for default in the payment of the Rs. 334, which in 1858 the lessees took upon themselves to pay, it ought to have been in that *solehnamah*. In fact, it would have been the creation of a new provision for re-entry, and a fresh stipulation should have been made, which was not done. The mere saying that the terms of the lease of 1847 should remain in force would not effect that, because they only extended to the Rs. 1,300, which had ceased to be payable and was in fact extinguished by the transaction in 1848.

The Judge appears to us to have gone wrong in this way. He says that the three deeds are to be taken together, and seems to have considered that he was to treat them as one deed. That was not the way in which he ought to deal with them; he must look at them as three deeds executed at different periods, and he could only deal with the payment of the revenue of Rs. 334, which the defendants took upon themselves to pay in 1858, according to the provisions of the deed made at that time. If it was intended to apply the clause of forfeiture or re-entry to that, the parties should have said so. Seeing what they stipulated for in 1847, it is not likely that they intended that, for they did not make a stipulation for re-entry on default of the payment of the revenue to Government.

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We think the decision of the Judge was wrong, and the decision of the Moonsiff was a right decision. We reverse the decision of the Judge, and the decision of the Moonsiff dismissing the suit will stand with costs.

The 27th June 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Evidence—Secondary Witness—Joint Family.

Case No. 148 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Patna in Rajshahye, dated the 11*th August* 1871, *reversing a decision of the Moonsiff of Shahzadpore, dated the* 31*st May* 1871.

Sunkuree Debia (Plaintiff), *Appellant,*

versus

Anund Moyee Dassia and another (Defendants), *Respondents.*

Baboos Issur Chunder Chuckerbutty and *Grija Sunkur Mozoomdar* for Appellant.

Baboo Sreenath Banerjee for Respondents.

A person who swears that he was present at the execution of an instrument, is not a *secondary* witness merely because he was not a subscribing witness.

There is nothing in the mere circumstance of a bond being executed in the name of the eldest brother of a joint family and of a lease being taken in the name of the younger, to lead to the conclusion that the latter is a fictitious document.

Mitter, J.—THE decision of the Subordinate Judge in this case appears to us to be very unsatisfactory, particularly when we find that he has altogether failed to take any proper notice of the facts and reasonings recorded in the clear and well-considered judgment of the Moonsiff who tried the case in the first instance.

The suit was one for arrears of rent, and was brought against two individuals, Dwarkanath and Anund Moyee, widow and heiress-at-law of Ram Gutty Bhowmick, the eldest rother of the said Dwarkanath Bhowmick.

The case of the plaintiff was that she borrowed a certain sum of money from the joint family consisting of the said Ram Gutty and Dwarkanath Bhowmick, and that for the liquidation of the amount covered by the bond she granted an ijarah lease which was executed by her in the name of Dwarkanath Bhowmick, the parties really interested in that lease being Dwarkanath and Ram Gutty. Dwarkanath did not enter appearance. Anund Moyee, defendant, put in a written statement alleging that the money due under the bond belonged exclusively to her husband, that Dwarkanath had no right or interest in that money, that the ijarah lease propounded by the plaintiff was a fictitious document, and that she, Anund Moyee, had nothing to do with the possession of the mehal covered by that lease.

The Court of first instance, after going elaborately through the evidence produced by both the parties, came to the conclusion that the ijarah kabooleut was a genuine instrument ; that Dwarkanath and Ram Gutty were members of a joint undivided family ; that the defendant Dwarkanath was still living with Anund Moyee as a member of a joint undivided family ; and that the plaintiff was therefore entitled to the amount claimed as rent under the ijarah after deducting the amount which was due from him to the defendants under the bond above alluded to. It is further to be observed that, during the course of the trial, one Juggut Chunder Bhowmick, the youngest brother of Dwarkanath and of Ram Gutty, who was conducting this suit on behalf of the defendant Anund Moyee, happened to be present in Court, and the Moonsiff took the opportunity to examine him as a witness in the case. That witness was obliged to swear on oath that the mehal was actually taken in Ijarah by Dwarkanath and Ram Gutty, and that they had been in joint possession thereof, but he added towards the latter part of his deposition that he did not know in whose name the lease was taken, as he was not present at the time of its execution.

The Moonsiff very properly placed considerable reliance on this evidence in dealing with the question which he had to determine in the case.

On appeal, the Subordinate Judge, Baboo Benee Madhub Shome, without endeavouring to meet the arguments used by the Moonsiff in support of his judgment, and after a most superficial examination of the real facts of the case, reversed the whole decree not only in favor of the sole appellant before him, *viz.*, Anund Moyee, but also in favor of Dwarkanath who had put forward no defence of any kind whatever, and who did not prefer any appeal against the judgment passed against him by the first Court.

We have gone through the whole judgment of the Subordinate Judge, and we feel

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ourselves bound to repeat that it is very unsatisfactory. The first point to which the Subordinate Judge directs his attention is that it appeared to him strange that the bond was executed in the name of one person and the ijarah granted in the name of another. Now, a Judicial Officer of the Subordinate Judge's experience ought to have known that transactions of this kind are extremely common in this country. Here there are two brothers living together as members of a joint undivided family, a bond was executed in the name of the eldest brother, and a lease taken in the name of the younger. What was there in this circumstance to lead the Subordinate Judge to the conclusion that the kabooleut was a fictitious document? The Subordinate Judge then goes on to say that it appeared very strange that, while the bond was registered, the kabooleut was not registered. No doubt this is a circumstance upon which the Subordinate Judge was justified in placing some reliance, but as we find that the other parts of his decision are entirely based on a misconception of the evidence and of the law relating to the admissibility of evidence, we do not think that that circumstance alone is sufficient to take this case out of our jurisdiction as a Court of special appeal.

We observe that there are subscribing witnesses to the kabooleut. One of them was examined in Court. He swore distinctly to the fact that there was an ijarah taken by the Bhowmicks, but he added that the signature purporting to be his own was not in fact his signature. The Moonsiff rejected the evidence of this witness so far as he denied the signature being his own, and we understand that he also directed proceedings to be instituted against him in the Criminal Court for giving false evidence in a judicial proceeding. The Subordinate Judge, without giving the slightest weight to the evidence of the plaintiff regarding the credibility of this witness, simply remarks that his evidence does not prove the genuineness of the instrument upon which the plaintiff's suit is brought. With regard to the two other subscribing witnesses, the Subordinate Judge says that the plaintiff has failed to take proper steps to produce them in Court; but here he is entirely wrong. It is proved by the witnesses produced by the plaintiff that one of those subscribing witnesses is dead, and we further find that the plaintiff had exhausted every legal means within his power to secure the attendance of the other.

Then, with regard to the other witnesses adduced to prove the authenticity of the kabooleut in question, the Subordinate Judge says that the evidence of those witnesses is "*secondary*," and therefore not sufficient to prove the plaintiff's case. It is true that they were not subscribing witnesses to the kabooleut, the genuineness of which the Subordinate Judge had to try in this case; but they distinctly swore that they were present at the time when that kabooleut was executed, and that Dwarkanath executed it not only for himself but also for his eldest brother Ram Gutty. This evidence cannot be characterized as *secondary* in any sense of the expression, and the Subordinate Judge was therefore wrong in rejecting it on that ground.

With reference to the evidence of Anund Moyee's brother-in-law, Juggut Chunder, the Subordinate Judge gives a go-by to it, simply saying that the witness does not know in whose name the kabooleut was executed. Such a flimsy mode of dealing with such important evidence is extremely surprising. That witness was conducting the case on behalf of Anund Moyee, and it is clear from the Moonsiff's decision that he and Anund Moyee and Dwarkanath were living together as members of a joint undivided family. The very fact that such a witness came into Court and, being then and there examined, was obliged to admit on oath that the mehal was in the possession of the joint family as ijaradars, was one of the utmost importance for the proper trial of the issue which the Subordinate Judge had to try in this case, and, although the witness failed to state in whose name the kabooleut stood, that circumstance alone was not sufficient to justify the Subordinate Judge to get rid of important evidence of this character without taking into consideration the material facts deposed to, *viz.*, that the mehal in question was actually in the possession of the Bhowmick family as ijaradars, and that the defendant Anund Moyee was living up to the time of the suit as a member of a joint undivided family with Dwarkanath and the said witness.

It has been urged, and very strongly urged, that we have to deal with the decision of the Subordinate Judge in special, and that we are therefore incompetent to interfere with findings of fact. But there are several errors in law in the judgment of the Subordinate Judge as already pointed out, only one of which, *viz.*, that relating to the rejection of the plaintiff's evidence as secondary, would

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be quite sufficient to justify our allowing this special appeal.

For the above reasons, we reverse the decision of the Subordinate Judge and remand the case to the Lower Appellate Court for a proper decision upon the merits.

The costs of this appeal and of the Lower Courts will abide the ultimate result.

The 29th June 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Criminal Prosecution for Cheating—Civil Action —Breach of Contract—Damages.

Reference to the High Court by the Judge of the Small Cause Court at Howrah, dated the 31st May 1872.

Prohlad Tewar Manjee, *Plaintiff*,

versus

Deb Narain Ghose, *Defendant*.

Baboo Bhyrub Chunder Banerjee for Plaintiff.

Baboo Sham Lall Mitter for Defendant.

Defendant, having contracted to sell two boats to plaintiff for Rs. 64, received the consideration-money, but did not deliver the boats to the plaintiff, who prosecuted him for cheating in the Criminal Court. The Magistrate convicted him of the cheating, and ordered the money which had been obtained by it to be returned to plaintiff. Plaintiff now sues in the Small Cause Court for the value of the boats and for damages for non-delivery of the boats. HELD that the suit would not lie.

Case.—THE plaint sets forth that the defendant having contracted to sell two green boats belonging to him at Rs. 64, had received the consideration-money, but has not delivered the boats in question to the plaintiff; that the plaintiff has, therefore, prosecuted the defendant in the Criminal Court under s. 417 of the Indian Penal Code, and that on 5th March 1870 the accused was found guilty of committing cheating, convicted, and fined by the Magistrate in the sum of Rs. 200, in default of payment to be rigorously imprisoned for six weeks, and that the award of the Magistrate has been upheld in the Appellate Court; that the plaintiff has sustained damages in consequence of the defendant's not delivering the said boats by the loss of a net income of 10 annas per day exclusive of wages of the *manjees* and *daurees* thereof; that the plaintiff sued the defendant in the Moonsiff's Court at Sulkea for the recovery of the two boats in question or the value thereof with damages: that by reason of the value of the claim having been considered by the Moonsiff excessive, and that the case being one cognizable by the Small Cause Court, the plaint was dismissed by the Moonsiff and the decision upheld in appeal; that the plaintiff now sues the defendant in this Court for the recovery of Rs. 500, being the value of the boats, *viz.*, Rs. 64, and damages which amounted from 16th Aughran 1276 to 15th Falgoon 1278 B. S. last, *viz.*, two years three months at the rate of 10 annas per day to Rs. 479-4, of which the amount of Rs. 43-4 has been relinquished by the plaintiff.

The defendant denied the demand and urged the following pleas:—

In bar to the hearing of the suit—

1*st*,—That Section 1, Clause 2, Act XIV of 1859 bars the plaintiff's claim.

2*ndly*,—That the plaintiff having been compensated by the Criminal Court in the sum of Rs. 64, the value of the boats, he cannot sue the defendant again in this Court for the recovery of the value thereof.

As to facts—

1. That the defendant has not sold the boats in question to the plaintiff, and that the amount of Rs. 64 was paid to him by the plaintiff in liquidation of a debt due to him.

The points for determination which arise in this case therefore are—

Issues in bar—

1*st*,—Whether Section 1 Clause 2 of Act XIV of 1859 bars the plaintiff's claim?

2*nd*,—Whether the plaintiff's claim in the Civil Court for the recovery of the two boats or the value thereof can be maintained, the sum of Rs. 64, the value of the boats, having already been awarded to him by the Criminal Court?

Issues as to facts—

1*st*,—Whether the defendant has sold to the plaintiff the two boats in question on receipt of the consideration-money, Rs. 64, or the plaintiff has paid the said amount in liquidation of his debt?

2*ndly*,—Whether the boats in question yielded a net profit of ten annas per day after paying the wages of *dauries* and *manjees*.

With regard to the first issue in bar, I am of opinion that the Section alluded to above applies to damages for injury done to the person or to the personal property, and not

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for recovery of the property itself or the value thereof or for the profits derived from it as *wassilat*, a suit for which can be brought within six years under Clause 16, Section 1, Act XIV of 1859.

Respecting the second issue in bar, I think that the plaintiff's right to sue for the recovery of the boats or the value thereof in the Civil Court is not waived in consequence of his having been compensated by the Criminal Court under Section 44 Chapter III of the Criminal Procedure Code, for the trouble and expense incurred by the plaintiff in prosecuting the defendant in that Court.

As to facts.

From the deposition of the plaintiff's witnesses Nos. 1, 2, and 3, it is clearly proved that the defendant sold his two old green boats to the plaintiff for Rs. 64 on a promise of delivering them over on the following day. The defendant failed to prove that the sum of Rs. 64 was paid to him by the plaintiff in payment of a debt due to him. He produced *khattean* and *rokur-khattahs* of which he made no mention at the first instance before the Criminal authority, and from an inspection thereof it appears that the plaintiff's name and the entry have subsequently been inserted in the *khattahs*, and that they have not been properly kept. He examined two witnesses who could not conceal the fact that the consideration-money was paid to the defendant through and in presence of the plaintiff's witnesses Nos. 1 and 3. Though they in a way supported the assertion of the defendant that the money was paid to him in payment of a debt due by the plaintiff, yet from the manner in which they deposed I am persuaded to think that they have been tampered with to depose falsely, and I cannot place any confidence in their testimony.

As regards the second issue of fact, it is proved by the plaintiff's witnesses that the daily profit of such a boat is on an average Rs. 1-8, and that it is divided sometimes into 4. 5, or 6 parts. I would, therefore, on an average fix one-sixth of 1 rupee 8 annas, *i. e.*, 4 annas to be the net profit of each boat per day, or 8 annas for two boats per diem. Calculating at this rate for two years and three months, the damages would amount to Rs. 360. From the deposition of the plaintiff's witness No. 3, namely, Kalee Komul Biswas, it appears that one of the boats was in a state which required repairs at the time; the plaintiff has not deducted in his claim the charges to have been incurred for such reparation, nor the amount which would be required for annual repairs and supply of materials, such as purchasing sails, ropes, and other furnitures. I would, therefore, deduct Rs. 25 a year for such purposes and give the plaintiff a decree for the recovery of the two boats with damages Rs. 300, should the defendant fail to deliver the two boats in question to the plaintiff within a week, the defendant is to pay Rs. 64 being the value thereof, and damages Rs. 300 with costs in proportion, Rs. 48-7-4, in all Rs. 412-7-4, subject to the orders of the Hon'ble High Court to which the case has been referred for decision on law points.

The judgment of the High Court was delivered as follows by—

Couch, C. J.—In this case, according to the facts which have been found, the present plaintiff, who sues in the Small Cause Court, proceeded against the defendant on a criminal charge of cheating, and obtained a conviction, and the Rs. 64, the sum which he had paid to the defendant, was ordered to be paid to him.

Now, it certainly is not found expressly that that was to be paid as compensation for the loss of money which the plaintiff had suffered by the cheating: but there can be no doubt that that is what was intended. The Magistrate having convicted the defendant of the cheating, ordered that the money which he had obtained by it should be returned. The plaintiff cannot after that bring a suit in the Small Cause Court for breach of contract in not delivering the boats. The criminal proceedings were founded upon a case that there was no contract between the parties, that the defendant never meant to deliver the boats, and that the plaintiff was defrauded. If there was a contract, the plaintiff cannot avoid it on the ground of fraud, and proceed against the defendant under the Penal Code, at one time, and, at another, when it suits his convenience, treat it as a valid contract. Therefore, this suit ought to have been dismissed.

It is not material whether the precise question is sent up to us. The case having come up to us, and it appearing that the suit ought not to have been brought and that the plaintiff ought not to recover any damages for the non-delivery of the boats or otherwise, we order that the suit in the Small Cause Court be dismissed with costs, and the defendant will also have the costs of the reference to this Court, which we fix at Rs. 16.

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The 29th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Cause of Action (Want of)—Bond (written and signed by Husband in Wife's Name)—Implied Contract—Breach of Contract—False Representation.

Anonymous.

Reference to the High Court by the Moonsiff of Cutwa, exercising the powers of a Judge of the Small Cause Court, dated the 31st May 1872.

Where a husband writes and signs a bond in the name of his wife, there is a tacit or implied contract by him that he had authority to do so. If he had not authority, the obligee may sue for damages for breach of contract or for false representation.

Case.—In 1871, an action was instituted by the present plaintiff against the wife of the defendant for the recovery of certain moneys due under an instalment-bond alleged to have been executed by her. The document was written by her husband, and in the trial of the case, he having denied that his wife did not permit him to write the document aforesaid, and the execution of the said document not being proved, the case was dismissed by my predecessor on the 16th May 1871. In the judgment recorded by him runs the following passage:—

"If plaintiff has been deceived by the hus-
"band of the defendant, I think the proper
"course for the plaintiff would be to sue
"the defendant's husband for damages,
"but he cannot get any remedy in this case."

In accordance with the above expression of opinion, the present suit has been instituted for the recovery of damages. The cause of action stated in the plaint is that "having
"cited defendant to give evidence, and the
"defendant having deposed to the effect that
"he had not his wife's permission in writing
"and executing the instalment-bond, the suit
"was dismissed."

Defendant's contention is that there is no cause of action evinced in the plaint.

I think the defendant's contention is good in law, and the suit of plaintiff should fail for want of a valid cause of action. Admitting for argument's sake that defendant wilfully concealed the fact that his wife's permission was obtained in the writing and execution of the instalment-bond referred to above, that is tantamount to saying that defendant gave false evidence before a Court of Justice, and I am aware of no law which renders a perjurer amenable to a Court of Civil Judicature to pay damages for giving false evidence. The decision in Bishonath Rukheet, X Weekly Reporter, 42, is in support of defendants' case to a great extent.

Another argument addressed to me by plaintiff's vakeel in support of his case is that the defendant by his act and conduct "raised the belief" in plaintiff's mind that the instalment-bond was what it purported to be, *viz.* the act and deed of his (defendant's) wife; and as his conduct was antagonistic to the belief he created, it is therefore fraudulent. This contention is unsound and wrong in law. It certainly does not make out a case of actionable fraud. Plaintiff had no business to place confidence in the defendant, he knew full well that the defendant was not the proper party to execute the kistbundee, and that defendant's act was not to have a binding effect on his wife's separate property. If plaintiff did all these with his eyes open, it was his own fault, and his failure in the former suit was not so much the result of defendant's fraudulent conduct as it was his own carelessness and neglect.

I dismiss this case with costs contingent upon the opinion of the Hon'ble Court.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—The bond was written and signed by the defendant in the name of his wife, and there was a tacit or implied contract by him that he had authority to do so Collen *vs.* Wright, 7 E. & B., 301, 27 Law Journal, Q. B. 215.—The defendant's deposition in the former suit is evidence against him that he had no authority, and he is liable to pay damages for the breach of his contract, which may include the costs of the former suit as well as the money lent on the bond. The cause of action is erroneously stated in the plaint, but that ought not to prevent the plaintiff from recovering the damages to which he is entitled. The defendant's conduct also amounted to a false representation for which he would be liable in damages, and the plaintiff might sue either for a breach of contract or for a false representation.

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The 1st July 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mahomedan Law—Proof of Parentage—Acknowledgment by Father—Onus Probandi.

Cases Nos. 140 and 141 of 1872.

Miscellaneous Appeals from an order passed by the Deputy Commissioner of Manbhoom, dated the 13th March 1872.

Zulfekar Khan, *Appellant,*

versus

Golam Murteza Khan and another, *Respondents.*

Baboos Romesh Chunder Mitter and *Rash Beharee Ghose* for Appellant.

Mr. R. E. Twidale, and *Moonshee Mahomed Yusoof* for Respondents.

According to Mahomedan Law, a public acknowledgment by A that B is his son clearly throws on the party who denies or disputes that fact the *onus* of proving that such parentage was a physical impossibility either by reason of the age of the son or because of his being the son of somebody else.

Glover, J.—THIS was an application by Golam Murteza Khan otherwise called Sundoo Khan, and Golam Mustaffa Khan, otherwise called Gundhoo Khan, who are the nephews of one Surfuraz Khan, deceased, to obtain a certificate under Act XXVII of 1860, to collect the debts due to their uncle's estate. Their application was opposed by Zulfekar Khan, who alleged himself to be the son of the deceased Surfuraz Khan, and who applies for a certificate on his own account. The allegation of the petitioners was that Zulfekar Khan was not the son of Surfuraz, although they admitted him to have been brought up in Surfuraz's house, but that he was the illegitimate son of one Goomanee, a Peadah, by a woman named Noorun Bibee.

The Deputy Commissioner, after taking a considerable quantity of evidence, was of opinion that this latter allegation was made out, namely, that Zulfekar Khan was the son of Noorun by a Peadah named Gomanee, and that being proved, the acknowledgments admittedly made of Zulfekar as his son by Surfuraz Khan in his lifetime were of no effect. He decided, therefore, that the certificate should be given to Sundoo Khan and Gundhoo Khan. Against this decision Zulfekar Khan has appealed to this Court.

The only question we have to decide is whether or not it has been proved that Zulfekar was the son of Noorun Bibee by the Peadah Goomanee ; for if that is not proved, then, undoubtedly, the admissions of parentage made on several occasions, and in fact during the whole of his lifetime, by Surfuraz Khan, must be held sufficient to establish, according to the rules of Mahomedan Law, the parentage of Zulfekar. In other words, an acknowledgment by Surfuraz would be a sufficient proof of Zulfekar's parentage unless it be distinctly proved that such parentage is impossible by reason of age, or that Zulfekar was the son of some other father.

Now, the evidence to prove that Zulfekar was the son of Goomanee consists of the depositions of seven witnesses ; two of these, Kinnunt Khan and Gunesh Acharjeea, do not mention Goomanee's name at all, and their evidence may therefore be set aside ; the third, Ram Dhun Jana merely speaks from hearsay, *viz.*, that he had heard that more than thirty years ago there was an enquiry made by the Darogah, which enquiry had resulted in Goomanee being supposed to be the father of this boy. The other witnesses, Niloo Mundul, Noor Mahomed, Ruhmut Khan, and Shoban Khan do no doubt speak vaguely as to the fact of Goomanee being the father of Zulfekar, but their evidence is altogether of a very unsatisfactory character. The principal witnesses who could have given credible evidence on the subject, such, for instance, as the woman who was the wet-nurse of the child, has not been produced, nor have any of the other servants of Surfuraz's household, some of whom must still be alive, been examined. The only evidence given is that of persons who stick to one story that Zulfekar was the son of Goomanee without giving any reasons for their belief or saying how they came to the knowledge of the fact, and even these witnesses, or at all events some of them, admit that Surfuraz was in the habit during his lifetime of calling the boy Zulfekar his son. Now, if the case had stopped here, inasmuch as it is admitted that Surfuraz did on more than one occasion acknowledge Zulfekar to be his son, that would be quite sufficient to meet the requirements of the Mahomedan Law in respect of the acknowledgment of sons, and we should be quite justified in saying that the nephews of Surfuraz Khan, Gundhoo and Sundoo Khan, had not made

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out any case. But, in addition to this, there are many admissions in the documentary evidence on the record as to the parentage of Zulfekar in papers to which the nephews themselves were parties; in a case, for instance, in which Sundoo and Gundhoo Khan sued Surfuraz with regard to a portion of the paternal estate. This suit was compromised in Magh 1275 and a razeenamah and safeenamah were filed, and in the razeenamah Surfuraz Khan, after making certain other arrangements, stipulated that the other side should execute a bond of Rs. 300 in favor of his son Zulfekar, and Sundoo and Gundhoo Khan, on the other side, agreed in the safeenamah to execute this bond in favor of Surfuraz's son, Zulfekar Khan. In another case, a civil suit, No. 48 of 1869, brought by the nephews against Surfuraz and Zulfekar, they describe Zulfekar as the son of Surfuraz, and the wording is peculiar, namely, "or *pitár nám* Surfuraz," "Zulfekar son of Surfuraz." It would seem from this that Zulfekar was at that time at all events thought to be the real son of Surfuraz and not, as contended, a sort of adopted son, for it is hardly to be supposed that, if it were not so, words of this kind would have been put in a document of such importance. There are several other acknowledgments by Surfuraz of Zulfekar, but it is needless to go into them, particularly as the fact is not in any way denied that Surfuraz was in the habit of calling the boy his son. There is also a quantity of oral evidence to the same effect.

As to the evidence with regard to the marriage of Noorun Bibee with Surfuraz Khan, that possibly may be weak, and we should not probably attach much value to it, but for the purposes of this case it is not necessary that we should believe that evidence, inasmuch as after the acknowledgment by Surfuraz Khan, publishing to all the world that Zulfekar Khan was his son, the *onus* was clearly on the opposite party to prove that that was not the case by showing that such parentage was a physical impossibility either by reason of the age of Zulfekar, or because of his being the son of somebody else.

We think that the nephews have not proved their allegation that Zulfekar was the son of Goomanee, and that the acknowledgment by Surfuraz must, therefore, be upheld.

These appeals will, therefore, be decreed with costs, the judgment of the lower Court reversed, and the certificate granted to Zulfekar Khan.

The 1st July 1872.

Present :

The Hon'ble F. A. Glover, *Judge.*

Onus Probandi—Rental recovered by Person during Period of wrongful Possession.

Application for review of judgment passed by the Hon'ble Justice L. S. Jackson and F. A. Glover, on the 1st February 1872, in Special Appeal No. 1081 *of* 1871.

Mr. F. E. Oman and another (Defendants), *Petitioners,*

versus

Ram Gopal Mojoomdar (Plaintiff), *Opposite Party.*

The Advocate-General and *Baboo Bhowanee Churn Dutt* for Petitioners.

No one for Opposite Party.

The *onus* of showing that the admitted rental was not recovered during the period of A's wrongful possession is on A.

Glover, J.—I SEE no reason to grant this application. The learned Advocate-General has contended that his client ought not to have been liable for anything beyond such sums as he had or might with due diligence have collected during the time of his unlawful possession. This may be so, but it was undoubtedly for the petitioner to have shown most distinctly that, in consequence of special and unavoidable reasons, he had not been able to collect and did not collect the usual rents. If there were any absconding ryots, it was for him to prove the fact, and to show moreover that they left the estate in arrears of their rent, and not in consequence of any act of the petitioner as landlord. If there were any charges for litigation, the petitioner was bound to show that they were incurred by him *bonâ fide* for the benefit of the estate of which he then believed himself to be the owner. In short, the *onus* of showing that the admitted rental was not recovered during the period of his wrongful possession, was heavily on the petitioner, and he made no attempt to discharge it. The case reported in IX Weekly Reporter, p. 473, and to which reference was made by the Advocate-General, does not for the reasons above given apply to this case.

The application must be rejected.

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The 2nd July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Special Appeal—Limitation—Small Cause Court.

Case No. 132 of 1872.

Miscellaneous Appeal from an order passed by the Deputy Commissioner of Manbhoom, dated the 29th January 1872, *affirming an order of the Moonsiff of Man Bazar, dated the 22nd September* 1871.

Rajah Mokoond Narain Deo (Judgment-debtor), *Appellant,*

versus

Pershad Mudduck (Decree-holder), *Respondent.*

Baboo Gopeenauth Mookerjee for Appellant.

Baboo Nil Madhub Sen for Respondent.

Appeal dismissed because the objection as to limitation was not taken in the Courts below, and because the decree of which execution was sought was made in a suit of a nature cognizable by a Small Cause Court, from which no special appeal can lie.

Glover, J.—THIS appeal must be dismissed with costs. The point taken is that, inasmuch as the decree was barred on the 19th of February 1863, the present application for execution cannot be entertained. In the first place, we observe that since 1863 several executions have been taken out of this decree, and no objection that it was barred was ever made by the judgment-debtor, and we find also that the objection as to limitation was never raised in the Courts below, either before the Moonsiff or before the Judge We find, moreover, that the decree of which execution is now sought was made in a suit of the nature of a Small Cause Court suit, and that therefore, under any circumstances, no special appeal would lie.

The 2nd July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Re-hearing—Service of Summons—Jurisdiction (of Revenue Courts).

Case No. 134 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Mymensingh, dated the 17th February 1872, *reversing an order of the Deputy Collector of that district, dated the 4th October* 1871.

Rajah Mohesh Chunder Singh Surmun and others (Plaintiffs), *Appellants,*

versus

Bhoobun Moyee Debia (Defendant), *Respondent.*

Baboo Gopal Lall Mitter for Appellants.

Baboos Romesh Chunder Mitter and *Nullit Chunder Sen* for Respondent.

In execution of a decree by the Deputy Collector, confirmed in appeal by the Judge, and in special appeal by the High Court, against certain defendants and the present respondent's husband who has since died and was then not present, an application having been made for the sale of certain immoveable properties belonging to him, the respondent applied for a re-hearing on the ground that her husband had no notice of the suit. HELD that the Moonsiff was clearly wrong in having, under Act VIII of 1869 (B. C.) ruled that the re-hearing was barred by the institution of an appeal and special appeal, and that he ought to have tried the question of due service of summons, inasmuch as the respondent's husband, if he really had no notice of the suit, could not be concluded by anything done in it.

On appeal from the Moonsiff's decision, the Judge having ruled that the Moonsiff had no jurisdiction in the matter, and that the application for re-hearing should be made in the Revenue Courts—HELD that everything thereupon done in the case by the Revenue Courts, and the order of the Judge remanding the case to the Revenue Court, must be set aside as altogether without jurisdiction.

Ainslie, J.—IN this case judgment was delivered by the Deputy Collector, on the 3rd September 1868, against certain defendants then present before him, and the husband of the present respondent, who has since died, and who was then not present.

On appeal by the plaintiff against so much of the order as disallowed a portion of his claim, the Judge made an order on the 25th November 1868, confirming the decision of the first Court, and that judgment was also affirmed by the High Court on the 17th June 1869. Execution as against the husband of the present respondent was sued out on the 9th May 1870, and on the 13th August

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following a list of certain moveable property belonging to him was filed in Court, but when the order for attachment issued none of those properties could be found, and a return was made to that effect on the 24th August 1870. On that same day, an application was made for the sale of certain immoveable properties, and on the 31st August 1870, the respondent filed a petition applying for a re-hearing on the ground that her husband had received no notice of the suit. This application was refused by the Moonsiff to whom it was presented (Act VIII of 1869 B. C. having in the meantime come into force) on the 25th February 1871, on the ground that the re-hearing was barred by the institution of an appeal and special appeal.

This was clearly wrong, for if the husband of the respondent really had no notice of the suit, he could not be concluded by anything done in it. The Moonsiff ought to have tried the question of due service of summons.

On appeal to the Judge, that officer held that the Moonsiff had no jurisdiction in the matter, but that the application should be made in the Revenue Court.

An application having been made to the Deputy Collector on the 12th September 1871, was disallowed on the merits on the 4th October following.

On the 17th February 1872, the order now appealed against was made by the Judge. It says, "let the papers be returned to the Collector for disposal, with reference to the preceding remarks."

The *first* ground of special appeal is that the Deputy Collector had no jurisdiction in the matter, and that the Judge was wrong in sending the case to be tried by the Revenue Court.

The jurisdiction of the Revenue Court is now at an end, but it has very recently been determined in Special Appeal No. 125 of 1872, disposed of on the 24th of last month by the First Bench,* that all proceedings under Act III of 1870 must be heard and disposed of by the Civil Courts, and that the procedure to be followed is that of Act VIII of 1859. Everything that has been done in this case by the Revenue Court, and the order of the Judge remanding the case to the Revenue Court, must be set aside as altogether without jurisdiction.

The *second* ground of appeal is that the Judge ought to have determined whether the application for revival could be entertained, the said application having been made after expiry of the period prescribed by law. If the statement of the case put before us and which has not been contested, is correct, it would appear that the first process for the enforcement of judgment was executed within thirty days of the date on which the application for re-hearing was filed.

The case will have to go back to the Moonsiff in order that he may enquire and determine whether notice of the suit was actually served upon the husband of the respondent. If not, she will be entitled to a re-hearing.

The pleader's fees in this appeal is fixed at one Gold Mohur. The costs of this appeal will follow the result.

* *Ante*, p. 207.

The 2nd July 1872.

Present :

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Decree of the Privy Council—Construction—Cost (of Translation and Printing)—Interest.

Case No. 81 of 1871.

Miscellaneous Appeal from an order passed by the first Subordinate Judge of Bhaugulpore, dated the 13th January 1872.

Muddun Thakoor (one of the Judgment-debtors), *Appellant,*

versus

Mr. Malcolm Brown Morrison and another (Decree-holders), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Romes Chunder Mitter and *Sreenath Banerjee* for Respondents.

Where the Privy Council reversed a decree of the High Court with £276 12*s.* 2*d.* as costs in England, and affirmed the decree of the Zillah Court with costs in the Courts below—HELD (1) that "the Courts below" included the High Court, and that "costs in the Courts below" included the cost of translation and printing incurred in the High Court; (2) that the decree of the Zillah Court having given interest on the costs incurred, the decree-holder was entitled to interest on the costs incurred on account of translation and printing; and (3) that the decree of the Privy Council had made no provision for interest on the £276.

Bayley, J.—WE think there can be no doubt whatever in this case. The order of the Privy Council was in these terms :—"It is hereby ordered that the said decree of the High Court of Judicature at Fort William in Bengal of the 28th November 1865 be and the same is hereby reversed with £276

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12*s.* 2*d.* costs, and that the *judgment or decree of the Zillah Court of Bhaugulpore* of the 9th February 1865 be *affirmed with costs* in the Courts below."

Three objections have been taken in this appeal: *firstly*, that the costs of translation and printing should not have been allowed to the decree-holder; *secondly*, that no interest should have been allowed on those costs; and, *thirdly*, that no interest should have been allowed on the sum of £276 12*s.* 2*d.* allowed as costs by the Privy Council.

The Full Bench decision reported at page 187, Volume VI, Weekly Reporter, has been very much relied upon by the appellant to show that we should not go beyond the terms of the decree, and it is contended that as there is nothing in the decree specified to show that the charges for translation or printing are to be calculated as costs of these Courts, or that any interest was awarded either on those charges or on the £276 2*s.* 2*d.* awarded as costs by the Privy Council none of these items should have been allowed.

Now, it is quite clear that what is affirmed by the Privy Council is the decree of the Zillah Court of Bhaugulpore, dated the 9th February 1865, with costs in the Courts below. The "Courts below" included also the High Court. In the High Court the cost of translation and printing had to be undergone. It was a cost actually incurred and necessary to be incurred by the parties, and therefore the terms of the decree of the Privy Council in this case clearly include the charges for translation and printing as costs in the Courts below.

The only cases in which the question of translation and printing being included as costs had been before this Court are one heard by Mr. Justice Markby sitting in the Privy Council Department on the 20th May 1872, reported at page 89, Volume XVIII, Weekly Reporter, and one by Mr. Justice Ainslie and Mr. Justice Paul on the 13th April 1871, reported at page 356, Volume XV, Weekly Reporter. In both the cases, the result of the orders passed is that the charges for translation and printing should be allowed as costs. Under these circumstances, it seems to us that the first ground of appeal must fail.

As regards the *second* objection, it appears that the decree of the Zillah Court, which is the decree affirmed by the Privy Council, and which has now to be executed, gives interest on the costs incurred. Now, the charges for translation and printing are also costs incurred. The money has been actually expended by the parties, and as the decree provides for interest on the costs, the decree-holder should not lose the interest on such costs.

As regards the *third* objection, *viz.*, as to the interest on the £270 awarded as principal costs in England by the Privy Council, it is clear from the terms of the order of the Privy Council that a distinction is drawn between the costs allowed by that tribunal and the costs incurred in the Courts below. It seems to have been the intention of the Privy Council to make the £276 12*s.* 2*d.* a part of their own order for costs. No provision is there made for any interest on that sum, and we therefore think that no interest ought to be allowed on that sum.

The result of our order, therefore, is that the order of the Lower Court is affirmed except in so far as it awards interest on the £276 12*s.* 2*d.* awarded as costs by the Privy Council.

Under the circumstances, we think that each party should bear his own costs of this appeal.

The 2nd July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Limitation—Bonâ fide Proceeding to keep Decree alive—Informal Petition.

Case No. 135 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rajshahye, dated the 23rd January 1872, reversing an order of the Subordinate Judge of that district, dated the 13th February 1871.

Bullohee Kant Bhuttacharjee and another (Decree-holders), *Appellants,*

versus

Koylash Chunder Roy and another (Judgment-debtors), *Respondents.*

Baboo Kishen Dyal Roy for Appellants.

Baboo Grish Chunder Mookerjee for Respondents.

Mere informalities in a petition for execution of a decree cannot affect the *bonâ fides* of the proceeding so as to bar limitation.

Bayley, J.—We think this appeal must be allowed with costs.

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The decree is dated the 9th December 1850.

The present application for execution is dated the 16th December 1870.

The question before us is whether any *bonâ fide* proceeding to enforce the decree was taken by the decree-holder within three years prior to the date of the present application.

It appears that on the 20th December 1865 execution was sued out, and after a portion of the judgment-debtor's property had been sold the case was struck off.

On the 17th May 1867 another application was made for the execution of the decree; but as it was not *formally* drawn, no action was allowed by the Court upon it.

On the 11th September 1867, the decree-holder applied for the proceeds of the previous sale, and on the 27th November received a cheque from the Court.

The first Court held that the receipt of the sale proceeds by the decree-holder on the 27th November 1867 was a *bonâ fide* proceeding within three years of the present application sufficient to keep the decree alive.

The Lower Appellate Court has reversed this decision and held that the decree is barred by limitation as there was no effectual proceeding taken within three years of the present application.

The Lower Appellate Court is clearly right in holding that even taking the receipt of the sale proceeds by the decree-holder from the Court to be an effectual proceeding, which the Lower Appellate Court holds it was not, it was beyond and not within three years of the date of the present application as the Moonsiff has held.

It is urged in special appeal that intermediately on the 20th September 1869, there was an application made by the decree-holder for execution of the decree, that notice was thereupon issued on the judgment-debtors who having raised the plea of limitation, the objection was overruled and the execution was allowed to proceed. It turns out, however, that as far as the present respondent was concerned no notice was issued upon *him*, and no action taken as against him upon the application of the 20th September 1859.

On the 11th July 1870 the decree-holder again applied for execution, upon which notice was served upon the present respondent, Kylash Chunder, but it was after the judgment passed by the Court on the 14th January 1870 overruling the objection of the other debtors in the case.

There remains, therefore, for us to consider as to whether the application of the 17th May 1867 was a proceeding sufficient to bar limitation. The Lower Appellate Court holds that the application being informal, was of no effect whatever.

Now, as far as the record shows, it appears that the decree-holder did not state in this application what sum he had realized and what he had to realize. There is a record by a proper officer of the Court that such a petition was given, but that it was rejected for some mere informalities.

On the whole, we think that as the decree-holder had, on the 17th May 1867, by a petition, asked *bonâ fide* for permission to execute the decree, and applied with this view within three years of the last proceeding, he took a proceeding *bonâ fide* to enforce his decree, and therefore the present application is within time.

We, accordingly, reverse the order of the Lower Appellate Court and allow this appeal with costs, one gold mohur. The Lower Court will restore the case to its file and proceed with the execution. The Lower Court must also consider and decide finally any objection as to the respondent Kylash Chunder not being liable under this decree, not having inherited any portion of the property from his father, the judgment-debtor.

The 2nd July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Act XXVII of 1860—*Certificate (Effect of)—Title—Will.*

Case No. 102 of 1872.

Miscellaneous Appeal from an order passed by the Commissioner and Judge of Julpigooree, dated the 23rd December 1871.

Sookho Soonduree Dabia (Petitioner), *Appellant,*

versus

Wooma Soonduree Debia (Objector), *Respondent.*

Mr. R. T. Allan and *Baboos Ashootosh Dhur* and *Kishen Dyal Roy* for Appellant,

Baboo Amarendro Nath Chatterjee for Respondent.

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The grant of a certificate under Act XXVII of 1860 to a person claiming under a will cannot support a claim to title by that person in a regular suit brought on the will.

Bayley, J.—We are of opinion that the order of the Lower Court in this case must be reversed. That order is in a very few words: "Parties present. The Court, after "hearing of argument on both sides, is of "opinion that a Hindoo widow in Bengal "has no right to dispose of her inherited "property, moveable or immoveable, by will, "and decline to grant certificate."

Now, the question before the Lower Court in this, a case under Act XXVII of 1860, was *not* whether a Hindoo widow had any right to dispose of her inherited property, moveable or immoveable, by will, so as to create a right to that property, but the Lower Court had only to look to the terms of Act XXVII of 1860, which in Section 3 most clearly provides how a certificate to collect the debts due to the estate of a deceased person may be granted to such of his representatives as may have the best right to it, and in Section 4 enacts that the certificate so granted shall indicate the representative character of the holder as regards all debtors to the deceased, and thus an acquittance may be secured to all debtors paying their debts to the person in whose favor the certificate has been granted. No order passed under Act XXVII of 1860 in its summary jurisdiction *as to a certificate* whether as to a will showing a representative character or such like, can affect the fact as to whether the will is good or not for the purpose of *inheritance* or be of avail for anything beyond the terms of the certificate. In fact, a Moonsiff can in a regular suit on the will set aside any summary order of the High Court even passed in such a miscellaneous case in the matter of a certificate under Act XXVII of 1860. It is most erroneously and absurdly supposed that an order passed or an opinion obtained upon any document in such a matter as this certificate goes a good way to support a claim to title in a regular suit.

There is for the purposes of this certificate a *primâ facie* evidence, standing unrebutted, of the *factum* of the will and the representative character of the party claiming under the will so far as to give a right to collect the debts due to the deceased and to give acquittances, and no further. Therefore, we think the order of the Lower Court must be reversed and the case remanded with direction that a certificate may be given to the applicant.

The appellant will be entitled to one gold mohur as vakeel's fees in this Court.

Ainslie, J.—I concur in the order made by Mr. Justice Bayley.

The 2nd July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint Family—Ancestral Property—Possession—Sale—Mortgage.

Case No. 181 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 30th September 1871, affirming a decision of the Moonsiff of Burdwan, dated the 13th May 1869.

Banesshur Dass (Defendant), *Appellant,*

versus

Banee Madhub Dass (Plaintiff), *Respondent.*

Baboo Opendro Chunder Bose for Appellant,

Baboos Mohesh Chunder Chowdhry and *Gresh Chunder Mookerjee* for Respondent.

Where it was found that the property in dispute was originally the ancestral property of three brothers and had not been sold out and out but only mortgaged, and that subsequently to that mortgage the property reverted to the family and was in its possession jointly, Held that the conduct of the parties and the fact that the possession reverted to the family was sufficient to show that the sale was not an out and out sale but a mortgage.

Kemp, J.—This case was remanded by Justices L. S. Jackson and Dwarkanath Mitter on the 29th of August 1870. The Judges observed "that if the issue of limitation "should be decided in favor of the plaintiff, "the Court will then direct its attention to "the main issue on the merits, which is whether the property in dispute after being "sold was purchased by one of the brothers "for the benefit of all three; and that much "light would be thrown upon this issue by "an enquiry as to whether the family was "at the time joint or separate in estate." It appears that the plaintiff in this case, one of three brothers, sued on the allegation that one-third share of the property in dispute belonged to him. The defendant's case is that his judgment-debtor whose rights and interests he has purchased is the sole owner of the whole of the property. It is admitted

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that originally this property was ancestral property. The plaintiff and his brothers, in another suit brought by the brothers, alleged that the property in dispute was not sold out and out to Lokenath, but that it was mortgaged to Lokenath on the understanding that when the money should be repaid the mortgagors would be entitled to get back the property. On the other hand, the defendant alleges that Lokenath's purchase was an out and out purchase, and that Lokenath has subsequently conveyed the property to his judgment-debtor, Jadoo Kurmokar, who held the property separately as his self-acquired property.

The Court below, Baboo Digamber Biswas, Subordinate Judge, tried the two issues laid down by this Court. He found that the suit was not barred, and upon this point no appeal has been preferred. Upon the merits the Lower Court found that the defendant had failed to prove that Jadoo had held the property as his self-acquired property; that the plaintiff is entitled to a one-third share, and that he held that one-third share until dispossessed by the defendant. He also held on the evidence that the sale to Lokenath was not an out and out sale, and that subsequent to the re-transfer of the property to the family, the plaintiff and his brother Jadoo were in possession.

In special appeal, it is contended that the deed of sale shows that the sale to Lokenath was an out and out sale, and that the Lower Court was wrong in admitting oral evidence to vary the deed; 2ndly, that the Lower Appellate Court has not fonnd whether the purchase was by the three brothers, through Jadoo or by one of the brothers, Jadoo, on his own account; and, 3rdly, that the Lower Appellate Court has thrown the *onus* wrongly on the defendant.

On the first point, it being admitted that this property was originally the ancestral property of the three brothers; it also being found on the evidence that the property was not sold out and out, but mortgaged to Lokenath, and that subsequently to that mortgage or within one and a half year after that mortgage the property reverted to the family and was in its possession jointly; we think that the conduct of the parties and the fact that the possession reverted to the family are sufficient, under the Full Bench ruling,* to show that this sale to Lokenath was not an out and out sale, but, as held by the Lower Appellate Court, a mortgage.

* 5 W. R., p. 68.

On the 2nd point, we think that there has been a clear finding by the Lower Appellate Court, in compliance with the order of remand, that the purchase was not made exclusively by the defendant's jugdment-debtor, Jadoo Kurmokar, but by him for the brothers jointly. Under the circumstances of the case, the *onus* was clearly upon the defendant to show that this was his self-acquired property, and it has therefore not been misplaced.

We dismiss the special appeal with costs.

The 6th July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Bond—Loan for Mahomedan Women—Duty of Lender.

Case No. 162 of 1872.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 31st August 1871, *reversing a decision of the Subordinate Judge of that district, dated the 24th March* 1870.

Syud Golam Sobhan (one of the Defendants), *Appellant,*

versus

Muddun Mohun Paul (Plaintiff), *Respondent.*

Baboos Kishen Dyal Roy and *Nullit Chunder Sen* for Appellant.

Baboo Bhugobutty Churn Ghose for Respondent.

Where A wishes to charge Mahomedan ladies under a bond executed in their absence by B under a *mooktarnamah*, even if there was no collusion between A and B, A is bound to show that there was no negligence on his part—that the advance was made after satisfying himself that it was taken for their use, and was required by them for the purposes stated in the *mooktarnamah* (*viz.*, for the payment of their debts), and also that the money was applied to the use of the ladies.

Ainslie, J.—THIS suit is founded on a bond executed by one Abdool Hamid Khan for himself and his sisters by virtue of a *mooktarnamah* which contains a provision empowering him to raise money for the payment of their debts.

It has been found as a fact that the bond executed by Abdool Hamid and the power of attorney under which he acted were genuine documents.

The first Court was of opinion that there was collusion between the plaintiff and

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Abdool Hamid, but this finding has been overruled by the Lower Appellate Court.

It seems unnecessary to go into the question of collusion in this case, for granting that there was no collusion, still it was for the plaintiff to show that there was no negligence on his part. He, wishing to charge certain Mahomedan ladies under a bond executed in their absence, was bound to show that the advance was made after satisfying himself that it was taken for their use, and was required by them for the purposes stated in the *mooktarnamah*. Of course, he might also have shown that the money taken was applied to the use of the ladies, and in this way connected them with the debt, but there is no evidence on any of these points. We think, therefore, that thefirst Court was right in refusing to charge the ladies with the debt and costs.

The appeal is decreed, the judgment of the Lower Appellate Court, as against the special appellant, Syud Golam Sobhan, will be set aside with costs.

The 8th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Guardianship of Minor—Revocation of Certificate—Neglect of Duty—Waste—Sales.

Case No. 139 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Dinagepore, dated the 9th February 1872.

Goonomonee Dossee (Opposite-Party), *Appellant*,

versus

Bhabo Soonduree Dossee (Petitioner), *Respondent*.

Baboo Nil Madhub Sein for Appellant.

Baboo Kalee Kishen Sein for Respondent.

A certificate of guardianship was recaled in a case where the guardian had been grossly, if lnot fraudulently, wasting the property of the minor by allowing portions to be sold for arrears and debts of very small amount when there was an ample fund in hand to have prevented the sales.

Couch, C.J.—We think the written statement supports this passage in the judgment of the Lower Court, which is a sufficient reason for recalling the certificate, *viz.*, "that the property of the minor in her "charge has been grossly, if not fraudulent-"ly, wasted. Numerous pucca dwellings "and other properties have been wantonly "permitted to be sold for arrears and debts "of very small amount when there was "ample fund in hand to have prevented the "sales." It may be that there was no collusion on the part of the appellant with the other sharers; but assuming there was not, there was such a neglect of duty on her part as would be quite a sufficient reason that she should no longer be entrusted with the management of the property.

The appeal against the decision of the Lower Court is dismissed with costs one gold mohur.

The 8th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Joint Property—Partition—Execution of Decree—Attachment of Share—Presumption—Onus Probandi.

Case No. 196 of 1872.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 30th September 1871, *reversing a decision of the Subordinate Judge of the District, dated the 21st February* 1871.

Inder Coomar Doss (Plaintiff), *Appellant*,

versus

Doolal Chunder Doss, Debtor, and Bhagomut Doss, Claimant (Defendants), *Respondents*.

Baboos Mohiny Mohun Roy and *Grish Chunder Ghose* for Appellant.

Baboos Aushootosh Dhur and *Ishur Chunder Doss* for Respondents.

The presumption is in favor of a decree-holder, who in execution of his decree attached the share of his debtor, one of five brothers, in a joint property, that the property is undivided, and the *onus* is on the debtor to show that there had been a partition of it.

Couch, C.J.—The case in the plaint was that the land in suit was the property of five brothers and in their possession, but that they made a private butwarrah, which being rejected by the Court, the decree-holder in execution of his decree attached the share of his debtor, one of the brothers

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in the said property, as if there had been no partition.

Now the presumption would be in favor of the plaintiff that the property was undivided, and it was for the defendant to make out that there had been a division of it. It is not disputed that there was a decree of the Court in 1866 declaring the partition to be collusive. The plaintiff relied upon this and contended that, although a butwarrah had been made, it was collusive. But it was alleged by the defendant in appeal that there were two butwarrahs, one in 1261 which related to the subject-matter of this suit, and one in 1263 which related to other properties and which alone was set aside. It does not seem clear that it was so alleged originally. It was rather alleged that there was one butwarrah, but that it was not at once entirely carried out for certain reasons. The Judge says that the plaintiff has called no witnesses. It is true the plaintiff called none; but he did that which was equivalent to calling witnesses, perhaps better, for the defendant's witnesses who were conversant with the transaction were cross-examined by him on the point and one of them deposed that there was only one butwarrah. That must be considered to be very good evidence for the plaintiff. There is no foundation for the Judge's finding that the butwarrahs in 1261 and 1263 were distinct and independent transactions, and that therefore the one being collusive did not affect the whole property.

The judgment of the Judge is so unfounded that it must be set aside as erroneous in law. The judgment of the first Court will be restored with costs of the appeal.

The 9th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Surety for Nazir—Liable only to Government.

Case No. 294 of 1872.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 9th October 1871, *reversing a decision of the Subordinate Judge of that district, dated the 21st June* 1871.

Bocha Gope Chowdhry (Pauper Plaintiff), *Appellant*,

versus

Brojo Gobind Doss (Defendant), *Respondent*.

Baboo Kalee Kishen Sein for Appellant.

Baboo Doorga Mohun Doss for Respondent.

A surety for a Nazir, under his obligation to the Government to indemnify the Government for any loss that the latter might incur, is not liable, except to the Government, for any wrongful acts done by him.

In 1865 a suit was brought against Bocha Gope, the present plaintiff, in the Moonsiff's Court, by one Gopal Kristo, who caused fifteen buffaloes belonging to Bocha Gope to be attached before judgment. Gopal obtained a decree in that suit, and in execution of that decree ten of the buffaloes were sold. Bocha Gope thereupon sued Gopal for the value of the remaining five buffaloes and their five young ones born subsequent to the attachment. Gopal in defence pleaded that the five old buffaloes had died. The Moonsiff gave Bocha Gope a decree for the value of the five old buffaloes, not finding his allegation concerning the five young ones proved. Against this decision Gopal appealed, and the Subordinate Judge held that no suit would lie against Gopal, the decree-holder, but that Bocha Gope ought to have sued the Nazir who was responsible under Section 233 Act VIII of 1859.

Bocha Gope then brought a second suit against tho Nazir, and obtained an *ex parte* decree, but being unable in execution to realize anything from him, applied to the Moonsiff for permission to execute the decree against Brojo Gobind who was surety for the Nazir under the Government rules. The Moonsiff, and subsequently the Judge in appeal, held that, as Brojo Gobind had not been a party to the suit, he could not be made liable for the amount.

Bocha Gope thereupon instituted this his third suit, in which he seeks to realize the amount due under his decree against the Nazir, from the surety, and the Collector on behalf of Government which took the bond from Brojo Gobind. The material part of the surety-bond will be found set out below in the judgment of the High Court. The first Court held that the Nazir was liable, and failing him, the surety, and that the surety was not liable to the Government alone. The Judge on appeal held that the surety, under his bond, was liable to the Government alone and that Bocha Gope could not recover from the surety direct.

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The plaintiff now appeals specially, and one of his grounds of appeal is that a surety for a Nazir is to all intents and purposes liable for all the acts done in his official capacity, and that the Lower Appellate Court was wrong in holding that such surety is liable for the acts of the Nazir to the Government alone.

Couch, C. J.—The decision appealed against is correct. The party could only be liable on his obligation as surety. It was an obligation to the Government and not to the plaintiff. The terms of the instrument of suretyship are these: "If he (the "Nazir) appropriates to himself the *tehbil* "or any money pertaining to the office of "Nazir or otherwise causes loss or becomes "liable to Government for any sum, then "neither I nor my heir will object to pay "the appropriated money, and the loss in-"curred will be recovered by sale of the "property pledged." It is clear that what he undertook was to indemnify the *Government* for any loss that the latter might incur. The plaintiff has no right under that bond to Government to recover against him for wrongful acts such as misappropriating goods, &c., done by the Nazir.

The decision of the Lower Appellate Court is right, and this appeal must be dismissed with costs.

The 10th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Res Adjudicata—Butwarra.

Case No. 1012 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 17th July 1871, *affirming a decision of the Moonsiff of Durbhanga, dated the 30th January* 1871.

Sheikh Hossein Buksh, *alias* Zumoorut Ali and others (Plaintiffs), *Appellants,*

versus

Sheikh Musund Hossein and others (Defendants), *Respondents.*

Moonshee Mahomed Yusoof for Appellants.

Mr. C. Gregor for Respondents.

In a suit brought by A against the vendor to establish his right to a share in a property alleged to be sold to A, B intervened and was made defendant, and a decree was passed in A's favor in 1863, directing his share to be taken out of a certain *puttee*. Pending this suit and before decree, A by his own act became a party to certain partition proceedings before the Collector, but omitted to include his claim in those proceedings, or to withhold his consent to them until it was ascertained what he was entitled to. Being consequently unable to execute his decree of 1863, or to ascertain the share thereby declared to belong to him, HELD that he could not bring a second suit against the same parties to establish the right that was established in the first suit.

Couch, C. J.—THE suit in which the decree in 1863 was made appears to have been brought by the plaintiff against the vendor to establish a right to the 9 gundas which were alleged to have been sold to the plaintiff, and the first defendants in this suit appear to have intervened, and to have got themselves made defendants, and then a decree was passed declaring the plaintiff's right, and directing that his 9 gundas were to be taken out of the *puttee* which was then the 7¼ *puttee*.

Now, it seems that, before the decree was pronounced, the plaintiff was himself a party to the partition proceedings before the Collector, and it is not correct, as is stated in the plaint in the present suit, that the first defendants procured the share to be included along with their share in the *puttee* of 5 annas, 1 gunda, and 2 cowrees. The fact is that, pending the suit and before a decree was made in it, this partition was made to which the plaintiff was just as much a party as the defendants. The plaintiff now says, in effect:—"I cannot execute my decree, I "cannot find out my 9 gundas," and he asks now that his right may be declared against the same defendants as were parties to the first suit, and against whom he got his decree. It was a decree affecting them so far as they had any interest in the 7¼ *puttee* share, and his present suit is to establish the right and to have his 9 gundas given to him out of the same property; it is a second suit upon the same cause of action, which cannot be allowed. If, subsequently to his obtaining a decree, there had been dealings with the property by different persons which might render it necessary that they should be brought before the Court, we do not say there might not be cases in which a second suit might be brought, butnot asuit to establish the right against the same parties as it had been established against in the former suit. That would be a suit to execute the decree in consequence of circumstances happening after it had been made; but this is not a a case of that kind. The plaintiff has

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got himself, undoubtedly, into a position of considerable difficulty, but the difficulty has arisen from his own fault. If, at the time when he became a party to this partition, he had a claim which he was enforcing in a suit, and which he must have supposed was a good claim, he ought to have taken care to have had it included in the partition proceedings, or to have withheld his consent to them, until it was ascertained what he was entitled to. No doubt, he has very greatly increased the difficulty of executing the decree of 1863, if he has not made it impossible to do so, by his own act in becoming a party to these partition proceedings. He brings a second suit really to establish the right that was established in the first suit, because he says, "I cannot execute the decree, and can-"not find out the property declared to be-"long to me," but the Code of Civil Procedure says that a second suit shall not be brought for the same cause of action, and this is for the same cause of action. On that ground we must hold that the decrees of the Lower Courts dismissing the suit were right, and the appeal must be dismissed with costs.

The 10th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Special Appeal—Act VIII of 1869 *B.C. s.* 102 *—Questions of Title—Jurisdiction—Dismissal of Suit against non-appealing Defendant.*

Case No. 259 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 24th August 1871, *reversing a decision of the Moonsiff of Chowkee Ondah, dated the 26th May* 1871.

Sristeedhur Chuckerbutty and another (Plaintiffs), *Appellants,*

versus

Koonjo Behary Biswas (one of the Defendants), *Respondent.*

Baboo Nilmadhub Sein for Appellants.

Baboo Mohendro Lall Mitter for Respondent.

A special appeal was held, under s. 102 Act VIII of 1869 B.C., not to lie in a case where the contention (if any) as to title was not between the parties to the suit, nor was there any conflict of claims between them.

Quære.—Whether, after deciding that no special appeal lay in the case, the High Court could consider the question whether the Lower Appellate Court was justified in dismissing the suit against a defendant against whom the first Court had given a joint decree, and who did not appeal to the Lower Appellate Court.

Glover, J.—A PRELIMINARY objection is taken under Section 102 of Act VIII of 1869 that the suit being one for arrears of rent amounting to less than Rs. 100, and no question having been decided with regard to title or to any interest in land as between parties having conflicting claims thereto, no special appeal will lie. We think this objection must be allowed. We have read the judgments of both Courts, and we find that the only question decided was whether the defendant was or was not the tenant of the plaintiff, and whether he was bound to pay him rent. It has been contended by the pleader for the special appellant, that, inasmuch as one of the defendants is said to have come in by purchase as regards a portion at least of the land for which the rent was claimed, there was, as a matter of fact, a question of title decided by the Moonsiff. We find that this is not so; but even if there was any question of title involved in the case, it must be according to the Section a question between parties having conflicting claims to the land. But in this case the contention, if any, was not between the parties to the suit, nor was there any conflict of claims between them. Then it is said that in any case the Judge was not justified in dismissing the suit as against Punchanun against whom the Moonsiff has given a joint decree, and who did not appeal to the Judge. It is very doubtful whether we could at all consider this question after deciding that no special appeal lies to this Court; but in any case there is no necessity for our doing so, as we find that Punchanun has not been made a respondent to the special appeal. The special appeal is dismissed with costs.

The 11th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, W. Markby, and W. Ainslie, *Judges.*

Appeal—Jurisdiction—Act VI of 1871 *s.* 22—*Amount or Value of Suit.*

Application for the admission of a Regular Appeal from a decision of the Subordinate Judge of Gya, dated the 22nd February 1872.

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Dooly Chund and others (Plaintiffs), *Appellants,*

versus

Nirban Singh (Defendant), *Respondent.*

Baboo Nil Madhub Sein for Appellants.

Case No. 244 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 25th September 1871.

Baboo Nurrender Narain Singh (Plaintiff), *Appellant,*

versus

Sree Narain Doss and others (Defendants), *Respondents.*

Mr. Woodroffe and *Mr. C. Gregory* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondents.

Cases Nos. 199 and 260 of 1871.

Regular Appeals from a decision passed by the Subordinate Judge of Gya, dated the 18th July 1871.

Case No. 199.

Neerbhoy Singh (Plaintiff), *Appellant,*

versus

Rampershad Singh and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Mohesh Chunder Chowdry* and *Nil Madhub Sein* for Appellant.

Baboos Kalee Mohun Doss and *Chunder Madhub Ghose* for Respondents.

Case No. 260.

Rampershad Singh and others (Defendants), *Appellants,*

versus

Neerbhoy Singh (Plaintiff), *Respondent.*

Baboos Kalee Mohun Doss and *Chunder Madhub Ghose* for Appellants.

Mr. R. T. Allan and *Baboos Mohesh Chunder Chowdhry* and *Nil Madhub Sein* for Respondent.

Where an original suit is brought for a sum exceeding Rs. 5,000, or for property exceeding that value, and the decree is for a less sum or for property of less than that value, the appeal, according to s. 22 Act VI of 1871, will lie to the High Court.

THESE cases came on for hearing upon a question submitted as follows by the Deputy Registrar in the case of Dooly Chund and others *versus* Nirban Singh.

Note by the Deputy Registrar.—"This appeal is against the portion of the decree of the Subordinate Judge of Gya, dated the 22nd February 1872, which disallowed the claim *in suit* to the extent represented by the amount at which this appeal is valued, *viz.*, Rs. 3,675, the entire claim being Rs. 7,935.

"With reference to each of *three* similar appeals, the 4th Bench has, to-day, held that, "under s. 22 Act VI of 1871, the appeal ought to have been preferred in the Court of the District Judge, inasmuch as the subject-matter in dispute does not exceed Rs. 5,000 in value," and directed "the case" to "be sent down to the District Judge."

"But for this order, the office would have received this appeal under the impression that the terms "*the amount or value of the subject-matter in dispute,*" as used in s. 22 Act VI of 1871, are synonymous with the terms "*suits exceeding the amount or value*" used in s. 4 Act XXV of 1837, which have been re-enacted first by Act XVI of 1868 (s. 18), and next by the more recent Act of 1871 above quoted.

"Under the circumstance, however, I must refer the appeal to the 1st Bench, to which the district it has come up from indicates it to belong, for orders as to its admission or otherwise."

A Bench of four Judges having been appointed for the decision of the question, the three other cases (*viz.*, Regular Appeals Nos. 244, 199, and 260 of 1871), in which the same question was raised, were also referred for the determination of that Bench. The matter came on for bearing on the 24th June 1872.

Mr. Woodroffe.—I appear on behalf of the appellant in the appeal No. 244 of 1871. My client was plaintiff, and he brought his suit valuing the property, the subject-matter of that suit, at Rs. 7,965-1-6. The case was heard before the Subordinate Judge of Bhaugulpore, who delivered his judgment on the 25th September 1871, in which he gave a modified decree on behalf of my client for 7 annas 4 gundas and ⅔ cowries of the property and costs in proportion. My client, in dissatisfaction of the judgment of the Lower

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Court in so far as it dismissed the remainder of his claim, filed his memorandum of appeal on the 10th October 1871, stating that his suit was for confirmation of possession and declaration of title regarding 7 annas 19 gundas and 2 krants, for possession of 1 anna 17 gundas and 1½ krants with *wasilat*, and for partition of the whole 9 annas 9 gundas and ⅓ krant, and laying his appeal at Rs. 2,418-5-9, the valuation of the whole share being made up of different amounts coming up to that sum.

On this appeal being called on for hearing before another Bench consisting of the Chief Justice and Mr. Justice Bayley, it was objected on the part of the respondent that the appeal could not be heard before the High Court, inasmuch as the value of the property, with respect to which the appeal had been laid, was only Rs. 2,418.

Two questions arise (1) whether or not the respondent, having regard to the provisions of s. 348 Act VIII of 1859, was entitled to take that objection, and (2) whether there is anything in the objection when taken. Section 348 says "upon the hearing of the appeal the respondent may take any objection to the decision of the Lower Court which he might have taken if he had preferred a separate appeal from such decision." It is manifest that the present is not an objection to the decision of the Lower Court. It is an objection (if any) to the jurisdiction of this Court or to its regularity in hearing this appeal, there having been no cross-appeal in this case. Therefore, unless it comes within s. 348, the respondent has no footing upon it. With respect to the second point, it appears to me to be very plain that the decision upon which the respondent relied in making that objection is one that is not well founded. The decision was one of 28th May 1872 in Regular Appeal No. 281 of 1871 (Sreemutty Sreemutty Dossee and another, defendants, appellants, *versus* Sreemutty Soudamenee Dossee, plaintiff, respondent) by L. S. Jackson and Markby, J.J. It appears from the decision of that case that it is not at all analogous to the present case. In that case the plaintiff valued the subject-matter of his suit above Rs. 10,000, *viz.*, the value of the lands at Rs. 7,926 and of the mesne profits at Rs. 4,417-0-16, laying his suit at Rs. 12,343-0-16. The defendants objected that the suit had been over-valued, and the Lower Court came to a finding by which the total value of the claim was established to be Rs. 6,917, and a decree was given in favor of the plaintiff. The defendants of their own motion, and contrary to the finding of the Court, chose to lay the appeal at Rs. 2,500. It would appear that the contention of the defendants, appellants, in that case was that from the beginning to the end of the question there never had been in that suit before any Court property of higher value than Rs. 2,500. Their Lordships, without giving any reasons, recorded the following judgment: "Under Section 22 of Act VI of 1871, the appeal ought to have been preferred in the Court of the District Judge, inasmuch as the subject-matter in dispute does not exceed Rs. 5,000 in value." I therefore contend that that is not an analogous case, and that the judgment in that case is not correct so far as it went. But supposing that it is correct, it has no bearing upon the case before us. The question turns upon the meaning of the Bengal Civil Courts Act VI of 1871, Chapter III, entitled Ordinary Jurisdiction. Sections 18 to 20 define the jurisdiction of District Judges, Subordinate Judges, and Moonsiffs. Section 21 allows an appeal from the District Judges and Additional Judges to the High Court; and Section 22 enacts that "appeals from the decrees and orders of Subordinate Judges and Moonsiffs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds Rs. 5,000, in which case the appeal shall lie to the High Court." There are two possible constructions which can be put upon those words "the amount or value of the subject-matter in dispute," *viz.*, amount or value in dispute in the suit or in the appeal. I submit that the former construction is the correct one. This is a matter dealing with the ordinary jurisdiction of these Courts, and it seems to me that the value of the suit as originally laid is, where that value is correctly laid, the test to be used in determining to what Court the appeal will lie; and I submit that, if it was intended to be otherwise, there would surely have been some such words as "decree in appeal" put into the Section to convey that meaning, supposing that that was the meaning present in the minds of the Legislature. As this Act is of recent date, it is not possible to find any decision on the Act itself. [*Couch, C. J.*—Was there no previous Act or Regulation?] The previous Act was Act XVI of 1868, s. 18, which was as follows: "In suits decided by any Subordinate Judge in the exercise of his original jurisdiction, of which the amount or value of the subject-

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matter does not exceed Rs. 5,000, an appeal shall lie to the District Judge to whoes control such Subordinate Judge is subject. In all other suits decided by any Subordinate Judge" the appeal lay direct to the High Court. There can be no question that under the wording of s. 18 Act XVI of 1868, the invariable practice was to admit such appeals. There is nothing in Act VI of 1871 to show any intention on the part of the Legislature to alter any law as there laid down. It is an Act to consolidate the law. Then, again, what is the difference in the wording of the two Acts? Act VI of 1871 s. 22 says that "an appeal shall lie to the District Judge except when the amount or value of the subject-matter in dispute exceeds Rs. 5,000." Under Act XVI of 1868, s. 18, "in suits decided by any Subordinate Judge of which the amount or value of the subject-matter does not exceed Rs. 5,000, an appeal shall lie to the District Judge." There is the same term used in both, "the amount or value of the subject-matter in dispute," "the amount or value of the subject-matter." It, therefore, appears to me that s. 22 Act VI of 1871 must be read thus:—"In suits decided by Subordinate Judges in the exercise of their original jurisdiction, appeals from decrees or orders of such Judges shall lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds Rs. 5,000." It seems to me that the same words are used in both Acts, except that the collocation of the sentences is slightly altered. As to what is the subject-matter of dispute between the parties, when we look at the heading of the Chapter of Act VI of 1871, *viz.*, Original Jurisdiction, there can be no question that it is the subject-matter decided by the Lower Court in the exercise of its ordinary original jurisdiction, and therefore has no regard to the appeal. There is a decision of L. S. Jackson, J. (6 W. R., Mis. Rul., 4), which has considerable bearing on this matter. In that case the plaintiff brought a suit to assess rent upon a quantity of land in the occupation of the defendant, laying the value at Rs. 12,400. The Lower Court dismissed the plaintiff's suit as to a portion of the land, and gave him a decree for Rs. 9,232. The plaintiff did not appeal from that decision, and therefore it was final as regarded him. The defendant, being dissatisfied with the portion of the decree against him, appealed to the High Court, and the result of the appeal was that the plaintiff's suit was dismissed as to the entire claim. Thereupon the plaintiff desired to carry that portion of the case which had been decided by this Court in appeal to England. The defendant objected that the value of the appeal fell short of Rs. 10,000, and that consequently the appeal was inadmissible. The learned Judge observed:—"Now the whole property to which this demand or question related was admittedly of the value of more than Rs. 10,000. It is true that, as to a portion of the demand, the plaintiff failed in the Court of first instance, and by his omission to bring that matter in appeal before this Court, the decision on that part of the case has become final." His Lordship then goes on to say:—"It does not appear to me that the fact of appeal by the opposite party (as bringing that share of the property in respect of which he has been successful into question) is what determines the right of the other party to appeal, and consequently I think that in this case, even as the fact stands, the party who is dissatisfied with a judgment which has been passed, is entitled to bring his portion of the case before Her Majesty in Council." His Lordship concludes thus:—"It appears quite possible that, if enquiry were instituted, or if the possible amount of *wasilat* which might be awarded were taken into consideration, the value might amount to Rs. 10,000. But I prefer admitting the appeal upon the ground I have stated, namely, that a party, having involved in his appeal a question or demand respecting property which on the whole is of the value of more than Rs. 10,000, is entitled to bring his appeal, especially where the whole property was originally involved in the suit." Just apply the principle I have just stated, and see how it bears on the present case. My client laid his suit at admittedly more than Rs. 5,000, and he obtained a decree for considerably over Rs. 5,000, *i. e.*, the amount of the suit less Rs. 2,418. His appeal is for this sum of Rs. 2,418, and because it is less than Rs. 5,000, the respondent has made the present objection. Whether or not he can do so under s. 348, is a question which I submit for your Lordships' decision. But whether he can or not under s. 348, he cannot raise any question which will affect the whole claim so far as it has been decreed against him. Then, again, if my appeal only lies to the District Judge, the District Judge would not have power to try his cross-appeal. The subject-matter of dispute means subject-matter of dispute in the suit; and whether or not we regard the light thrown

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upon it by s. 348, the appeal must lie to this Court. The Act does not expressly or, as it appears to me, impliedly say that the amount must be the amount of dispute in the appeal.

Mr. Allan.—I appear in Regular Appeals Nos. 199 and 260 of 1871. In this case there are two appeals; the first (199) is preferred by my client, the plaintiff against the defendants, the other by the defendants against my client. The suit itself was valued at Rs. 5,324-15-6-18, besides interest. No objection was taken by the defendant to the valuation of the suit by the plaintiff, and the plaintiff obtained a modified decree. The appeal was preferred for Rs. 2,916-6-8-8, which was the amount disallowed. The defendants, not satisfied with the decree against them to the extent of Rs. 2,408-8-10, have preferred their appeal No. 260 of 1871. There is, therefore, this peculiarity in this case that there are two appeals, one by the plaintiff regarding the amount disallowed by the first Court, and the second by the defendants repudiating liability altogether. Both these appeals are before your Lordships, and will be heard simultaneously. They will be against the entire decision of the first Court, and there is no question that the subject-matter of dispute is the whole sum. The question is one of great public importance, because if the decision of the Court be against the right of appeal to this Court, the result will be to prevent suitors from appealing to the highest Court in the country, and obtaining the best legal opinion. There can be no doubt that, until the present question was mooted, the uniform practice has been that, in all suits valued at Rs. 5,000, the regular appeal has been allowed to be filed in this Court. And the question has now for the first time been raised, whether, in violation of that former practice, there is anything in s. 22 Act VI of 1871 to show that the Legislature intended to vary the procedure which has existed since 1837. In order to determine that, it is necessary to construe strictly the words in s. 22. One of your Lordships thinks that the words "in appeal" may be added after the word "dispute." Now, that Section may be read :— "Appeals from the decrees and orders *passed in suits* by Subordinate Judges and Moonsiffs shall lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds Rs. 5,000." The words "decrees and orders passed in suits" will constitute the antecedent to the words "in dispute." [*Markby, J.*—We do not want to introduce any words. The antecedent to the words "in dispute" is "appeals."] Without introducing any words whatever, and looking to the words "in dispute" in s. 22, are they to be limited to the dispute in the appeal, or to the dispute between the parties in the suit? By analogy to the case cited by Mr. Woodroffe, I should say it is clear that the subject-matter in dispute must refer to the suit; and why the same principle should not be adopted on the present occasion, I cannot understand. The sum or value clearly involves the whole sum. Should your Lordships however be inclined to think that the decree being under Rs. 5,000, the appeal can only be for that sum, I would ask your Lordships to remember that under s. 348, the respondent has a right to file a cross-appeal for the whole amount; and until the appeal of the appellant is concluded, it cannot be said that the respondent cannot claim the whole amount. Therefore, until the Court decide the matter in dispute, the amount or value will be the whole sum. In 6 W. R. Mis. Rul., 102, it was ruled by a Full Bench that a respondent may file with the Registrar, before the hearing of the appeal, a written notice of the objections which he intends, under s. 348 Act VIII of 1859, to take at the hearing; so that up to the very latest moment, the subject-matter of dispute is not the amount in dispute in the appeal; and it is quite clear that, in the case in which I appear, the two sums added together amount to more than Rs. 5,000. Then in 8 W. R., 322, it was held that, though a notice of a cross-appeal may be lodged with the Registrar previously, the cross-appeal itself must, under s. 348, be taken at the hearing of the appeal. Therefore, looking at the previous practice and at the words of s. 22 Act VI of 1871, the words "in dispute" must refer to the subject-matter of dispute between both parties, and not the amount in dispute in appeal which may be altogether varied by the cross-appeal filed at the last moment.

Baboo Nil Madhub Sein.—I appear in support of the Regular Appeal which has been preferred by Dooly Chund and others *versus* Nirban Singh. The plaintiff sued for about Rs. 7,000, and got a decree for about Rs. 3,000 principal. The original claim was for Rs. 7,935, *viz.*, principal Rs. 3,000, and interest from the date of the bond to the date it was stipulated to be paid at the rate agreed on, and from the date the suit was brought at 6 per cent. per annum. By Regulation XVI of 1797 (respecting

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appeals from the Sudder Court to the Privy Council), "the judgment appealed against shall, exclusive of costs of *suit*, be to the value of £5,000" (s. 2); and "the value of the property constituting the subject of the judgment appealed against is to be determined according to the nature of such property, whether land, money, effects, or otherwise, according to the general rules prescribed in like cases for determining the value of the same property, when constituting the cause of action in the Sudder Dewanny Adawlut and the several Civil Courts subordinate thereto." By Rule I of the Rules annexed to the order of Her Majesty in Council of the 10th April 1838, it was provided that no appeal should be allowed, "unless the value of the matter in dispute in such appeal shall amount to the sum of Co.'s Rs. 10,000 at least." By reference to 7 Moore's I. A., 261 and 553, it will be seen that, by *matter in dispute*, is meant the whole sum involved in the suit, which was the subject of judicial enquiry in the Courts below. The first law which was passed with regard to the jurisdiction of the late Sudder Court, in the matter of appeals, was Act XXV of 1837, in Section 4 of which it was enacted that, "in all suits exceeding the amount or value specified in Clause 1 Section 18 Regulation V of 1831 (or Rs. 5,000) which shall, under the authority of Section 1 of this Act, be referred to a Principal Sudder Ameen, the appeal from the decision of such Principal Sudder Ameen shall be direct to the Court of Sudder Dewanny Adawlut." By a Construction of the Sudder Court upon this Section No. 1282 (Constructions S. D. A., 1798 to 1847, p. 537, it was "held on a reference from the Judge of Mymensing that, in a suit laid at a sum exceeding Rs. 5,000, but in which the Principal Sudder Ameen gives a decree for a sum less than that amount, the appeal from the Principal Sudder Ameen's decree lies to the Sudder Dewanny Adawlut."

I will now put a case from which it will be seen that, if *the subject-matter in dispute* in s. 22 Act VI of 1871 be taken to mean the subject-matter of dispute in the appeal, great difficulty will arise. Suppose A sues B for Rs. 50,000, and B pleads non-liability, and A gets a decree for Rs. 2,000. A prefers a regular appeal in the High Court for Rs. 48,000, and B appeals to the Judge for Rs. 2,000 on the ground of non-liability. Should B get a decree in his appeal, A must prefer a special appeal. But suppose the special appeal is dismissed as containing no ground of law, and A's regular appeal is decreed upon the evidence. B appeals to the Privy Council against the decree of the High Court, whose decision in special appeal remains final, unless A obtains special leave to appeal to the Privy Council, and then their Lordships may have before them two conflicting decisions between the same parties upon the same evidence. Or, suppose that in B's appeal before the Judge, A takes an objection at the hearing of the appeal under s. 348, and the Judge then tries the whole matter valued at Rs. 50,000. Suppose then that the Judge decrees B's appeal, and dismisses A's cross-appeal, A thereupon prefers a special appeal, and your Lordships will not be able to go into the evidence; so that if the special appeal is dismissed, and the matter goes up in appeal to the Privy Council, their Lordships will have before them only one judgment upon the evidence.

I will put another case. Where there are no Small Cause Courts, the suits cognizable by those Courts where they exist are brought in the first instance before the Moonsiff, and from him in appeal to the Judge, whose decision is final both in original suits and execution of decrees. Suppose a suit is brought for less than Rs. 5,000, and the decision passed by the Judge remains final, and suppose the decree has swelled to more than Rs. 5,000, and the Moonsiff passes a decree against the decree-holder, will the appeal be to the Judge or to the High Court? [*Ainslie, J.*—Can the Moonsiff execute a decree above Rs. 1,000?] It has been held that a Court must execute its own decree. But suppose that there is a decree for costs above Rs. 10,000, and the matter comes up in regular appeal before the High Court, and suppose that the regular appeal is decided in favor of the decree-holder, and the Court allows the execution to proceed. Accordingly the decree-holder executes his decree, and realizes the amount of his decree from the sale of the property. But suppose a balance of Rs. 500 is left, the same question will be raised, and the matter will have to go before the Judge in regular appeal, whereupon the Judge may hold that the whole transaction was *benamee*, and disallow the execution. [*Couch, C. J.*—If you suppose such cases, the other side may quote cases of a different kind in support of their views.] I will only add that the words in the "suit" or "in the appeal" are left out of the Section, and therefore I contend that it was not the intention of the Legislature to

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change the procedure which has existed since 1837.

Baboo Unnoda Pershad Bannerjee (*contra*).—The whole question turns on the construction of s. 22 Act VI of 1871. Under the old law the practice hitherto has been that the appeal lay to the Sudder Court or the High Court according to the value of the suit. Act XXV of 1837 s. 4 enacted (*reads*). Act VI of 1871, however, was changed in the phraseology. Under Act XVI of 1868, the general rule was that the appeal lay to the High Court, except where the value of the suit was below Rs. 5,000. Under Act VI of 1871, the exception is that, if the value exceeds Rs. 5,000, the appeal shall lie to the High Court, otherwise to the Judge. Why should the Legislature have used the words "in suits"? Sections 19 and 20 refer to original suits. After having disposed of the jurisdiction of the Civil Courts in respect of its original jurisdiction, s. 21 refers to appeals, as also s. 22. Therefore the words "amount or value of the subject-matter in dispute" in s. 22 could not possibly mean subject-matter of dispute in the suit, for that Section refers only to appeals, and it evidently means amount or value of the subject-matter of dispute in appeals. Mr. Woodroffe cited a case from the 6 W. R. to show what construction had been put upon the law relating to appeals to the Privy Council. Now, the Rules in the Privy Council lay down that no appeal should be allowed "unless the value of the matter in dispute *in such appeal* shall amount to the sum of Co.'s Rs. 10,000 at least." [*Couch, C. J.*—Those words "in such appeal" are omitted in the Charter.] The words in the Charter are:—"Provided that the sum or matter at issue is of the amount or value of not less than Rs. 10,000, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than Rs. 10,000." The latter words explain that the *amount at issue* does not mean the amount in suit but the amount of the decision of the High Court. Then Act VI of 1871 is not simply a consolidating Act. It is an Act to consolidate and *amend*, and it lays down the jurisdiction of the different Courts. This is a question of jurisdiction, and it is not a question raised under s. 348. The decision of 28th May 1872 (cited by Mr. Woodroffe) is not applicable to the present case, inasmuch as the objection regarding over-valuation was raised by the defendant in the Lower Court, and the Court found that the plaintiff was not entitled to more than Rs. 2,500, the value of the lands without the mesne profits, inasmuch as his claim to mesne profits had not been decided. The defendant appealed to the High Court, laying his appeal at Rs. 2,500, and the question was whether the plaintiff could raise the question as to mesne profits under s. 348. Suppose a party brought a suit for Rs. 10,000, and got a decree for Rs. 4,000, his claim being dismissed as regards Rs. 6,000. According to the construction I am putting upon the law, the defendant will have to appeal to the Judge in respect of the Rs. 4,000. If the plaintiff chooses to appeal, he can appeal to the High Court for Rs. 6,000, and then the case that may be pending before the Judge may be brought up by a motion made before the Court, so that the inconsistency complained of will be removed.

Mr. Gregory (in reply).—With reference to the contention that Act VI of 1871 was an Act to consolidate and *amend*, the words in the Preamble were "to consolidate and amend the law relating to the *District and Subordinate Civil Courts.*" This shows that the law did not mean to take away any appeal which was hitherto allowed to the Sudder or High Court; and inasmuch as there are no distinct words in s. 22 to limit the construction as contended for by the other side, the appeals allowed to the High Court were clearly intended to remain as before. [*Couch, C. J.*—There are clauses in this Act which apply to the High Court. We are not to see the Preamble, when we find that the enactment itself is clear.] Reference has been made to s. 19 and the other Sections preceding s. 22. I do not think that the preceding Sections affect the matter at all. The words "to all like suits in which" in s. 20 do not appear in s. 22. If the latter Section was meant to refer to the amount or value in the appeal, then some such words as "in which" would be found in it as in s. 20. [*Couch, C. J.*—The words "in which" do occur in s. 22.] The words are "in which case," and they only refer to the amount as determining whether the appeal lies to the High Court or the Judge. [*Ainslie, J.*—You may substitute the words "in cases in which" for "when."] [*Couch, C. J.*—Suppose that there is a decree for Rs. 10,000 (as my brother Markby puts it), and the defendant complains about an excess of Rs. 5,000, and offers to pay Rs. 5,000, is he obliged to appeal to the High Court on

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account of Rs. 5,000, when he does not dispute the correctness of the decision as to Rs. 5,000. ?] The expression "subject-matter in dispute" would seem to point to what was the amount of dispute in the suit. [*Couch, C. J.*—How can the Rs. 10,000 be in dispute if the defendant admits Rs. 5,000? Suppose again that plaintiff has a decree for Rs. 10,000, and after decree defendant wishes to appeal for Rs. 1,000, where would his appeal lie? Under the old law he would have been obliged to come to this Court, because the language of the old law was so different. But now that there has been a change of language in the new law, the question is whether it was the intention of the Legislature to alter the jurisdiction.] The right of appeal to one Court or the other, which is what the Act provides for, is antecedent to what the appellant may do afterwards when he makes up his mind to appeal. Then the difficulties under s. 348 would be more serious, for suppose a decree is given for Rs. 5,000, and the suit is dismissed for Rs. 5,000, and both parties appeal to the Judge, or one party appeals and the other takes an objection by way of cross-appeal, the Judge would have to try a matter of the value of Rs. 10,000. The jurisdiction of the High Court cannot be taken away when there are no distinct words to that effect.

Mr. Allan.—Until the respondent files his cross-appeal under s. 348, it will be impossible for the Court to say what will be the amount in dispute in the appeal. And then as to the distinction made between ss. 19 and 20 as relating to original suits, and s. 22 as relating to appeals, I will only say that I draw from ss. 19 and 20 my strongest argument in favor of my construction of s. 22, for according to my view, s. 22 is only a corollary of ss. 19 and 20, and ss. 19 and 20 must be read in connection with s. 22 to show what the latter means. Another reason, in support of my view of the matter, is that the decisions of the District Judge are not appealable to the Privy Council, and no attempt has been made to answer this objection.

The judgments of the Court were delivered as follows on the 11*th July* 1872:—

Couch, C. J.—The question which is raised in this case is whether, where the original suit is brought for a sum exceeding Rs. 5,000 or for property exceeding that value, and the decree is for a less sum or for property of less than that value, the appeal is to lie to the District Court, or to this Court.

Before the passing of Act VI of 1871, there was no doubt that in such a case the appeal lay to the High Court. The words of Section 18 Act XVI of 1868, which was then the law, and which was only a continuation of the law, as it was previous to the passing of that Act, are very clear. They are:—"In "suits decided by any Subordinate Judge in "the exercise of his original jurisdiction of "which the amount or value of the subject-"matter does not exceed five thousand "rupees, an appeal shall lie to the District "Judge, to whose control such Subordinate "Judge is subject."

"In all other suits decided by any Subor-"dinate Judge, whether, in the exercise of "his original or appellate jurisdiction, the "appeal from the decision of such Judge "shall be direct to the High Court."

Act VI of 1871 is entitled "An Act to consolidate and amend the law relating to the District and Subordinate Civil Courts in Bengal;" and it recites that "it is expedient "to consolidate and amend the law relating "to the District and Subordinate Civil "Courts." Although it purports to be an amending Act, and such an alteration in the law as this would be with respect to the right of appeal may be considered by some persons an amendment, I think so important an alteration ought not to be held to have been made by the Legislature, unless the language used in the Act shows a clear intention to make it.

Now, Section 22 of the Act, upon the construction of which the question depends, is one of several Sections which begin by defining the extent of the original jurisdiction of the District Judge or the Subordinate Judge. Section 19 provides that the jurisdiction of a District Judge or Subordinate Judge extends to all original suits cognizable by the Civil Courts. Section 20 declares that the jurisdiction of a Moonsiff extends to all like suits in which the amount or value of the subject-matter in dispute does not exceed one thousand rupees, and Section 21 provides that appeals from the decrees and orders of District Judges shall, when such appeals are allowed by law, lie to the High Court; then Section 22 says:—"Appeals from the decrees and orders of "Subordinate Judges and Moonsiffs shall, "when such appeals are allowed by law, lie "to the District Judge, except where the "amount or value of the subject-matter in "dispute exceeds five thousand rupees," being

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the same expression which is used in Section 20 where the jurisdiction of the Moonsiff is defined.

For my own part, I cannot see any reason for supposing that in this Section the Legislature intended by 'subject matter in dispute,' the subject-matter in dispute in the appeal. And there is this reason, I think, for its not being so; the appeal is only a stage in the suit; it is not a fresh suit, but a part of the proceedings in the suit, and therefore, ordinarily, I should say that, with regard to the jurisdiction in appeals from decrees and orders of the District and Subordinate Judges, the expression 'the subject-matter in dispute' would mean the subject-matter in dispute in the suit itself, unless, of course, a contrary intention appeared as in appeals to the Privy Council, where the language is 'the subject-matter in dispute in the appeal.'

Then there is another and a cogent reason why that construction should be adopted, and that is the extreme inconvenience, or worse than inconvenience, which would arise if the other construction were adopted. There might be, and no doubt there would be cases, and probably many, in which the decree being for a smaller sum than Rs. 5,000, and the whole suit coming by the appeal as it must before the District Court, it would be open to the respondent to object, without bringing any cross-appeal, that the decree ought to have been for a larger amount or for the whole of the sum claimed; and thus the District Court, as an Appellate Court, would have to adjudicate upon the right to a sum exceeding Rs. 5,000, and in a suit of the description that ought to come to the High Court in appeal.

There might also be the further difficulty that the plaintiff having got a decree for less than Rs. 5,000 being dissatisfied with it, and considering that he was entitled to the whole sum which he claimed, might appeal to the High Court against it, the other party appealing to the District Court against the decree as it affected him. Probably in such a case, the only course that could be adopted would be for the High Court to have the appeal to the District Court transferred to itself, and hear both together.

That is a state of things which would cause so much inconvenience that I think the language of the Legislature admitting of the construction that the subject-matter in dispute is the subject matter in dispute in the suit, we ought to adopt it. If the intention was to make so important an alteration with regard to the jurisdiction in appeal as the other construction would be, it ought to have expressed it more clearly. I think, therefore, that the appeal mentioned in the reference by the Deputy Registrar ought to be admitted, and the other appeals in which this question has been raised will be brought on for hearing in the ordinary course.

Bayley, J.—I am of the same opinion.

Markby, J.—I am of the same opinion. I think the construction put by the Chief Justice on the Section in question is the right one. It is quite true that Mr. Justice L. S. Jackson and myself, in considering this same question, had decided that the appeal, wherever it was, for a sum less than Rs. 5,000 must go to the District Judge; but the matter has been now much more fully argued, and I think that the inconvenience which would arise under Section 348, pointed out by the Chief Justice, is a good ground for our holding that the Legislature did not intend to alter the practice existing at the time the Act was passed.

Ainslie, J.—I concur.

The 12th July 1872.

Present:

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Jurisdiction—Act VIII of 1859 *s.* 5—*Sale of Mortgaged Property—Decree (setting aside part of).*

In the matter of
S. J. Leslie, *Petitioner,*

versus

The Land Mortgage Bank of India, Limited, *Opposite Party.*

Mr. Branson for Petitioner.

The Advocate-General for Opposite Party.

A suit for the sale of mortgaged property in satisfaction of the mortgage-debt is a "suit for land" within the meaning of s. 5 Act VIII of 1859. A decree in a suit in the mofussil for the recovery of a mortgage-debt with interest, and in default for sale of the mortgaged property, enables the plaintiff to sell the mortgaged property as it stood at the time of the mortgage and clear of all subsequent incumbrances. Such a sale completely bars redemption.

Where a decree was sought to be altogether set aside, and there were no materials for separating the legal from the illegal part of the decree, the Court declined to set aside a part of it.

Markby, J.—In this case, a rule was issued calling upon the plaintiffs to show cause why the decree of the Judge of the

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Twenty-four-Pergunnahs, dated the 10th October 1871, should not be set aside upon the ground that the said decree was made without juristdiction.

The decree in question was given in a suit in which the plaint states that the suit was brought "to recover Rs. 29,070-5-6, the aggregate amount of principal, interest, and costs due under a deed of mortgage, and in default of payment for sale of the mortgaged property."

The plaint then sets out briefly the provisions of the deed of mortgage, and that the plaintiff had been put to expenses in respect of certain matters connected with the property which they claimed to recover against the defendant; that subsequently the defendant mortgaged the same property to one Dear; that the plaintiffs had given the tenants of the mortgaged property notice to pay the rents to themselves; that they had demanded payment both from the defendant and from Dear, neither of whom had paid the money demanded.

The plaintiffs prayed for a decree that the defendant should pay to the plaintiffs the above sum with interest.

2. That, in default of such payment being made by a time to be fixed by the Court, the property mortgaged might be sold by the Court, the plaintiffs being at liberty to bid.

3. That the amount to be realized by such sale might be applied in payment of the amount to be decreed to the plaintiff, that the plaintiffs might be at liberty to execute the decree against the defendant or his property for any balance which might remain owing, and that all proper parties might be ordered to concur in the conveyance.

4. That a Receiver should be appointed to manage the property.

5. That, if necessary, an account should be taken.

In the plaint, the plaintiffs were described as of No. 3, Mangoe Lane, Calcutta; the defendant as of the town of Calcutta, Attorney-at-Law.

The mortgage-deed is not before us, but it is stated to have been a conveyance by way of mortgage, and was made in Calcutta between Europeans; it was, therefore, probably in the ordinary English form. It contained a power of sale, and a covenant for re-payment of the money.

The mortgaged property is situate at Dum-Dum within the district of the Twenty-four Pergunnahs.

It is said that this was not a suit cognizable by the Judge of the Twenty-four-Pergunnahs, because it was not a suit for land. It was contended that it was a suit upon a cause of action which arose in Calcutta, where the defendant was described as dwelling. There was some doubt whether the defendant in fact then resided in Calcutta or elsewhere; but it was admitted that the defendant was not dwelling or personally working for gain in the district of the Twenty-four-Pergunnahs when the suit was brought: the plaintiffs however contended that the Judge of the Twenty-four-Pergunnahs had jurisdiction, inasmuch as this was subtantially a suit for land.

I think that the plaint, so far as it asks for a sale of the mortgaged property in satisfaction of the mortgage-debt, is a "suit for land" within the meaning of Section 5 of the Code of Civil Procedure which regulates the jurisdiction in this case. Mr. Branson contended that these words should be read as signifying those suits alone in which the land itself is sought directly to be recovered. It was admitted that a much wider construction had been put by Mr. Justice Macpherson upon the similar words of the Charter of the High Court; that learned Judge holding that a suit for foreclosure by the mortgagee was as such a suit for land (1 Ind. Jur., N. S., 40), and that a suit for redemption was so also (1 Ind. Jur., N. S., 319); but it was contended that these decisions were not correct. We see no reason to suppose this. They have never been questioned as far as we are aware. On the contrary, the uniform practice of this Court on its original side has been in accordance with them. They are also supported by the decision reported in IX Weekly Reporter, 173, where it was held that a suit brought to enforce a security against land was a suit for recovery of an interest in immoveable property within the meaning of Clause 12 of Section I of Act XIV of 1859. Upon the authority of these decisions, I hold that a suit for land includes any suit in which a decree is asked for operating directly upon the land, and, therefore, includes any suit brought to enforce a security upon land.

It was contended, however, that this was a suit neither for foreclosure nor redemption, nor in any way to enforce a security upon land, but simply for money to be recovered by the sale of the plaintiff's property through an attachment and sale in the usual way. This, however, is not so. It is perfectly well established that a decree in a suit like the resent in the mofussil Courts enables the

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plaintiff to sell the mortgaged property *as it stood at the time of the mortgage* and clear of all subsequent incumbrances; and that such a sale completely bars redemption: whereas a suit brought simply on the provision to repay the loan will only enable the plaintiff to sell the interest which the defendant has at the time of execution. I think that we cannot upon this rule enter into any enquiry as to the origin or validity of a procedure so well established.

This being so, I hold that this is a suit for land in the same sense that a suit for foreclosure or redemption on the original side has been held to be a suit for land.

Lastly, it is said by Mr. Branson that the decree is at any rate without jurisdiction so far as it directs execution to be taken out against the property of the defendant other than the mortgaged property. This contention is to some extent right. The Judge had no jurisdiction to entertain a suit upon the covenant to repay. This has no connection with a suit for land; and so far as it is a cause of action, it did not arise within the Twenty-four Pergunnahs. Before, therefore, proceeding with this part of the suit, the leave of this Court should have been obtained. But then there is this difficulty in rectifying the error upon this application. The Judge of the Twenty-four-Pergunnahs had authority to order the mortgaged property to be sold; he had also authority to find what sum was due from the defendant to the plaintiff upon the mortgaged security; he had also authority to order the defendant to pay costs. Now we have not the actual decree before us, but only the minutes of the decree; and supposing the decree to be in the same terms as the minutes, the only part of the decree which relates to this portion of the suit is that which directs that, "in the event of the "said purchase-money being less than the "total amount of principal, interest, and costs "hereby declared to be due to the plaintiffs, "the plaintiffs shall be at liberty to execute "the decree against the defendant or his "property for the balance which may re-"main due." But even this part of the decree is perfectly within the District Judge's jurisdiction so far as relates to costs; and if the only balance which is now due under the decree is for costs, or if the plaintiff is only executing the decree in respect of costs, the execution proceedings which are now being carried on, and which the plaintiff desires to get rid of, are perfectly legal. And we have no materials for separating the legal from the illegal part of this portion of the decree. Indeed, this result is not at all contemplated either by the petition on which the rule is founded, or by the rule itself, which both pray that the decree may be altogether set aside; and that is the only point the Advocate-General has argued. I think, therefore, that we ought not to set aside any part of this decree, and that the rule should be discharged with costs.

I am authorized by Mr. Justice Ainslie to say that he concurs in disposing of the rule in this way.

The 13th July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Act XXVII of 1860—*Outstanding Debts—Limitation—Disclaimer—Right to Rent.*

Case No. 190 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 2nd August 1871, *modifying a decision of the Subordinate Judge of that district, dated the 20th March* 1870.

Shibdyal Tewary Chowdhry (Defendant), *Appellant,*

versus

Biddyamoyee Debia Chowdhrain (Plaintiff), *Respondent.*

Baboos Kally Mohun Dass and *Nullit Chunder Sein* for Appellant.

Baboo Rash Behary Ghose for Respondent.

Act XXVII of 1860 does not contemplate that debts beyond a certain date or the date of the certificate shall not be collected, but that, on the contrary, all debts due to, and outstanding at the time of the death of, the deceased, shall be collected and accounted for.

A disclaimer by petitioner of a right to rent under a deed of transfer was held sufficient.

Bayley, J.—I AM of opinion that this special appeal should be dismissed with costs.

The suit was originally instituted by Chundra Bolee Dabia, after whose death it was prosecuted by Biddya Moyee Dabia as her representative, against Shibdyal Tewary for arrears of rent under a kubooleut. The kubooleut was given to one Bhoobun Moyee Dabia, the widow of Bhobanee Kishore Acharjee. Bhoobun Moyee Dabia died on the 5th Joit 1274, and the aforesaid Chundra Bolee Dabia succeeded as mother of Bhobanee

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Kishore Acharjee. Subsequently she also died in Bysack 1277, and Biddya Moyee succeeded her. The first Court decreed the plaintiff's suit but refused interest. The Lower Appellate Court dismissed the defendant's appeal, and on plaintiff's cross-appeal allowed the interest.

The special appeal as brought before us in the petition of appeal, and in fact as argued before us, is mainly on the points,—that Biddya Moyee Dabia has no right to sue, as she is not the defendant's landlord; that limitation bars the rent of Aughran and Magh, that there was an admitted ouster, and that it was the duty of the Judge to see whether during that ouster the plaintiff has not realized the rent; that Chundra Bolee's deed of gift in favor of Ram Kishore Acharjee was misconstrued; and that interest ought not to have been given.

The plaintiff Biddya Moyee appears in this suit as the representative of Chundra Bolee Dabea under a certificate according to Act XXVII of 1860 authorizing her to collect the *outstanding* debts due to Chundra Bolee. Now, if the rents were due to Chundra Bolee, the plaintiff, as her representative under the certificate, has every right to sue and collect them as *outstanding* debts. The law does not contemplate that debts beyond a certain date or the date of the certificate shall not be collected, but that on the contrary it contemplates that all debts *outstanding* at the time of the death of the deceased due to her, shall be collected and accounted for. The case cited from 2 Weekly Reporter, page 49, is not an analogous case, it not being for arrears of rent.

It was then said that Ram Kishore Acharjee was made owner of Chundra Bolee's property by means of a স্বত্বত্যাগ অর্পণ পত্র deed of transfer, whereby she conveyed all her rights to him. But Ram Kishore comes forward in this suit and states that he has no claim whatever to the property.

It is said that a simple petition of the kind filed by this party under the deed is not sufficient to enable a party to disclaim rights duly conveyed. In this suit, the claim is for rent. If Ram Kishore is the proper party to sue, and he comes forward and says that he is not the proper party to sue, and does not want the rent, the Court cannot force him to prosecute this suit.

As to limitation, it is quite clear that the period of three years from the last day of the year in which the arrear claimed shall have become due, is the period of limitation allowed under Section 29 Act VIII of 1869 B. C. for suits for the recovery of arrears of rent, and therefore the attempt to regard the kists as the dates of cause of action and take out certain kists of rent as being barred by limitation is untenable.

On the point of ouster the Lower Court finds that there was an ouster although it says that there was no *forcible* ouster; but there is nothing whatever to show the collection of those rents legally and really due to the defendant was prevented by plaintiff.

As to interest, I think the Lower Appellate Court's reasons as given by it are quite sufficient to justify the decision of the cross-appeal in the way the Lower Appellate Court decided it.

The appeal is dismissed with costs.

Ainslie, J.—I concur in dismissing the appeal with costs.

The 13th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Kubooleut at enhanced Rates—Notice—Decree for less than claimed—Informality of Notice.

Case No. 138 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 18*th September* 1871, *reversing a decision of the Moonsiff of that district, dated the* 4*th January* 1871.

Gopeenath Jannah (Plaintiff), *Appellant,*

versus

Jeteo Mollah and others (Defendants), *Respondents.*

Baboo Ashootosh Dhur for Appellant.

Baboos Tarucknath Dutt and *Woomesh Chunder Banerjee* for Respondents.

Where a tenant has had full and timely notice of the grounds on which his landlord claims a *kubooleut* at enhanced rates, the landlord is entitled to a decree for a *kubooleut* for what he may prove to be a fair and legal demand, notwithstanding his failure to prove his right to a *kubooleut* at the rate fixed by him.

The plea of informality of notice on the ground that it contained all the grounds of enhancement allowed by law, was disallowed, inasmuch as the ryot had not shown that he had been prejudiced thereby, or had been in any difficulty as to what he was called upon to answer.

Glover, J.—THIS was a suit for a *kubooleut* at enhanced rents after notice. The

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plaintiff claimed to receive Rs. 113-9-5 as an area of 24 beegahs 3 cottahs 1 gunda. The defendant alleged that he held 19 beegahs 5 cottahs at a rent of Rs. 57-1-10, which could not be enhanced.

The Moonsiff decided that the defendant held 22 beegahs 1 cottah 13 gundas, and that the proper rent payable was Rs. 96-14-6 for which he decreed a *kubooleut* to run from the ensuing year.

The Judge, on appeal, held that, as the plaintiff had failed to prove his right to a *kubooleut* at the rate of Rs. 113-9-5, his suit should have been dismissed under this Court's Full Bench precedent, Gholam Mahomed *versus* Asmut Ali Khan (X Weekly Reporter, F. B., 14), and that in any case plaintiff ought not to have got a decree for enhancement, as the notice served on the defendant was informal.

The first question we have to decide in special appeal is whether the ruling laid down in Gholam Mahomed *versus* Asmut Ali Khan, and afterwards followed in Kunchun Deo Singh *versus* Tekaet Sidhnath Singh (XV Weekly Reporter, 289), and in Shib Ram Ghose *versus* Pran Pariah and others (XIII Weekly Reporter, 280), applies to this case.

After full consideration, and not forgetting the very important nature of the question at issue, I am of opinion that it does not. In the cases referred to, the suit for a *kubooleut* was brought without any previous service of notice of enhancement. In the Full Bench case, express mention is made of this fact; and in the two others there is no allusion to any notice, and it appears to me that there is the widest possible difference between the two classes of cases. It may be, and I think it is quite right, that, where a landlord, without any previous notice sues a tenant for a *kubooleut* at a certain fixed sum, he should be held to a strict proof of his claim to have a *kubooleut* at that fixed sum, and that if he fails, his suit should be at once dismissed, even though he be able to prove that he is entitled to a *kubooleut* for some smaller sum. And the reason is that the tenant has been taken unfairly by surprise. His first intimation of his landlord's intention has been a suit for a *kubooleut* at a rate much higher than he has hitherto been paying; he has not been informed of the precise grounds on which this demand for a new contract is based; and he has had no opportunity, if he wished it, of avoiding litigation, except by paying the entire demand. In such a case, it is right that the landlord should be obliged to prove every title of his claim, and should have his suit dismissed if he fails.

But where the tenant has had full and timely notice, the case seems to me very different. He knows that his landlord is dissatisfied with the present rate of rent, and thinks he ought to get more; he knows what the grounds of the landlord's claims are, and he knows whether or not he can expect to resist them. The landlord says—The rent you pay is less than you ought to pay; you have more land than you say you have; other ryots of the same class and with similar advantages pay more; the productive power of the land has increased, &c., &c. The rent you ought to pay is so much, and I desire that you enter into a new agreement with me at that rate.

I do not see why, in such a case, the landlord should not have a decree for what he can prove is a fair and legal demand. In the present case, the difference seems to have mainly arisen in consequence of there being more than one measurement standard relied on. But speaking generally, I do not see why, in cases where the ryot has had ample notice and full opportunity of making out his own case, the landlord should lose his, and with it rights which have been nearly all of them established, merely because his estimate of what the ryot ought to pay was slightly exaggerated. I think he is entitled to have a *kubooleut* for what he has proved to be an honest demand.

With regard to the second question, *viz.*, the informality of the notice, I do not think the Judge is right. The notice contained no doubt all the grounds of enhancement allowed by law; and if it could have been shown that the ryot had been in any way prejudiced thereby, or had been in any difficulty as to what he was called upon to answer, there would have been some reason for disregarding it. But in this case the defendant has contested in the most determined manner every single ground of enhancement. He has objected to the plaintiff's calculation of the area of his holding, has objected to the classification of his lands, to the rates of each different kind, and to the allegation that the productive power of the land had increased; and the Moonsiff, after taking evidence, gave a decision on the merits of each particular objection.

It is clear, therefore, that the defendant has been in no way prejudiced by the plaintiff's lumping up together all the possible grounds of enhancement in one notice;

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and that being so, I do not think that we should be justified in interfering.

My opinion is, therefore, that the decree of the Judge should be reversed, and that of the Moonsiff restored with costs.

Kemp, J.—I am of the same opinion.

The 15th July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Pleadings—Inconsistent Titles.

Case No. 189 of 1872.

Special Appeal from a decision passed by the Assistant Commissioner and Subordinate Judge of Burpettah, dated the 12th October 1871, *affirming a decision of the Moonsiff of Burpettah, dated the 21st August* 1871.

Doss Ram Doss (Defendant), *Appellant,*

versus

Mohendro Roy Decha and another (Plaintiffs), *Respondents.*

Baboo Bhuggobutty Churn Ghose for Appellant.

Baboo Obhoy Churn Bose for Respondents.

Plaintiff having set up a title by purchase of the whole property from K. C. was held not at liberty to change his case entirely and to come in and set up another and inconsistent title, apparently founded either on inheritance or joint purchase with K. C.

Ainslie, J.—THE first plea taken by the special appellant is that there is no cause of action. We think that the application of the auction-purchaser to have his name registered in the Collectorate as the sole proprietor of the property in dispute, was, under the circumstances alleged in the plaint, if they could have been proved, a sufficient cause of action. But, on the second ground, we think the special appellant must succeed. The plaintiff's petition of the 2nd July 1857, seems to us to be distinctly an allegation that he took the whole property by purchase from Kishen Chunder Roy. It has been suggested that, if the order made upon that petition had been before us, we should have found that it was not so. However, that order is not upon the record, and we must deal with the case as we find it. We think that the plaintiff having set up a title by purchase of the whole property from Kishen Chunder is not now at liberty to change his case entirely and to come in and set up another and inconsistent title, apparently founded either on inheritance or joint purchase with Kishen Chunder. In support of this ruling, we refer to a judgment of their Lordships in the Privy Council in the case of Eshan Chunder Sing *versus* Shama Churn Bhutto, reported in 6 Weekly Reporter, page 57, Privy Council Rulings. We therefore think that the plaintiff's suit ought to have been dismissed; and, reversing the judgments of the Courts below, we dismiss the suit with costs in all the Courts.

The 15th July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Settlement Proceedings—Construction—Proprietary Right—Limited Interest—Transfer.

Case No. 183 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 28th September 1871, *modifying a decision of the Moonsiff of Chowkee Bajitpore, dated the 28th September* 1870.

Mr. W. G. N. Pogose and another (Plaintiffs), *Appellants,*

versus

Aozan Bibee and others (Defendants), *Respondents.*

Boabos Kally Mohun Doss and *Doorga Mohun Doss* for Appellants.

Moonshee Mahomed Yusoof for Respondents.

Where a settlement of a talook, although it ran for 20 years only, was with a person professing to be a proprietor,—HELD that the settlement conferred a proprietary right, and not a limited interest; and that the plaintiff's vendor, having been admitted to a share in the settlement with a *maliki* allowance, became a co-sharer in the proprietary interest which proprietary right had been transferred to the plaintiffs by their purchase.

Bayley, J.—I AM of opinion that this special appeal should be allowed with costs, and the judgment of the Lower Appellate Court reversed. This case was remanded by Mr. Justice E. Jackson and myself on the 10th July 1869, * we then held that

* 12 W. R., 150.

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the Lower Appellate Court had thoroughly misunderstood the legal effect of the proceedings of the Revenue Commissioner, and had also failed entirely to distinguish that the proper and distinct jurisdiction of the Resumption Court was to declare, whether lands were liable to assessment for Government revenue or not, and not to determine the proprietary right and title, the latter being a question for the consideration of the Civil Courts.

I may here mention that the plaintiff sued the Collector of Sylhet in respect of 8 annas, but that appeal has been withdrawn.

The plaintiff also sued Meherban Bibee as his vendor for 1½ anna. He also sued Aozan Bibee who admittedly had the same interest as the plaintiff.

The last defendant's answer was, that she purchased the rights and interests of the judgment-debtor, Abdool Hossein or Abdool Kurrim (for it was admitted before us by the respondent that they were very much the same parties) and claims upon that title.

I wish here to go back to the judgment of the first Court, because it seems to me that it contains in a very few words the real questions to be decided in this case. The finding of that Court is this:—

"On examining and considering all the "documentary evidence adduced by the plain-"tiffs and the Collector, I come to the conclu-"sion that the disputed julkur river Dhonne-"pore was owned and held by the plaintiffs "and others as appertaining to *Jol* mehal "*Gangkanchee* belonging to the 7-5-1 annas "share, the auction purchased zemindaree of "Government, *and* to 8-14-3 annas share "which constitute the zemindaree of the "plaintiffs in Pergunnah Janshaye in Zillah "Mymensingh; that the plaintiffs have been "dispossessed in the manner as stated in the "plaint; that no portion of this *julkur* is in "Zillah Sylhet; that Government has no "right or possession in the same as apper-"taining to Sylhet, and that the suit insti-"tuted by the plaintiffs is not affected by "the general law of limitation."

On appeal, the Lower Appellate Court has, after remand, decided against the plaintiff on the ground that Meherban Bibee had nothing but a temporary farming right to transfer, that the 20 years settlement, *viz.*, from 1849 to 1869, was a mere farming settlement, and that the term had expired in 1275.

Plaintiff appeals specially. He relies on the plea that the settlement proceeding of the 4th April 1860 has been entirely misconstrued by the Lower Appellate Court. On the other hand respondents' pleader, Moonshee Mahomed Yusoof, strongly relies on the ground that the Lower Appellate Court has found as a fact that there was a temporary settlement only and no proprietary interests were created and passed, and that finding of fact cannot be interfered with in special appeal.

Looking into the nature of the rights transferred by Meherban Bibee to the plaintiff, we find that every word in the *kobalah* is consistent with the transfer of a distinct *proprietary* right, and there is no reference whatever in its terms to any *ijarah* right at all. It may be said, however, that the *kobalah* by itself is not sufficient to give the plaintiff a title. But the real thing to see is, what is the character of the plaintiff's vendor's title, whether it is not of a *ryotee* character or not, and whether the settlement proceeding of the 4th April 1860 merely recognized her as a farmer or the holder of a limited interest only for 20 years, and not of the *proprietary* interest, or whether she was recognized and admitted *as proprietor* with Abdool Hossein or Abdool Kurrim.

We have heard the whole of the settlement proceeding read. It speaks of the right as derived from the fact of Meherban Bibee's being *maliki* and that her right was a *maliki* right; that when it was discovered in the old record that the plaintiff's ancestor was a zemindar, that is, *proprietor*, her right to the settlement was admitted. Malikana is also allowed. It is true that the word *maliki* is omitted in the kobalah, and the settlement runs for 20 years only. But it is not impossible that for certain reasons there was some settlement with the proprietor for a limited period only. Be that as it may, the documents and evidence shew that the settlement proceedings do in fact give the *proprietary* right.

Some stress has been laid by the pleader for the respondent on the remark made by the Lower Appellate Court that Ali Hyder, the husband of Meherban Bibee, is still alive. The Lower Appellate says:—

"It is mentioned in the roobokarry relat-"ing to the settlement that the name of Ali "Hyder, the husband of Meherban Bibee, "was recorded in the Collector's sherishta "as proprietor. But the said Ali Hyder is "still alive; how can it then be explained "that Meherban Bibee had a permanent right "in the mehal in question? I hold, therefore, "that Meherban Bibee had only a temporary

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"right in the mehal in dispute, and the "plaintiffs have purchased that right only."

The Collector himself records that Meherban Bibee had a proprietary right, and that because of her *maliki* right she was admitted to a share in the settlement and a *maliki* allowance was made in her favor. The term of 20 years only limits the right of Government to demand increased rent during that term. It may be that a mehal is recorded in the rent roll and paying revenue to Government in the name of the husband, but that with such a settlement record as that before us, it was certainly not an *ijarah* right only to which the wife was admitted. It is entirely going out of the ordinary rule of construction of the words to hold in this case that the intention of the settlement proceeding of the 4th April 1860 was not to confer a proprietary right to Meherban Bibee, and that proprietary right was not conveyed by Meherban Bibee to the plaintiff.

In this view of the case I would reverse the decree of the Lower Appellate Court and restore and affirm the decree of the Court of first instance with costs in all the Courts.

Ainslie, J.—I entirely concur with Mr. Justice Bayley in thinking that the Subordinate Judge has mistaken the effect of the Collector's proceedings of the 4th April 1860, and it seems to me that the finding of the Subordinate Judge to the effect that Meherban Bibee had no interest but what arose out of that temporary settlement is inconsistent with his finding on the plea of limitation, because it is quite clear that if Meherban Bibee took merely as a lessee of the Government, her possession would in no way meet the plea of limitation. The settlement of 1849 was not in any sense an *ijardaree* settlement: the kubooleut distinctly shows that it was a settlement of a talook with a person professing to be a proprietor, and when Meherban Bibee became a party to that settlement in 1860, it was impossible that she could have become a party on any other footing except as a co-sharer in the proprietary interest. The Subordinate Judge having dealt with this settlement as creating only a limited interest in Meherban Bibee, his judgment is clearly based on an unsound view of the Collector's proceeding of the 4th April 1860, and therefore I think it ought to be set aside and that of the first Court restored.

The 15th July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Sale—Regulation VIII of 1819—*Regulation VII of* 1825—*Putnee—Implied Warranty.*

Case No. 297 of 1872.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 6th October 1871, *affirming a decision of the Subordinate Judge of that district, dated the 15th May* 1869.

Khelut Chunder Ghose (Defendant), *Appellant,*

versus

Kristo Gobind Deb, after his death, Bama Soondery Dossee in his place, who did not appear in this appeal (Plaintiff), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.
No one for Respondent.

There can be no analogy between a sale under Regulation VII of 1825, in which the rights and interests of the judgment-debtor whatever they might be are put up for sale, and a sale under the Putnee Regulation VIII of 1819 where there is an implied warranty on the part of the zemindar to give possession to the purchaser.

Bayley, J.—We are clearly of opinion that this appeal should be dismissed. There is no ground whatever for saying that there is any such error in law as to justify our interference in special appeal with the finding of the Lower Appellate Court.

It is contended by the pleader who conducts the special appeal that the remand order of this Court was not confined to requiring the Lower Appellate Court to find whether there was collusion or not, but that other questions were left open, specially the question whether there was an implied warranty to give possession on the part of the zemindar to the purchaser in this sale of a putnee under Regulation VIII of 1819. In this case, it is admitted on all sides that the putnee alleged to have been sold was held by competent authority to belong to altogether another zemindary.

We find the remand order that the sole object of the remanding Judges, Mr. Justice Elphinstone Jackson and Mr. Justice Onoocool Chunder Mookerjee, was to require the Lower Appellate Court to find whether there were circumstances in the case to show collusion and fraud, and thereby to

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deprive the plaintiff of any benefit on account of such fraud.

The Judge, in accordance with the directions in the remand order, goes into the case, and finds that the circumstances in it do not show fraud.

In this finding, the Judge says,—"The "only thing against plaintiff or his father "are, 1*st*, that they did not assist Khelut "Chunder; and, 2*nd*, that plaintiff bought "and plaintiff's father was durputneedar. "We find these two facts proved. But that "is all. It is loudly said Khelut Chunder "was a stranger, and consequently ignorant "and consequently helpless, and that plain-"tiff or his father, who might have saved "him, wickedly abstained from helping in "any way, but we really do not see any "reason for blaming them. Was it the "business of either of them to rush and "help Khelut Chunder? If he wanted help "why did he not ask for it? why did he not "summon those who could help him?"

The Judge finally definitively holds that he does not see any reason to believe that the plaintiff was guilty of any fraud. He comes to the conclusion of his judgment in these terms,—"I have heard defendant's "witnesses and seen all the documents his "pleaders refer to in the case, and I see no "reason whatever to suppose that plaintiff, "or plaintiff's father, or any one else was "in collusion with Chunder Money, or that "plaintiff or plaintiff's father had any col-"lusion with any body at all."

This is a most clear finding of fact which it is not for us to interfere with in special appeal, whether it is right or wrong as a matter of fact.

Then as to the question of the implied warranty having been left open (as it is contended by the pleader for appellant) for determination by the Lower Appellate Court, we think it is better when verbal technical criticisms of parts of judgment are so frequently resorted to by pleaders to quote the words of the senior Judge who remanded the case (the junior Judge not expressing dissent in any way). The words are as follows: "The zemindar in such a "sale guarantees to the purchaser that he "is selling a putnee which is to be found, "and not a myth."

There is a case which is quite against the contention of the special appellant, and that is to be found in 9 Weekly Reporter page 371, Civil Rulings. The other case quoted from the 12 Weekly Reporter page 8, Full Bench Ruling, is a case of a sale under Regulation VII of 1825, in which the rights and interests of the judgment-debtor, *whatever they might be*, are put up for sale. But the sale under the Putnee Law is quite a different thing, and no analogy can exist between a sale under Regulation VII of 1825, and a sale under the present Putnee Law.

There is no ground for this special appeal, and it is dismissed without costs. Respondent not appearing.

The 16th July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Construction—Decree—Bond—Interest.

Case No. 131 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 21st February 1872, affirming an order of the Moonsiff of Monghyr, dated the 12th October 1871.

Syed Shah Aleh Ahmed Shahazadanusheen (Decree-holder), *Appellant,*

versus

Bany Singh (Judgment-debtor), *Respondent.*

Mr. R. E. Twidale and Moulvee Marahmut Hossein for Appellant.

Baboo Anund Chunder Ghosal for Respondent.

Where a bond provided for the payment of interest from the date of the bond on failure of payment of the principal on a certain date, and the decree awarded "the entire sum of money covered by the bond,"—HELD that the decree meant something more than the principal, and could only mean the principal together with the interest accruing thereon.

Ainslie, J.—THIS appeal must be decreed with costs. The respondent seeks to explain the meaning of the decree of the High Court by introducing a consideration of the circumstances of the case. But we are of opinion that the decree can be interpreted and understood without going beyond the four corners of the paper that contains it. The terms of the decree are as follows:—

"By consent of the vakeels for the several parties, it is ordered and decreed by the said Court that this appeal be dismissed on the terms following,—that is to say, that it is declared that the appellant be at liberty

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to redeem the property, subject of suit, by payment to the plaintiff, respondent, within three months from the date of this decree of the *entire sum of money* covered by the bond of the 11th July 1856 in the plaint mentioned."

The bond provided for the payment of 175 Rupees without interest up to a certain date, and, on failure of payment in one lump sum on that date, of the whole amount, but interest should run from the date of the bond. Now, if the intention of the Division Bench of the High Court had been to exclude interest, it would probably have done so either in specific terms or by using the word *principal*. We should have expected that the order would have been *by payment of the principal sum covered by the bond*, or *the money advanced without interest*. But when the words, *entire* sum of money covered by the bond, are used, it is quite clear that the decree means something more than the principal, and can only mean the principal together with the interest accruing thereon.

We therefore reverse the judgments of the Courts below and decree the appeal, allowing to the decree-holder to include in executing his decree interest on the principal sum of 175 Rupees from the date of the bond to date of payment, and costs of all the Courts and interest thereon as already decreed, together with costs of this appeal and all costs incurred in executing the decree.

One gold mohur is allowed for Pleaders' fees in this Court.

The 16th July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Jurisdiction—Execution of Decree.

Case No. 149 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 8th April 1872, *reversing an order of the Subordinate Judge of that zillah, dated the 27th September* 1871.

Ishan Chunder Roy (Decree-holder), *Appellant,*

versus

Tarruck Chunder Bhuttacharjee (Judgment-debtor), *Respondent.*

Baboo Sree Nath Dass for Appellant.

Baboos Romesh Chunder Mitter and *Nulit Chunder Sein* for Respondent.

Not an assumption merely, but a clear finding of the fact upon evidence, whether the subject-matter of a suit was within the jurisdiction of a Court at the time when the application for execution of the decree was made, is necessary to determine whether the Court has jurisdiction in the matter.

Bayley, J.—THE question in this case is whether the subject-matter in dispute lay within the Civil jurisdiction of Rajshahye or the Civil jurisdiction of Pubna. The case was taken up, tried, and decided by the Subordinate Judge of Zillah Rajshahye: at that time it was not contended by any one, although the Court of the Subordinate Judge of Pubna was then in existence, that the Subordinate Judge of Rajshahye had no jurisdiction over the subject-matter in dispute.

The Judge states that the judgment-debtor pleaded in the Lower Court that the subject-matter of the suit was situate within the jurisdiction of the Subordinate Judge of Pubna. This is not correct. The statement of the judgment-debtor was that his residence was at Pubna, and that he had some *other* property there. The Judge records to the effect that the case in 14 Weekly Reporter, page 396, is in all its facts and bearings precisely similar to the present case, that case also being one in which the decree was made by the Subordinate Judge of Rajshahye and "*execution proceedings arising out of lands in Pubna.*" This consideration might possibly have led the Judge to an assumption, but an assumption only, that the lands in this case were in Pubna. This is not sufficient. There must be clearly a finding of the fact upon evidence whether the subject-matter of the suit was within the jurisdiction of the Subordinate Judge of Pubna *at the time when the application for execution of the decree was made.* If it be found not to have been within the Civil jurisdiction of Pubna, the Civil Courts of Rajshahye would alone have jurisdiction in the matter.

The case is accordingly remanded to the Judge to be re-tried with reference to the above remarks.

Costs of this appeal will follow the result.

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The 16th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decree—Solehnamah—Fresh Suit—Limitation.

Case No. 153 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 27th March 1872, affirming an order of the Moonsiff of that district, dated the 3rd February 1872.

Pran Kristo Ghose (Decree-holder), *Appellant,*

versus

Sujeeun Singh and another (Judgment-debtors) *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Kumola Kant Sen for Respondents.

Where a decree-holder enters with his judgment-creditor into a *solehnamah* or compromise under which the debtor arranges to pay a certain sum, and makes other conditions, the original decree gives place to the compromise, which again can only be enforced by a fresh suit instituted within the period of limitation.

Kemp, J.—THE decree-holder is the appellant in this case. It is admitted that the original decree was for Rs. 470. That decree is dated the 28th of November 1864. It is said that certain properties were attached in 1866, but nothing appears to have been done by the decree-holder in execution of his decree between 1866 and the month of March 1871. On the 8th of May 1868, a *solehnamah* petition, not a *kishteebundee*, but a compromise, was entered into by the parties. On that date, matters stood thus:—The original decree with interest had then swollen to Rs. 1,041-12, and it was found that, after crediting certain payments in part made by the judgment-debtor, Rs. 536 were due. For this sum the judgment-debtor entered into an arrangement to pay that sum of Rs. 536 within six months, pledging certain properties; the said sum of Rs. 536 to bear interest up to date of realization.

The present application made in March 1871 is not to enforce the terms of that petition, but to enforce the terms of the original decree. In the *tupseel* of the petition applying for execution, Rs. 470 is stated to be the amount covered by the decree. Interest on that sum is claimed from the 9th of May 1868 to the 30th of January 1871, amounting to Rs. 656-4, or a total of Rs 1,126-4.

Now, if the decree-holder is proceeding to execute his original decree, he is barred, not only by the statute of limitation, inasmuch as he has done nothing to enforce that decree between 1866 and 1871, but he is also barred by the the terms of the *solehnamah* petition; that petition clearly stipulating that, on the 8th of May 1868, Rs. 536 only were due after certain payments made; but the petition of March 1871 makes no provision for these payments. If on the other hand he proceeds on the *solehnamah*, that petition having been executed on the 8th of May 1868, a suit to enforce the terms of that petition must be barred. We also think that the Lower Courts have taken a right view of this case, namely, that the balance which was struck by the *solehnamah* executed on the 8th of May 1868, namely, Rs. 536, exceeded the amount of the decree, and that that balance included interest on the original amount decreed and provided for compound interest upon that interest. The original decree is therefore altered by the terms of the *solehnamah*. If the judgment-creditor's claim under the *solehnamah* was in time, he would have to bring a suit to enforce that *solehnamah*; not being in time, his suit is barred whether brought under the *solehnamah* or in execution of the original decree. The appeal is therefore dismissed with costs.

The 17th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Mortgage—Registration—Decree (under s. 53 Act XX of 1866)—Priority—Attachment—Sale—Act VIII of 1859 s. 270—"Null and Void" (s. 240.)

Case No. 273 of 1871.

Regular Appeal from the decision passed by the Subordinate Judge of Patna, dated the 12th September 1871.

Gooroo Pershad Sahoo (one of the Defendants), *Appellant,*

versus

Mussamut Binda Bibee, *alias* Nuthee, adoptive mother and guardian of Ram Kishen Panday (Plaintiff), *Respondent.*

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Baboo Sreenath Doss for Appellant.

Mr. C. Gregory for Respondent.

Plaintiff had a first mortgage in 1866 of 8 annas of a certain mouzah, and a second mortgage in 1868 of the whole 16 annas of the same mouzah. In 1869 the mouzah was sold in execution of a decree obtained by her under s. 53 Act XX of 1866, upon her first mortgage, and purchased by defendant with notice of plaintiff's second mortgage. Prior to the first mortgage, the mouzah in question had been attached in 1864 in execution of decree by R and G, who, on the strength of their attachment, were declared by the Lower Court entitled to be first paid out of the proceeds under s. 270 Act VIII of 1859.

HELD that the defendant was not entitled to have the second mortgage held void as against him, the words "null and void" in s. 240 having been ruled to mean, not null and void as against every body, but null and void as against the attaching creditor; but that the defendant, as purchaser under the sale of 8 annas of the mouzah, was entitled to have a priority over the second mortgage, it not being just and equitable that the plaintiff should be allowed to set aside her own act in getting the property sold under the first mortgage, and to set up the second mortgage against the first.

Couch, C. J.—THE suit in this case was brought for foreclosure of a mortgage and recovery of possession of sixteen annas of Mouzah Mohunpore Pareo, Pergunnah Shahpore Monair, Zillah Patna, and entry of name in the proprietary and *malgoozaree* register of the Collectorate, on the ground of a deed of mortgage dated the 26th of May 1868, and foreclosure proceedings dated the 27th of April 1871.

The case of the defendant was that, on the 13th of July 1866, a mortgage of eight annas of the mouzah had been made by Ajrawul Singh to the plaintiff Binda Bibee, and that a suit had been brought upon the mortgage instrument under Section 55 Act XX of 1866, and a decree obtained, by which it was ordered that the suit be decreed to the plaintiff, and that the defendants do pay to the plaintiff from their persons and the property pledged to them, the amount of the claim with interest at one per cent. per month on the principal from the date of suit to the date of payment.

Now, it was said that the Court in a suit, under Section 55 of this Act, had not power to order, as was done here, that the money should be paid out of the property which was mortgaged; that the decree could only be for the payment of the money. However, the decree was in this form, and no objection appears to have been made to it. On the 11th of February 1869, an attachment was issued upon it, and proceedings were taken to sell the property under the attachment. Now, on the 26th of May 1868, as we have already stated, the mortgage in respect of which the present suit was brought, which was for Rs. 13,000, was made to Binda Bibee, and on the 30th of March 1869, she presented a petition to the Court in consequence of the impending sale of the property in execution of the decree obtained by her under Act XX of 1866. Her petition was this: "Your petitioner prays that, when "the auction-sale is held, the fact of "Rs. 13,000 being due to your petitioner "under the conditional sale, and Rs. 683-2-6 "on account of the money covered by the "decree purchased by your petitioner, and "the fact of your petitioner being in possession of the property, and the property "being under attachment, be notified, so "that there may be no difficulty in recovering the money." Upon that an order was made that "the auction-sale take place on "the objections of the objectors being notified and this case be struck off the file;" and the sale then took place. That appears from a proceeding which is dated the 15th of June 1869 in the Civil Court of Patna, in which it is stated that, "on the date "fixed, the above mentioned property was "put up to sale for the recovery of "Rs. 2,012-7-8 on the conditional sale; "consideration-money of Rs. 13,000 stated "in the deed of the 26th of May 1868 in "favor of the decree-holder, being notified."

Now, prior to the mortgage of the 8 annas to Binda Bibee, the whole of the property had been attached by decree-holders named Rughoobuns and Gopee Nath on the 10th of September 1864. That attachment was struck off the file on the 16th of March 1865, but was restored on the same day, and Rughobuns and Gopee Nath appear to have taken out a second attachment in March 1869. Then, relying upon the attachment which had been restored to the file in March 1865, they appear to have made an application to the Court with regard to the proceeds of the sale, and an order was made on the 16th of August 1870. The parties to the proceedings in which that order was made were Rughoobuns and Gopee Nath, Binda Bibee, and Ram Surrun and others, heirs of Chowdhry Ajrawul Singh. After stating the proceedings, it was decided that Rughoobuns and Gopee Nath should be first paid out of the proceeds, under Section 270 of the Code of Civil Procedure.

Now, the effect of this was that, although the sale was made under the attachment in the suit upon the mortgage to Binda Bibee, and the mortgage for Rs. 13,000 was prior to that, and would not be void as against it, yet the application of the proceeds

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was ordered as if the sale had really been made under the attachment of Rughoobuns and Gopee Nath. The sale should have been under their attachment as against which the mortgage for Rs. 13,000 was void, and the sale would not have been subject to it. We doubt whether the proceeding was a proper one, but we have not to determine that. The present defendant's case is this:—He says, it is true I purchased under an attachment which was subsequent to the mortgage for Rs. 13,000 in respect of which the plaintiff brings this suit, but the money which was realized from my purchase was applied in satisfying the decree of Rughoobuns and Gopee Nath; and as their attachment was previous to the mortgage for Rs. 13,000, I claim to have the benefit of it, and to have the mortgage held void as against me.

Now, we think the defendant is not entitled to that. The decisions of this Court, which have been confirmed by the Judicial Committee of the Privy Council, upon the construction of Section 240 of the Civil Procedure Code, are, that "null" and "void" means not null and void as against every body, but null and void as against the attaching creditor. The decision does not go beyond this, that it shall be null and void as against the attaching creditor and persons who claim under or by virtue of his attachment—persons making title under it. Such a question as the present was not before the Judicial Committee, or before this Court in those cases, but the principle upon which they were decided would not entitle the present defendant to have the benefit of an attachment from which he does not derive his title. It is true that the Court has ordered that the proceeds of the sale should be paid to Gopee Nath, but that is a matter subsequent to his purchase. The mere application of the purchase-money does not make him a purchaser under that attachment.

Therefore, as regards that part of the case, we think the defendant is wrong.

Then there is another question in the case with regard to the 8 annas share which was mortgaged to Binda Bibee. Now, as we have said, the decree under Act XX of 1866 authorized the sale of the mortgaged property to satisfy the debt, although wrongly, and the property was sold. Therefore Binda Bibee, the plaintiff, is in the position of a person who has, by the process of a Court, had sold, under the mortgage, the eight annas share. We think it must be taken that she caused to be sold all which she had power to sell, and to give to the purchaser all which she had a title to. This would give to the defendant a priority over the subsequent mortgage for the Rs. 13,000; and it is just and equitable that he should have the benefit of that, and that the present plaintiff should not be allowed, as it were, to set aside her own act in getting the property sold under the mortgage, and set up a subsequent mortgage against the mortgage to her of the eight annas share.

The result is that the defendant is entitled to retain an eight annas share of the property, but that the plaintiff will have a decree as prayed for in respect of the other eight annas share. And the parties will bear their own costs in both Courts.

The 17th July 1872.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Acquiescence—Auction-purchaser—Limitation.

Case No. 215 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 14th September 1871, modifying a decision of the Moonsiff of Bhaugulpore, dated the 25th May 1871.

Sibdyal Ghose (Defendant), *Appellant,*

versus

Gouree Roy and another (Plaintiffs), *Respondents.*

Baboo Taruck Nath Dutt for Appellants.

Baboos Nil Madhub Bose and *Taruck Nath Sein* for Respondents.

An auction-purchaser is barred by implied acquiescence from pleading that he is not bound by the acts of his predecessor if he does not question those acts at any time within twelve years from the date of his purchaser.

Ainslie, J.—This is a suit to recover possession of a mangoe-tope, containing 47 trees standing on about 5 beeghas of land. The plaintiff claims under a *kabalah* of the year 1214 from the former proprietor of the estate, by which the *Ryotee* and *Hakimee* shares in the trees in question were sold to him. He also puts forward a document called a *char-chittee* of the 24th of Assar 1259, professing to be signed by the present defendant, who is an auction-purchaser of the estate at a sale for arrears of revenue.

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The Court below, holding that the defendant is bound by that *char-chittee*, has made an order in favor of the plaintiff, but has limited his claim to a certain extent; that is, it has declared that plaintiff is to have possession of the trees and the land on which they stand so long as the trees shall remain standing, and no longer.

The defendant appeals, and the respondent has also raised objections under Section 348. The first question is whether the *char-chittee* is sufficiently proved to bind the defendant.

It appears that no evidence was given in support of it. The defendant himself on oath denied its genuineness, and his son who was examined to prove it altogether declined to do so; from his manner the Subordinate Judge inferred that he was not giving true evidence. However, it is impossible to say, because his evidence was doubted that the document is therefore proved: As matters stand, we think the appeal must be so far allowed that we are obliged to say that the Subordinate Judge has found on no evidence at all that the *char-chittee* is proved. This, however, is immaterial for the decision of the case, because there can be no question that the plaintiff holds under the deed of 1214, and has for upwards of sixty years been in actual possession of this mangoe orchard without paying rent to any person either for trees or land. It is quite possible that in some cases the rent might be made up of two *parts*, one being for the land and the other for the trees standing upon the land: but in this case nothing of the kind is alleged. It appears on the finding of the Lower Appellate Court that no rent whatever has ever been paid for this land since 1214, and that the only rent ever taken by the predecessor of the defendant was the *Hakimee* share of the produce of the trees, which he sold to plaintiff in 1214. Then the defendant says that as he is an auction-purchaser at a sale for arrears of revenue, he is not bound by the acts of his predecessor. Had he questioned those acts at any time within twelve years of his purchase, possibly he might have done so successfully. But we find that he entered as auction-purchaser nearly twenty years ago, and that before the institution of this suit he took no steps to set aside the transaction of 1214, and we think that he is barred by implied acquiescence from setting up that plea in the present suit.

On the cross-appeal we are of opinion that so much of the order of the Subordinate Judge as limits the enjoyment of the land must be set aside, and that it must be declared that the plaintiff is entitled unconditionally to be maintained in the enjoyment of the orchard which he has held free from all rent or incumbrances for the last sixty years.

The special appeal is dismissed with costs.

The 17th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1859 *s.* 200—*Execution of Decree (for particular Act)—Removal of Obstructions in Pathway.*

Case No. 133 of 1872.

Miscellaneous Appeal from an order passed by the Judge of 24-*Pergunnahs, dated the* 26*th April* 1872, *affirming an order of the Moonsiff of Alipore, dated the* 8*th April* 1872.

Bhoobun Mohun Mundul and another (Judgment-debtors), *Appellants,*

versus

Nobin Chunder Bullub (Decree-holder), *Respondent.*

Baboo Hem Chunder Banerjee for Appellants.

Baboo Kalee Mohun Doss for Respondent.

A decree for the performance of a particular act (*e g.*, the removal of certain obstructions in a pathway) can only be enforced under s. 200 Act VIII of 1859, by the imprisonment of the judgment-debtor, or the attachment of his property, or both.

Kemp, J.—In this case the judgment-debtor is the appellant. It appears that in Chyet 1276, a suit was brought by the vendor of the plaintiff to remove certain obstructions in a pathway; these obstructions being described in the plaint as a wall running east and west, the foundation of a wall running north and south, and the closing of a pucca drain. The pathway is described as being 60 haths in length and 4 haths in breadth. The plaintiff obtained a decree, and it is this decree which we have to construe and execute. The decree is to the following effect, namely, "that the defendants do, within six weeks after the service upon them of this decree, remove the obstruction and re-open the pathway or lane leading from

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"the northwest end of the plaintiff's house "northwards to a public road as the same "existed before the commencement of the "suit and as described in the plaint." This decree of the Court is therefore a decree for the performance of a particular act on the part of the defendants. Such a decree, therefore, must be executed under the provisions of Section 200 of the Civil Procedure Code which enacts that, "If the decree "be for any specific moveable, or for the "performance of any contract, or for the "performance of any other particular act, "it shall be enforced by the seizure, if practicable, of the specific moveable and the "delivery thereof to the party to whom it "shall have been adjudged," or, as in this case where the decree has been for the performance of a particular act, "by the imprisonment of the party against whom the "decree is made, or by attaching his property, and keeping the same under attachment until further order of the Court, or "by both imprisonment and attachment, if "necessary."

The Lower Appellate Court in its judgment says that the judgment-debtor has for months been able to keep the decree-holder out of his rights by trying every manœuvre possible in the execution department. The Judge then goes on to say that the case has been before his predecessor twice in appeal, and that on both occasions the order of the first Court was upheld. He then animadverts on the conduct of the pleader who appeared before him, and of the Ameen deputed to execute the decree; and he then states that the objections of the debtor had been fully considered by his predecessor and that the appeal must be dismissed with costs.

In special appeal, it is contended that the decree simply ordered the performance of a particular act by the defendant, and that the Courts below had no authority under the decree and the Procedure Code to order the destruction of the building by the Nazir of the Court.

We think that this objection must prevail. Under the Section the only way in which this decree can be executed is, as already observed, by the imprisonment of the party against whom the decree is made, or by attaching his property, or by both imprisonment and attachment of property if necessary.

The order of the Judge must, therefore, be reversed and this appeal decreed, but without costs.

The 19th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Small Cause Court—Special Appeal—Damages—Unsuccessful Claim to attached Property—Payment to save Sale.

Case No. 1276 of 1871.

Special Appeal from a decision passed by the Judge of Beerbhom, dated the 31st July 1871, *reversing a decision of the Moonsiff of Chowkey Kandrah, dated the 25th March* 1871.

Poorsuttum Chunder and others (Plaintiffs), *Appellants,*

versus

Gour Soonder Pandey and others (Defendants), *Respondents.*

Baboo Motee Lall Mookerjee for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

A suit for money paid by an unsuccessful claimant, under Section 246 Act VIII of 1859, in order to save from sale his share of an estate which had been attached in execution of a decree, is in reality a suit for damages, and (the value being below 500 rupees) is in the nature of a Small Cause Court suit in which no special appeal will lie.

Glover, J.—We think that this special appeal must be dismissed with costs on the preliminary objection which is made by the vakeel for the special respondent. The plaintiff, it appears, bought a small fraction of an estate from one of the defendants; another of the defendants attached that share in satisfaction of a decree of his own, on which the plaintiff made a claim under Section 246 of the Code of Civil Procedure, and obtained its release. The defendant took out execution again afterwards against the same property, and the plaintiff again put in a claim, but this time was unsuccessful, and in order to save his property from sale, the plaintiff had to pay the sum due under the decree, namely, 359 rupees.

He now sues to recover these 359 rupees. It is clear, we think, that this is a suit for damages, the plaintiff, by that payment, having been endamaged to the extent of 359 rupees, in order to secure from sale the property which he had purchased, and this being so, and the value being under 500 rupees, the suit is in the nature of a Small Cause Court suit, and no special appeal will lie. We have been referred to a case in Vol. VII,

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Weekly Reporter, page 383, but that was an entirely different case. In that case it was ruled that a suit for contribution was not in the nature of a Small Cause Court suit; but this is a case of an entirely different nature.

The 19th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction (of Civil Court) — Magistrate's Order under s. 320 Code of Criminal Procedure—Right of Water—Possession.

Case No. 197 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 11th September 1871, affirming a decision of the Moonsiff of Onlooberiah, dated the 20th February 1871.

Ram Kristo Sircar (one of the Defendants), *Appellant,*

versus

Sheik Kaloo and others (Plaintiffs), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Sreenath Doss and *Bhowany Churn Dutt* for Respondents.

A suit to get rid of the effect of an order passed by a Deputy Magistrate under s. 320 Code of Criminal Procedure, declaring a certain river to be a public thoroughfare, and to have it declared that plaintiffs are entitled with others to use the water of the said river by raising bunds or dams in the bed of the stream as heretofore, will not lie in the Civil Court, the only way in which the Deputy Magistrate's order can be got rid of in the Civil Court being by distinct proof of plaintiffs' title to exclusive possession of the right of water claimed.

Glover, J.—THE point involved in this case is one of considerable importance, and we have taken time to consider what our decision should be.

The plaintiffs come into Court to get rid of the effect of an order passed by the Deputy Magistrate under Section 320 of the Criminal Procedure Code, and to have it declared that they are entitled with others to use the water of the Kanoonuddee, by raising bunds or dams in the bed of the stream as heretofore.

And the first question is whether such a suit will lie in the Civil Court.

The objection was taken by the defendants in both the Courts below but was decided against them, as it appears to us, without any clear understanding on the part of either Moonsiff or Subordinate Judge as to what the nature of the objection was. The Moonsiff says that, inasmuch as Section 320 provides for a suit in the Civil Court to establish rights against an order passed by a Criminal Court, therefore the present suit lies, and the Subordinate Judge comes to the same conclusion in even a more summary manner.

We are of opinion that the objection is a valid one, and must be allowed.

The Deputy Magistrate who decided the case under Section 320 Code of Criminal Procedure against the present plaintiffs, did so on the ground that the Kanoonuddee was a running stream open to the use of all, and that the plaintiffs had no right to dam it up to the exclusion of the public.

This decision may have been right or wrong, but it was one which the Deputy Magistrate was competent to give, and under Section 320 the only way in which it could be got rid of was by the plaintiffs proving in a competent Court, *i. e.*, Civil Court, that they were entitled to exclusive possession of the right of water claimed.

The only question, therefore, which the Civil Court could determine and by its determination do away with the effect of the Deputy Magistrate's order, was the right to "exclusive" possession. It could not nullify the decision under Section 320 by declaring that the plaintiffs had some kind of a right in the water of the river, but only by judicially finding that the right claimed was supreme, and that no one else had any right at all.

Now, in this case the plaintiffs have not claimed and do not claim any "exclusive" right; all that they ask for is a share of the water; they do not even claim the privilege of entirely damming up the channel, for they allege that side openings were always permitted by which water could pass down stream to the occupants of villages situated below.

The plaintiffs, moreover, declare that the inhabitants of several other villages are interested in the right claimed.

There can in fact be no doubt that the right sought is not in any sense an exclusive right, nor has any attempt been made to prove that any such right ever existed. The Deputy Magistrate has declared the river to be a public thoroughfare in the rains and

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open to the use of the public at all times, and the Civil Court cannot interfere with that order, or declare what is decreed to be a public highway, a private appanage, without distinct proof of the exclusive title of the parties claiming.

In this case the plaintiffs set up no such title, and the Civil Court therefore could not entertain the suit.

The appeal is allowed, and the decrees of the Courts below reversed. Under the circumstances, however, we shall make no order as to costs.

The 19th July 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Evidence—Witness in other cases (Credibility of).

On Appeal from the Sudder Court at Agra.

Lall Beharee Lall

versus

Mussumat Gopee Beebee and others.

The Privy Council, referring to the generality of the Principal Sudder Ameen's observations as to certain witnesses having given evidence in other cases, observed that, though it was a legitimate objection to a man's credit that he was a professional witness, yet to state broadly and generally that a witness had given evidence in other cases, and therefore became unworthy of credit, could only tend to increase the indisposition of respectable persons to come into Court as witnesses, which was one of the social evils of India.

Their Lordships are of opinion that no special ground has been shown on which this case ought to be excepted from the general rule against disturbing the concurrent judgments of two Indian Courts upon a pure question of fact; that if this were treated as an exceptional one it would be difficult to apply the rule to any future case.

The appellant brought his suit to oust the parties in possession on the ground that he became entitled to the property, as next heir, on the death of one Bowanee Pershad, who died in August 1855. To make out his title he had to establish two facts: first, that he stood to Bowanee Pershad in the relationship that he alleged; and, secondly, that being joint in estate with Bowanee Pershad his title as nearest male heir overrode the rights of the respondents, the widows of Bowanee Pershad, and of his two brothers who predeceased him.

The first issue has alone been tried, and both Courts have found that upon it the appellant failed to prove his title, which was founded on the allegation that he and Bowanee Pershad were descended from a common ancestor, one Lalloo Mull, the former being the grandson, the latter the great-grandson of that person.

It may be observed that the appellant came into Court with a considerable presumption against him, arising from the fact that he had slept on his alleged rights, and failed to bring his suit for twelve years after the decision of the Collector in the proceeding for the mutation of names, wherein this question of heirship was raised.

Both Courts have concurred in treating the oral testimony adduced by him as untrustworthy. They have weighed the effect of the proceeding before the Magistrate in 1844, and of the circumstances proved concerning the dwelling-houses of the parties, and have come to the conclusion that these ought not to turn the scale in the appellant's favour. It is obvious that the weight to be given to the latter circumstances is a question which Judges in India are far more competent than their Lordships can be, to determine.

Their Lordships, moreover, are prepared to say that, if they were trying the case as a Court of first instance, they would have thought, upon the evidence before them, that the appellant had failed to prove his title as alleged, though they might have hesitated to assert that there was no relationship between the parties, or that the case of the defendants on that point was wholly true.

In these circumstances they can only humbly advise Her Majesty to dismiss this appeal with costs.

They wish further to observe, with reference to the elaborate and ingenious criticism to which the judgment of the Principal Sudder Ameen has been subjected in this case, that the only objection to that judgment which they would be inclined to take, is to the generality of his observations as to certain witnesses having given evidence in other cases.

It is no doubt a legitimate objection to a man's credit that he is a professional witness; but to state broadly and generally that a witness has given evidence in other cases, and therefore becomes unworthy of credit, can only tend to increase that indisposition of respectable persons to come into Court as witnesses, which is one of the social evils of India.

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The 20th July 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Review of Predecessor's Judgment—Second Application after 90 *Days—Jurisdiction.*

In the matter of
Sreenath Chowdhry, *Petitioner,*

versus

Kritatto Moyee Dossee, *Opposite Party.*

Baboo Bama Churn Banerjee for Petitioner.

Baboo Ramanath Bose for Opposite Party.

Where a second application for review of a judgment passed by a Sub-Judge was admitted by his successor after the expiry of 90 days from the rejection of the first application, without a finding that any just and reasonable cause was shown for such admission, HELD that the Subordinate Judge, in reversing the decision of his predecessor, had acted without jurisdiction.

Kemp, J.—THIS rule must be made absolute. It appears that the original decision in this case was passed on the 3rd of September 1870. On the 22nd of April 1871, an application for review of that judgment was rejected, and on the 26th of July 1871, or more than 90 days after the former application being rejected, a second application was made to another Subordinate Judge, who, on the 25th of January 1872, admitted the review, and reversed the decision of his predecessor, namely, the decision of the 3rd of September 1870. We think that the Subordinate Judge had no jurisdiction to entertain the application for review presented on the 26th of July 1871, under the Full Bench ruling reported in Volume IX Weekly Reporter, page 181. The application in question not having been made within 90 days from the date of the order against which it was preferred, and the Lower Court having failed to find that any just or reasonable cause was shown for the admission of the review after the expiry of 90 days, therefore, according to the ruling of the Full Bench which has been followed in another decision published in Volume XI, page 22, the Subordinate Judge, in reversing the decision of his predecessor, acted without jurisdiction. His decision must, therefore, be reversed with costs.

The 20th July 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appellate Court—Costs of first Court.

Case No. 2 of 1872.

Application for review of judgment passed on the 7th of March 1872 *in Miscellaneous Appeal No.* 17 of 1872.

Mothoora Mohun Roy and others (Decree-holders), *Petitioners,*

versus

Hury Kishore Roy and others (Objectors), *Opposite Party.*

Mr. Lowe and *Baboo Sreenath Banerjee* for Petitioners.

Baboos Doorga Mohun Dass and *Nullit Chunder Sein* for Opposite Party.

Section 360 Act VIII of 1859 only requires the Judge of an Appellate Court to state in his decision by what parties (and in what proportions if necessary) the costs of the original suit, which he must take for granted, are to be paid; but not to go into particulars, or append to his judgment a schedule setting forth the different items which make up the costs of the first Court.
Decision in 17 W. R., 445, set aside on review.

Glover J.—THIS case was decided by us on the 6th of March last in favor of the objector (judgment-debtor).

We have since had the case re-argued on review, and are of opinion that our former decision as to the necessity of specifically mentioning in the schedule of the Appellate Court's decree, the costs that were to be paid in respect of the original suit in the Court of first instance was wrong.

Section 360 Code of Civil Procedure does not do more than require the Judge of the Appeal Court to state in his decision by what parties (and in what proportions if necessary) the costs of the original suit are to be paid. He is not bound to go into particulars, or append to his judgment a schedule setting forth the different items which make up the costs of the first Court. He takes the amount of costs for granted—indeed he could not do otherwise—and decides who is to pay them.

This the Judge undoubtedly did, and on further consideration we think that this was all that the law bound him to do.

The decree of this Court of the 6th of March last is set aside, and a fresh decree passed, upholding the Judge's decision of the 2nd October 1871. and dismissing the special appeal No. 17 of 1872 with costs.

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The 22nd July 1872.

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, *Judge.*

Issue — Averments — Admission — Jurisdiction — Mortgage Lien (Enforcement of) —Suit for Immoveable Property.

Case No. 143 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 13th April 1871.

Musst. Ahmedee Begum and others (Defendants), *Appellants,*

versus

Dabee Persaud and others (Plaintiffs), *Respondents.*

Mr. C. Gregory and *Moulvee Murhamut Hossein* for Appellants.

Baboos Sreenath Doss, Mohesh Chunder Chowdry, and *Dabendro Narain Bose* for Respondents.

Averments upon which no issue is framed must be taken to be admitted.

A suit for the enforcement of a mortgage lien and for a decree that the money due be realized from the property, is a suit for immoveablo property, and must be brought in the Court within the jurisdiction of which the property is situated.

Couch, C. J.—This appeal must be dismissed. The decree of the Lower Court is right. We think we must take it that the mortgages under which the plaintiff claims were really executed, and were *bonâ fide* transactions, because, supposing that the words in the defendant's written statement, "the mortgages created by those bonds are "insufficient and unjust," may be read as a denial of the making of the mortgages, and as raising a question of the *bonâ fides* of those transactions, we must see what was done at the settlement of issues. If the defendant really intended by this portion of the written statement to raise such a question, she might have requested the Lower Court to frame an issue upon it. The plaintiff would then have had notice of such a question being raised, and might have produced evidence upon it, and satisfied the Court that the mortgages were *bonâ fide* transactions. As no such issue was raised at the first hearing, we must take it that such a case was not put forward by the defendant so as to make it necessary for the plaintiff to give any evidence on the point. It was said by the Judicial Committee in a suit tried before the Code of Civil Procedure, 9 Moore, 301,* that they cannot apply to pleadings in Indian Courts the strict rule that averments not traversed must be taken to be admitted, but where in a suit tried under that Code issues have been settled, averments upon which no issue is framed should be taken to be admitted, as the Court, before proceeding to frame and record the issues, is directed to enquire and ascertain upon what question of law or fact the parties are at issue. If there is any mistake or omission, the Court may, at any time before the decision, amend the issues or frame additional issues. The defendant therefore cannot now take the objection and by his pleader say, "the deeds were not executed "at all; there is not a tittle of evidence on "the record to show that they were exe-"cuted." To allow such an objection to be taken now would lead to great injustice. We must take it that the mortgages on which the plaintiff claims are good, and that the question between the parties was that upon which the Subordinate Judge has decided. The case therefore resolves itself into this. The plaintiff has a right as mortgagee. The defendant is a purchaser under a sale in execution of a decree of the Patna Court. It is admitted that the property sold was not within the local limits of the Patna Court. Although that Court might make a decree for the payment of the mortgage-debt against the mortgagor personally, and might execute that decree by sending it to the Bhaugulpore Court, where the mortgaged property was, and having it attached, yet it could not make a decree declaring the liability of the mortgaged property. The title conferred by the sale in execution of the decree, was not a title under the mortgage, but under an attachment in execution of a simple money-decree. A suit for the enforcement of a mortgage lien, and for a decree that the money due be realized from the property, is a suit for immoveable property, and must be brought in the Court within the jurisdiction of which the property is situated, namely, the Bhaugulpore Court. The defendant is not in the position of an assignee of the mortgage to Loofi Ali Khan. If she were, the question should be one of priority of mortages as between herself and the plaintiff; and if she had a priority, it would be only in respect of Rs. 1,000 as regards one of the properties.

* 2 W. R., P. C., 19; Suth. P. C. Cases, 485.

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As the case stands the decree of the Subordinate Judge is a right decree, and the appeal must be dismissed with costs.

The 23rd July 1872.

Present:

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge.*

Procedure—Misjoinder—Multifariousness—Issue.

Case No. 277 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 6th September 1871.

Imrit Nath Jha (Plaintiff), *Appellant,*

versus

Baboo Roy Dhunput Singh Bahadoor and others (Defendants), *Respondents.*

The Advocate-General and *Baboo Taruck Nath Sein* for Appellant.

Mr. R. T. Allan, *Baboo Sreenath Dass*, and *Moonshee Mahomed Yusoof* for Respondents.

Where a talookdar brought a suit against the zemindar and the several purchasers to set aside the sales to them respectively of five *putnee* talooks sold for arrears of rent due separately upon each, and the defendants at the earliest possible time put in a plea of misjoinder, the Judge not only found an issue upon it, but other issues upon the question of fact involved in the suit, and after taking the evidence upon the different issues, dismissed the suit upon the ground of misjoinder. HELD that the Judge was right in having done so.

Couch, C. J.—THE plaintiff in this case held five talookas under five *putnee* pottahs from the same zemindar, and it appears from the admission of the plaintiff's pleader, the correctness of which is not disputed, that these were separately sold for arrears of rent due separately upon each. The plaintiff now sues to set aside the sales, and to be restored to the possession of the property.

Now, as regards the zemindar defendant, there were five separate causes of action; there was a cause of action in respect of each talooka. Although one or more than one might have been properly sold, it by no means followed that all were.

If it were not necessary to join other persons in the suit, it would be a case in which the Code of Civil Procedure would have allowed one suit to be brought, because separate causes of action by and against the same parties may be joined in the same suit subject to the entire claim being within the jurisdiction of the Court, but here it was necessary to join the other defendants who were purchasers of different talookas. With regard to them the causes of action and the plaintiff's right to recover possession of the property were separate. Here we have, as against the defendants, the purchasers, separate suits upon separate causes of action put into one suit, and the decisions of this Court are clear that this is not proper. Sir Barnes Peacock in the Full Bench Ruling reported at page 16, Vol. VIII W. R., gives reasons, in which we concur, why it should not be allowed; and he says that, when a plaint of this nature is presented, it ought to be rejected. Here the plaint was not rejected. The defendants were not present at that stage of the suit, and could not take the objection. The plaint having been received, all the defendants at the earliest possible time, including the zemindar, objected that they ought not to be joined in one suit. The objection being taken, the Judge property framed issue upon it. He not only framed that issue, but other issues upon the questions of fact involved in the suit. We are not prepared to say that this was an erroneous course. The Judge might have felt doubtful whether his decision on the point of multifariousness, if appealed against, would stand, and if it did not, the case would be remanded to be tried on its merits. Probably he thought the better course was to take the evidence bearing upon the different issues, and then to give his judgment. Having done this he decided, as he might have done in the first instance, that the suit ought to be dismissed upon the objection of misjoinder. It was contended by the learned Advocate-General that the Judge, having taken the evidence, ought not to have dismissed the suit upon that objection; that apparently no mischief had been done by joining the parties in one suit; and that the present respondent should not be allowed to retain the decision which has been given in his favor. We think this argument cannot have effect. The respondents had no power to compel the Judge to try singly the issue whether there was a misjoinder of claims. If he thought it proper to take evidence upon all the issues, the respondents could not prevent it. It is said that they could have come to this Court, but this Court certainly would not, in the exercise of its supervising power, interfere in that stage of the proceedings. The defendants took the objection at

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the proper time, and the judgment which the Judge gave after hearing the evidence must be considered as if it was given at the proper time, and as if he had rejected the plaint on its being first presented to him. When a plaint which ought to be rejected is received by the Court, and it is afterwards found that the plaint ought to have been rejected, the proper course is to dismiss the suit as has been done here. Then, as regards any costs which the plaintiff may have been put to by the taking of the evidence, it seems that, after the objection of misjoinder had been taken by the defendants, and an issue raised upon it, the pleader for the plaintiff deliberately insisted on his right to proceed in this suit against all the separate purchasers.

We dismiss the appeal and confirm the judgment of the Lower Court with costs. Our judgment will not prejudice the right of the plaintiff to bring his suit in the proper form.

The 24th July 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Charter s. 15—Power of High Court—Jurisdiction.

In the matter of Issur Chunder Poddar,

versus

Shoshee Dhur Sen, *Opposite Party.*

Baboo *Mohendro Lal Mitter* for Petitioner.

Baboos *Bhowanee Churn Dutt* and *Bungshee Dhur Sen* for Opposite Party.

Per Glover, J.—The High Court will only interfere under s. 15 of the Charter when it is shown that a Lower Court has either declined or has improperly exercised jurisdiction.

Glover, J.—We think that this rule should be discharged with costs. There are many circumstances connected with the decree-holder's action which would of themselves make it extremely doubtful whether this Court would be justified in exercising its extraordinary powers under Section 15 of the Charter in his behalf, but it is not necessary to decide the question on this point.

This Court will only interfere under Section 15 when it is shown that a Lower Court has either declined or has improperly exercised jurisdiction. And the Moonsiff did neither. He may have been wrong in his view of the law, but he did not refuse jurisdiction. He held that the tenure, having been already sold previous to the decree-holder's decree, could not be re-sold in execution, but that he had no jurisdiction to order the sale, if such sale was legal.

The point has on more than one occasion been decided by Division Benches of this Court (XI Weekly Reporter, pages 23 and 402).

We may remark that, in this particular case, the petitioner had a complete remedy under the provisions of Regulation VIII of 1819.

Mitter, J.—I concur in discharging this rule. The circumstances of the case are not such as to justify our interference under Section 15. I express no opinion upon the limits of our jurisdiction under that Section.

The 24th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, *Judge.*

Sale in Execution—Auction-purchaser—Inchoate Owner (Payments made by)—Priority.

Cases Nos. 210 and 232 of 1871.

Regular Appeals from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 4th July 1871.

Rajah Hossein Buksh Khan (Defendant), *Appellant,*

versus

Baboo Roy Dhunput Sing Bahadoor (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Rashbeharee Ghose* for Respondent.

Plaintiff, the inchoate owner of an estate purchased by him at a sale in execution of a decree against it, was held justified, whilst the proceedings with regard to the validity of the sale were pending, in preserving the estate from sale to another, whether for arrears of Government revenue or for the amount of a decree for which the estate had been attached, and when the sale to him was set aside and restored to A, entitled to be repaid any amounts *bonâ fide* paid by him for the preservation of the estate. If A made any arrangement with *mokurrureedars* by which the latter stipulated to pay the Government revenue for him, plaintiff could not recover from the *mokurrureedars*, there being no priority between him and them. His remedy was against A, who again had his remedy against the *mokurrureedars.*

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Couch, C.J.—THE case of the plaintiff in this suit was that, on the 10th December 1869, he became the purchaser of an 8-anna share in Pergunnah Kujrah, which was sold by the Court at an auction-sale in execution of a decree obtained by Motee Lall Dhur against Maharanee Wazeerunnissa, and after her demise against the defendant Rajah Hossein Buksh Khan, and that an objection was preferred by Rajah Hossein Buksh Khan to the validity of the sale, and the case remained pending for a long time, and that whilst the case was so pending, the 8-anna share was about to be sold for a realization of Government revenue, and, plaintiff paid the instalments of revenue for the months of January, March, and June 1870, the details of which are given at the ends of the plaint. The plaint also stated that, during the pendency of the proceedings with regard to the validity of the sale, the 8-anna share was advertized for sale by the Court of the Moonsiff of Soorujgurrah in a suit in which a decree had been obtained by Ram Prosad Dass; and the plaintiff, in order to protect the estate, made an objection to that sale, but the objection having been disallowed, he, in order to prevent the sale in that execution, had paid the amount of that decree. The sale to the plaintiff was set aside by an order of the Court made on the 13th of August 1870, and he claimed to be repaid by the defendant Rajah Hossein Buksh Khan the money which he had so paid.

There is no dispute with regard to the above facts. We will presently notice the defence set up in the written statement. The plaintiff by his purchase at the auction-sale had acquired an inchoate right to the property. If the sale had been confirmed, he would have become the absolute purchaser; and while the proceedings with regard to the validity of the sale were pending, he was justified, although he might not be bound, to protect the estate by paying the Government revenue which was due, and for which, had it not been paid, the estate would have been sold, and thus lost either to himself or Rajah Hossein Buksh Khan according to the result of the proceedings on the objection to the validity of the sale. So also with regard to the payment of the amount of the decree for which the estate had been attached. If that sum had not been paid, the estate would have been sold. The payments made by the plaintiff were payments which he might fairly make in order to preserve the estate; and when the sale was set aside, and the property restored to Rajah Hossein Buksh Khan, he ought to be repaid by the latter.

The defence set up by the written statement was that the liability for the payment of the Government revenue was on other persons, it being alleged that, with regard to 6 annas, there were *mokurrureedars*; and with regard to 2 annas, there was a purchaser. Now the proposition that the liability of the payment of the Government revenue was on the *mokurrureedars* cannot be supported. It is true that, as between Rajah Hossein Buksh Khan and the *mokurrureedars*, they bound themselves to pay the Government revenue, but the person liable to the Government and who was bound to it to pay the revenue was Rajah Hossein Buksh Khan. He might, in an arrangement made with the *mokurrureedars*, stipulate that they should pay the revenue for him; and if they did not pay it, he would have a remedy against them for not performing their agreement. The position then, with regard to the Government revenue, was this:—The plaintiff being, as we have said, the inchoate owner of the estate, might pay it in the same way as Rajah Hossein Buksh Khan might have done; and if the latter is now made to repay to the plaintiff what he paid, he will have a right to get an allowance for it in his account with the *mokurrureedars*, and will not be ultimately a loser. The plaintiff cannot recover from the *mokurrureedars* the sum which he has paid, because there is no priority between him and them, whereas there is between the *mokurrureedars* and Rajah Hossein Buksh Khan. Therefore the plaintiff ought to be repaid anything that he has honestly paid for the preservation of the estate.

With regard to the purchase of the 2-anna share, it appears that Rajah Hossein Buksh Khan succeeded in setting aside the sale of that 2-anna share to the person who, he now says, is the purchaser. Certainly it is not competent for him in this suit to set up that there is a purchaser of that when he himself had the sale set aside, and was restored to the possession of the property. It seems to us that the plaintiff is fairly and equitably entitled to be reimbursed the sum which he has paid.

A question has been raised in the other appeal, No. 232 of 1871, whether the Lower Court was right in refusing to allow to the plaintiff the amount which had been paid by the *mokurrureedars* because the decree which has been made is only for the balance after deducting the sum which had been paid by them. We have already pointed out

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the reason why this ought not to be done. The plaintiff paid the money, and appears to have paid it *bonâ fide*. He was not bound in the position in which he was as the inchoate owner of the estate to wait till the last moment, in order to see whether the *mokurrureedars* would pay, and thus run the risk of the property being sold for arrears of the Government revenue. We do not say that he would have been liable for the estate being sold if the Government revenue had not been paid, but the possibility of his being liable would justify his making the payment. We think, therefore, that the appeal ought to be allowed for the full sum which the plaintiff has paid, Rajah Hossein Buksh having his remedy against the *mokurrureedars*.

The result is that the decree of the Lower Court will be altered by substituting for the amount awarded by the decree the sum of Rs. 5,953-7-3 bearing the same rate of interest as the decree gives. The plaintiff Dhunput Sing must have the costs of both these appeals.

The 25th July 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges*.

Mesne Profits—Joint Decree—Partition—Exclusive Possession—Presumption.

Case No. 84 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 31st January 1872.

Baboo Roy Luchmiput Singh Bahadoor (Defendant), *Appellant*,

versus

Baboo Roy Dhunput Singh Bahadoor (Plaintiff), *Respondent*.

Baboos Mutty Lall Mookerjee and *Bykunt Nath Dass* for Appellant.

Baboos Romesh Chunder Mitter and *Mohiny Mohun Roy* for Respondent.

Plaintiff and defendant, two brothers, were liable under a joint decree for possession and mesne profits. By virtue of a partition of the inheritance between them, property, the mesne profits of which had been decreed to the decree-holder, fell to the defendant's exclusive share in 1268, and remained in his exclusive possession until 1271, when the decree-holder recovered possession in execution of his decree. Plaintiff now sues to make defendant exclusively liable for the whole of the mesne profits due to the decree-holder between 1268 and 1271. Held that the defendant's admission of his exclusive possession between 1268 and 1271 was not sufficient to establish plaintiff's case, and that, in the absence of the deed of partition, the division must be presumed to have been made in equal shares between plaintiff and defendant.

Mitter, J.—We are of opinion that the plaintiff has failed to make out his case, and that the decision of the Subordinate Judge ought, therefore, to be reversed.

It appears that Mr. Forbes brought a suit against Baboo Protab Singh, the common father of the plaintiff and the defendant in this case, for possession of certain lands. During the pendency of that suit, Baboo Protab Singh died, and the plaintiff and the defendant were substituted on the record as his legal representatives. A decree was ultimately passed in favor of Mr. Forbes on the 9th April 1860, which was confirmed by the High Court on the 19th March 1863. Mr. Forbes then took out execution of his decree both for possession and mesne profits. The mesne profits, including costs, amounted to rupees 39,925, of which the plaintiff paid rupees 19,960 and the defendant an equal sum. The plaintiff now says, that since by virtue of a partition, made between him and the defendant, of the inheritance left to them by their deceased father, Baboo Protab Singh, the property, the mesne profits of which had been decreed to Mr. Forbes, *fell to the exclusive share* of the defendant in the year 1268, and remained in his exclusive possession until the year 1271, when Mr. Forbes recovered possession in execution of his decree, the defendant is exclusively liable for the whole of the mesne profits due to Mr. Forbes for that period,—that is, for the period intervening between 1268 and 1271, when Mr. Forbes took possession in execution of his decree.

The defendant, in his written statement, urged, that the partition was made in equal shares; that although he, the defendant, got exclusive possession of the property involved in the suit instituted by Mr. Forbes, the plaintiff got fair equivalent for that property, and as the amount of mesne profits decreed to Mr. Forbes was due upon a cause of action which had accrued during the lifetime of the common ancestor of the parties, the plaintiff was liable for half of that amount.

The Lower Court has given a decree to the plaintiff solely and exclusively on the ground that it was admitted by the defendant that he had been in exclusive possession of the lands decreed to Mr. Forbes since the year 1268.

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We are of opinion that this admission is not sufficient to make out the plaintiff's case. The plaintiff has not produced the deed of partition as he was bound to do, for it is by *virtue of that partition* that the lands in question are alleged to have fallen to the exclusive share of the defendant in 1268. In the absence of the deed of partition, therefore, we must presume that the division was made in equal shares between the plaintiff and the defendant, and the plaintiff must have got some property in lieu of the lands involved in Mr. Forbes' suit, which were allotted to the defendant under that decision. It was the duty of the plaintiff to prove the particular equity upon which his case rested, since the decree was a joint one against the plaintiff and the defendant, and it is admitted that each party has paid half the amount due under it. It is upon the special ground that the defendant got exclusive possession of the lands decreed to Mr. Forbes in the year 1268, that the plaintiff subsequently comes into Court; and as that ground is alleged to have arisen, the particular terms and conditions of the partition and proof of those particular terms and conditions ought to have been made available to the Court.

It is said that we ought to give the plaintiff a fresh opportunity to produce evidence in order to show that the partition was not made in equal shares, and that although the lands decreed to Mr. Forbes fell exclusively to the share of the defendant, the plaintiff did not get any equivalent for them.

We see no reason for granting this indulgence. The plaintiff fully knew what he had to prove in support of the allegations made by him in his plaint, and he had ample opportunity in the Lower Court to produce all the evidence which he had in his power, and which it was his duty to produce. He failed to avail himself of that opportunity, and we do not think it necessary to remand the case in order to give him another chance to mend his hands.

For the above reasons we reverse the decision of the Subordinate Judge, and dimiss the plaintiff's suit with costs.

The 25th July 1872.

Present:

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Jurisdiction—Act VIII of 1859 *s.* 376—*Review of Judgment—Reference of Appeal (under Act VI of* 1871 *s.* 26*).*

In the matter of
Shama Churn Bhutt and others, *Petitioners,*

versus

L. Payne and Co., *Opposite Party.*

Baboos Kalee Mohun Dass and *Rash Beharee Ghose* for Petitioners.

Baboo Sreenath Dass for Opposite Party,

Where a Subordinate Judge hears and disposes of an appeal referred to him by the District Judge under Act VI of 1871 s. 26, he does so as District Judge, and has therefore, by implication, the same power of reviewing his judgment as a District Judge has under s. 376 Act VIII of 1859.

Markby, J.—THIS was an appeal from the decision of the Moonsiff to the District Judge, which the District Judge, under Section 26 of Act VI of 1871, referred to the Subordinate Judge. The appeal was disposed of by the Subordinate Judge, and subsequently an application for review was filed in the Court of the Subordinate Judge, and for the reason assigned, namely, that at that time the Subordinate Judge was the very Moonsiff who had passed the original decision, the District Judge thought it right to transfer the appeal proceedings back again into his own Court. Then, dealing with them there, he supposes that a difficulty arises from the wording of Section 376 Civil Procedure Code, which makes no reference to decrees passed in appeal other than those of the *District Court,* which by Section 386 is defined to be the principal Civil Court of original jurisdiction in a district, that is, the Judge's Court, and on that ground he held that, "according to the letter "of the law, there could be no review of a "judgment in reference to a decree passed "on appeal by the Subordinate Judge, as "has been done in this case."

But we think that this is too narrow a view of the Section. A District Judge has power to refer cases to the Subordinate Judge, who is to "hear and dispose of them accordingly," that is as District Judge, and therefore by implication the Subordinate Judge has the same power of reviewing his judgment as a District Judge has. Until this decision we never heard any doubt expressed upon the matter.

The case to which the Judge refers is quite a different case. Act VIII of 1869 (B. C.) provides in what cases an appeal will lie from the order of the District Judge. In the case referred to by the Judge (XVI W. R., page 235), there was an objec-

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tion taken by the respondent that no appeal would lie, because the sum claimed being under Rs. 100, and no question of title being determined by the judgment, by Section 102 of Act VIII of 1869 (B. C.) the decision of the Court below was final. It was held, however, that the restriction did not extend to a case tried by a Subordinate Judge, and which had been referred to him by the District Judge.

It is pointed out that there are clear reasons for inferring that the Legislature did not intend to take away the appeal, except in the particular case of suits tried by the District Judge himself.

We think the best mode of disposing of this case will be to order that, if the Subordinate Judge of Moorshedabad is still the Moonsiff who originally tried the case, the Judge should hear the review himself, but if not, then the District Judge may, if he think proper, send it back to the Subordinate Judge. The costs are fixed at two gold mohurs, and will abide the final result.

The 25th July 1872.

Present:

The Hon'ble W. Markby, *Judge.*

Act VIII of 1859 *s.* 102—*Reasonable Time—Death of Plaintiff—Appeal—Jurisdiction.*

In the matter of
Bhujohuree Mundul, *Petitioner.*

Baboo Kumla Kant Sen for Petitioner.

Where a plaintiff died on the very day on which the time for filing an appeal expired, and the plaintiff's son unsuccessfully applied to the District Judge, two days after his father's death, for leave to file an appeal, the HIGH COURT seemed to think that the application was made within a *reasonable time* after the father's death, and might have been dealt with on the principle laid down in Section 102 Act VIII of 1859, but that it was a matter entirely within the District Judge's jurisdiction, and not appealable.

Markby, J.—IF the facts stated in this petition are true, it seems to me that the applicant has made out a fair case for consideration. The Moonsiff's judgment seems to have been given on the 8th of April. A copy of the judgment of the Moonsiff was applied for by the plaintiff on the 20th, and delivered on the 23rd, and therefore, according to what I understand to be the usual practice, the time for filing an appeal would expire on the 12th May. On that day the plaintiff died.

On the 14th of May, the present applicant (the son of the deceased plaintiff) applied to the District Judge for leave to file an appeal; and according to the practice observed in this Court, the point for consideration would be whether this application was made *within a reasonable time* after the death had taken place. It is a case not expressly provided for by the Court, but we generally deal with these applications on the principle laid down in Section 102.

Possibly, if the case had been as fully placed before the Judge of the 24-Pergunnahs as it has been before me by the assistance of Baboo Kumla Kant Sen, who looked into the matter at my request, the application might have been successful.

I do not, however, consider that under the law I have any power to interfere. It was a matter entirely within the District Judge's jurisdiction, and there is no appeal. But possibly if the facts which I have stated are correct, the District Judge would allow the applicant to place them again before him. Let a copy of this be given to the applicant.

The 25th July 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Case No. 249 of 1871.

Verbal Contract (between Hindoos)—Registration Act.

Regular Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 31*st August* 1871.

Hurrish Chunder Chowdhry (Defendant), *Appellant,*

versus

Rajendur Kishore Roy Chowdhry (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Appellant.

Baboos Sreenath Dass, Doorga Mohun Dass, and *Issur Chunder Dass* for Respondent.

There is nothing in the Registration Act which renders a verbal contract between Hindoos invalid or inoperative.

Bayley, J.—I AM of opinion that this appeal ought to be dismissed with costs.

The plaintiff, the nephew of the defendant, brings this suit alleging that the defendant took an *izarah* lease from him for the term of five years extending from 1274 to 1278

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at an annual rent of Rs. 4,812-10 ; that there was a balance of rent due from the defendant for three years, 1275, 1276, and 1277, amounting to Rs. 14,437-6 annas and less certain payments made by the defendant to the plaintiff, there remained a net balance of Rs. 14,350-15 in plaintiff's favor, and that this, with the loss estimated as damages, made up Rs. 17,900. Lastly, that, notwithstanding repeated demands by plaintiff from the defendant, the defendant did not pay.

The defendant's case was that he never took any lease from the plaintiff; that the plaintiff was not his lessor nor he the plaintiff 's lessee, and therefore this suit for arrears of rent would not lie. Further, that the sum of Rs. 5,639 was due to the defendant from the plaintiff on account that the plaintiff himself realized the rent of the mehal for the year 1274, and that the actual assets made over to defendant by plaintiff on assignment of the lands were not equal to the amount due to defendant at the time of that assignment.

The first issue was a general one, *viz.*, whether the defendant took a lease from the plaintiff as the plaintiff alleged, or whether there was an assignment of land to meet defendant's dues and a balance of debt still due to the defendant from the plaintiff as the defendant alleged. Also whether the plaintiff held possession of the *izarah* mehal during the year 1277.

The Lower Court has based its decision on the fact that as the defendant had, by a petition dated the 26th August 1871, stated, when summoned to give evidence by the plaintiff, that in a family dispute of this kind between himself and the plaintiff it was derogatory to honor to give evidence against each other, and that he was willing to abide by the deposition which the plaintiff might give, he (defendant) was bound by such deposition of plaintiff. It does not very clearly appear from the judgment of the Subordinate Judge as to whether he also considered that the plaintiff had proved his case and the defendant failed to meet it, but it is clear on the record that the plaintiff gave his own deposition in the fullest and clearest manner, and that the defendant in all his various petitions did not ask the Court to take any evidence on his behalf, nor did he put forward anything to rebut the plaintiff 's case, so that whether the defendant acted wisely or otherwise in this respect the case stands thus :—the plaintiff gave his own evidence to prove the allegations made by him in the plaint, and the defendant not only did not tender his own evidence or that of any witnesses on his behalf to rebut the plaintiff's statements, but actually undertook by a petition in Court to abide by what statements the plaintiff might make in the case. Therefore it comes to this that in fact, and irrespective of the ground taken by the Subordinate Judge, the plaintiff has proved a case which the defendant has in no way rebutted. I do not see therefore any just reason in this case for interfering with the result of the judgment come to by the Lower Court.

I may also mention that the defendant took an objection to the effect that the plaintiff 's claim is not enforceable as it is based only on a verbalc ontract. Now, the parties were Hindoos, and a verbal contract between Hindoos is neither invalid nor inoperative. No authority is shown to the contrary. The decisions cited now merely rule that contracts in writing should be corroborated by registration, but there is no decision which says that verbal contracts shall not be received in Court.

Mitter, J.—I am of the same opinion. With reference to the first ground I wish to observe that there is nothing whatever in the Registration Act which says that a verbal contract between Hindoos is invalid or inoperative. All that the Act says is that certain instruments specifically mentioned therein should not be admitted or acted upon as evidence unless they are registered in the manner provided by the Act. But there is nothing whatever in that Act or in any of the authoritative rulings either of this Court or of any higher tribunal, on the strength of which it can be held that a parol contract, like the one on which the present suit is based, is not to be acted upon by a Court of Justice, because there is no registered instrument to support it.

I do not think it necessary to express any opinion as to what would be the effect of non-registration on the title of a person holding under a parol contract when that title is impugned by another claiming the same property under a *bonâ fide* registered instrument subsequently executed in his favor. The present case is between the immediate parties to the contract; and as between them I do not see any reason in justice or in equity why it should not be enforced if the case set up by the plaintiff is a true one.

The second ground of appeal also must fail. It may be that the Subordinate Judge was wrong in holding as a matter of law that the defendant was absolutely bound by

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the deposition of the plaintiff, inasmuch as he, the defendant, had by a previous petition intimated his willingness to abide by that deposition. But still the evidence given by the plaintiff, which if believed would be quite sufficient to prove his case, must be received as good *primâ facie* proof in his favor, unless it is rebutted by any counter evidence on the part of the appellant. Now, there is no such counter evidence on the record. It has been suggested in the course of the argument that the Subordinate Judge declined to examine the witnesses summoned by the defendant and actually produced by him in Court. But, on a close examination of the proceedings of the Subordinate Judge, it appears to me that the defendant did not tender any evidence on his own behalf, and the charge brought against the Subordinate Judge, *viz.*, that he has improperly refused to examine the defendant's witnesses, must therefore fall to the ground. It appears that both parties had cited each other as witnesses. On the 26th August 1871 the Nazir made a report to the Court that certain witnesses summoned by the defendant were present; but on that very day the defendant filed a petition stating that his position and rank in society would not permit him to appear in Court in order to give his evidence, and asking the Court to dispose of the case *solely* and *exclusively* on the evidence of the plaintiff which evidence he, the defendant, undertook to abide by. The plaintiff's examination was finished on the 28th, and on that very day the Subordinate Judge recorded the following proceeding:—

"As the Subordinate Judge of Benares "has been requested to take the evidence of "the plaintiff's mother by commission; as "the above Subordinate Judge has forwarded "a robakaree intimating that the witness is "elsewhere, and that therefore the taking of "the deposition has been postponed for a "week; and as the pleader of the defendant "being asked, has expressed his intention "of informing the Court just at its first "sitting on the day following as to the "necessity or otherwise of the taking of the "evidence of the said witness, it is ordered "that the case be postponed this day." It is clear from this proceeding that the Subordinate Judge was quite ready and willing to examine at least the particular witness whose name is mentioned therein, and he actually gave time to the defendant's pleader to mention to him on the following day as to whether his client would like to have the evidence of that witness taken or not. Now, what did the defendant do on the next day? Did he ask the Court to take his own evidence or that of any of the witnesses summoned by him including the witness above referred to? Nothing of the kind was done, and all that the Court was asked to do was to give further time in order to enable the defendant to explain to his pleaders the deposition which had been already given by the plaintiff on the 28th. In the face of these facts it appears to me impossible to hold that the Subordinate Judge has deliberately refused to examine the defendant's witnesses; and the only reasonable conclusion I can arrive at is that the non-examination of those witnesses is entirely due to the defendant's own negligence, wilful or otherwise. The reason why the defendant did not press for the examination of his witnesses appears to me to be almost self evident. He himself would not come forward to pledge his oath to the truth of the averments made by him in his written statement; and, as he knew very well that the first step which the Subordinate Judge would take, in case he insisted on the examination of the witnesses summoned by him would be to examine him personally, he thought it prudent to let matters be as they were and take his stand on the defects which he supposed he could point out in the evidence given by the plaintiff. Some stress has been laid by the learned pleader for the appellant on a letter written by the plaintiff to the defendant on a date long previous to that of the lease referred to in the plaint. But there is nothing whatever in that letter which is inconsistent with the evidence given by the plaintiff; and as that evidence has not been rebutted by any counter evidence produced by the defendant, the case has been in my opinion properly decreed against him.

No other grounds of appeal have been urged.

The 25th July 1872.

Present:

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Mooktears—Renewal of Certificate to practise in another District.

In the matter of
Kalee Churn Banerjee Mooktear, *Petitioner.*

Baboo Kushee Kant Sen for Petitioner.

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Where a mooktear who had been practising in Backergunge, applied to the Judge of the 24-Pergunnahs for a renewal of his certificate, and the Judge of the latter district refused to grant him a certificate to practise in his district without a certificate from the authorities of Backergunge of the truth of his representations, the HIGH COURT declined to interfere, but observed that, as the application had been made within three years from the date of his certificate, if the applicant procured the certificate required by the Judge within six weeks from this date, the application ought to be treated as made within time.

THE petition alleged that petitioner passed the mooktearship examination held at Backergunge on the 11th and 12th February 1867, and having been enrolled in the mofussil mooktear's list of the High Court in July 1867, obtained certificate to that effect in 1868, and again renewed it on the 2nd July 1869 from the Judge of Backergunge; that petitioner practised as mooktear on the strength of those certificates at Dowlat Khan, in the District of Backergunge, from July 1867 to September 1869; that after September 1869, petitioner fell sick, went home, did not practise as mooktear, and was out of employ up to the present date; that desiring to practise as mooktear in the District of 24-Pergunnahs, petitioner presented an application, under Section 12 Act XX of 1865, on the 8th April 1872, together with his certificate to the Judge of that district, through the sheristadar of the Court at 10-30 A.M., but the sheristadar at about 2 P.M. returned the said application to petitioner, saying that nothing could be done here, and that the Judge had verbally ordered petitioner to go to the Judge of Backergunge; that on the next day, *i. e.* the 9th April 1872, petitioner was present in Court with his application dated 8th April 1872 and his certificates, but could not present them to the Judge as he was busy; that on the 10th April, petitioner presented the said application to the Judge, who had returned it to petitioner without passing any written order on it, and had verbally directed him to go to the Judge of Backergunge, saying that he has no hand in the matter; that, aggrieved by this, petitioner now came up to the High Court with the application and certificate he presented to the Judge of 24-Pergunnahs, filed an affidavit herewith which verified and confirmed the facts stated in the petition, and submitted that petitioner was legally entitled, under Section 12 Act XX of 1865, and Rules 36 and 42 of the Rules passed by the High Court on the 2nd May 1866, to be enrolled in the Court in which he should desire to practise; and that, as petitioner desired to practise as mooktear in the 24-Pergunnahs, the Judge of that district, under Rule 36 of the 2nd May 1866, was the only authority to whom petitioner could apply for such permission, and the present proceeding of the Judge concerning the application of petitioner was altogether illegal, and passed without jurisdiction. Petitioner therefore prayed that the High Court will be pleased to direct the Judge of the 24-Pergunnahs to accept his application, enrol him as mooktear, and permit him to practise as mooktear in the 24-Pergunnahs.

A reference having been made to the Judge of the 24-Pergunnahs he stated that he had no means of knowing whether the petitioner's certificate ought to be renewed or not. He had been practising in the Backergunge Courts; and without any certificate from the Backergunge authorities of the truth of his representations, the Judge of the 24-Pergunnahs did not consider it his duty to grant him a certificate to practise in his district, and did not consider himself bound to call upon the Judge of Backergunge to state whether the petitioner's representations were correct; but he told the petitioner that he would renew the certificate if the Judge of Backergunge stated that there was no objection to his doing so, and referred him to the Judge of the district in which he had been ordinarily practising.

Markby, J.—We do not think that we ought to interfere with the order made by the Judge in this case. We think it was quite reasonable when a man, who was a perfect stranger, came into the Judge's Court, with a certificate dated nearly three years prior to the date when the application was presented, to require some certificate from the Judge of Backergunge, where it was alleged that the petitioner had been practising. This being proper and reasonable, we ought not to interfere.

But it appears that, at the time when the application was made, it was within three years; and that during the time that this matter has been under discussion, the three years have expired. We think, therefore, that, if the applicant does procure the certificate which the Judge has required within the period of six weeks from this date, the application ought to be treated as having been made within time.

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The 26th July 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Issues—Evidence—Appellate Court.

Case No. 200 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Beerbhoom, dated the 21st August 1871, *reversing a decision of the Subordinate Judge of that district, dated the 10th August* 1870.

Ram Persaud Dutt (Plaintiff), *Appellant,*

versus

Krishto Mohun Shaw and another (Defendants), *Respondents.*

Baboos Nullit Chunder Sein and *Bipro Dass Mookerjee* for Appellant.

Baboos Mohinny Mohun Roy and *Aukhil Chunder Sein* for Repondents.

Where the first Court has fixed and tried a wrong issue, the Judge in appeal should give the parties ample opportunity of adducing evidence upon the proper issues that he may lay down.

Glover, J.—THE plaintiff sues for a declaration of his right in, and to recover possession of, 18 beegahs of land. His statement is that in 1265 he borrowed Rs. 132 from the defendant on an usufructuary mortgage of this land, which was the ancestral *lakheraj* of his family ; the mortgage was to last for 11 years and 4 months. On the day the mortgage was given, the plaintiff took a lease of the land in question on a jumma of Rs. 39-4 from the mortgagee ; the arrangement being that the rent was to pay off the mortgage within the time therein stipulated. The plaintiff, it appears, neglected to pay his rent, and the defendant sued him for arrears and for ejectment, and got a decree. The decree was for the rent of 1267 ; and in execution of it, the plaintiff was ejected from his *jote.* The plaintiff says that he never got possession again, but the defendant alleges that after this ejectment the plaintiff again came to terms with him under a verbal arrangement ; that he again took possession of the land, and again defaulted in the payment of his rent in consequence of which the defendant brought another suit for the rents of 1271, 1272, and 1273, and got a decree, in execution of which he sold the plaintiff's rights and interests in the land *lakheraj,* and bought these rights himself.

The grounds upon which the plaintiff sued to recover possession of this land were that he made no arrangement such as alleged by the defendant ; that he never had possession of the land after the first ejectment ; that he owed no rent ; and that the decree which was an *ex parte* one was obtained without his knowledge, he having had no notice of the suit, which was a fraudulent and collusive one.

The first Court gave a decree for the plaintiff. The Judge in appeal reversed that decision. The only point which it is at all necessary for us to deal with in this special appeal is the Judge's procedure. The objection as to the nature of the right sold has been disposed of in favor of the special respondent. By a perusal of the sale certificate, which shows that it was not the plaintiff's right in any particular tenure which was sold, but the whole of the *lakheraj tenure,* was the Judge right in deciding the case without first remanding it for further enquiry ? It is urged, and the only question remaining is, that, inasmuch as the Judge has found that the first Court fixed and tried a wrong issue, he ought not himself to have tried what was undoubtedly a proper issue, without giving the plaintiff notice of the nature of the contention and of the issue which the Judge considered was the right one. The first Court no doubt fixed the wrong issue and the Judge was quite right in saying that the proper point for decision was whether the second decree for rent obtained by the defendant against the plaintiff was a collusive decree, and whether it was proved or not that the plaintiff had no notice of the claim against him, and whether the *ex parte* decree was got through fraud. The Judge very rightly says that this being the issue, it was for the plaintiff who alleged fraud, to prove fraud, and that he had altogether failed to do so. But it must not be forgotten that, if the plaintiff had no evidence to adduce on this point, it was because he had no opportunity of adducing it on the issues laid down in the first Court, those issues not involving that question. It has been found no doubt that, on the occasion of execution being taken out after the second decree, the plaintiff's brother endeavoured to avoid the sale by alleging that the land was *debuttar* land, which could not be sold, and not content with appealing against the order adverse to him passed by the Deputy Collector, went into the Civil Court, and endeavoured to prove the same thing, in which he again failed. But this would not in our opinion prevent the plaintiff from proving his contention in this case ; and as the proper issue to be tried was whether the second decree was or was not fraudulently

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obtained, and as the plaintiff had no opportunity of adducing evidence to prove that fact, we think that the case must go back to the Court of first instance, in order that this issue may be fixed; the plaintiff must have an opportunity of showing by evidence that the second decree for the rent of the years 1271, 1272, and 1273 was obtained against him collusively and without notice of the suit having been served upon him. Costs will follow the result.

The 27th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Village Chowkeedar (appointed under Regulation XX of 1817 *s.* 21*)—Suit for Wages against Landholder—Limitation—Meaning of "Servant" in cl.* 2 *s.* 1 *Act XIV of* 1859.

Reference to the High Court by the Judge of the Small Cause Court at Bhaugah, dated the 28th June 1872.

Golamee Chowkeedar, *Plaintiff in two cases,*

versus

Shaikh Paelan and another, *Defendants in two cases.*

A liability on the part of a landholder to pay the wages of a village chowkeedar appointed under s. 21 Regulation XX of 1817, cannot be inferred from the fact that the chowkeedar's salary was fixed by the heads of the village, and apportioned among the several householders without objection made by any of them, but must be proved in order to sustain a suit brought by the chowkeedar against the landholder.

A chowkeedar is a servant within the meaning of cl. 2 s. 1 of the Limitation Act XIV of 1859.

Case.—PLAINTIFF, a village chowkeedar, sues the defendants respectively in the cases above enumerated, for recovery of Re. 1-11, being the amount of wages due to him from Magh 1276 to Chyet 1278, at the rate of one anna per mensem, for services rendered by him in his capacity of a chowkeedar. Plaintiff, it seems, had presented a petition to the District Superintendent of Police of Furreedpore, to adopt measures for the realization of the arrears in question, but that officer passed an order to the following effect, that the petitioner may sue in the competent Court for the recovery of his dues. Hence these actions have been brought in this Court. The following points have been raised by the defendant's pleader, and I most respectfully solicit the Court's opinion on them.

1. That these cases are not cognizable by the Civil Court, inasmuch as there are special laws prescribed for the realization of chowkeedars' wages.

2. That the limitation of one year, under Clause 2 Section 1 Act XIV of 1859 applies to the plaintiff's claim; consequently, that portion of the claim which refers to a period beyond one year next preceding the institution of the suit is barred.

With reference to the first point, I have to observe that, the recent enactment in regard to the village chowkeedar, is Act VI of 1870 B. C. It provides for the appointment, dismissal, and maintenance of a chowkeedar, but Act I of 1871 B. C. (an Act to amend the Village Chowkeedaree Act, 1870) enacts (Section 1) that "Nothing in the said "Act shall be held to repeal the provisions "of Section 21 Regulation XX of 1817, "in any village, or union, until a chowkeedar "shall have been appointed therein, under "the provisions of the said Act." It is admitted that the plaintiff has not been appointed under the provisions of Act VI of 1870. It being so, the law applicable to the plaintiff's case is Regulation XX of 1817, and not Act VI of 1870. Section 21 Regulation XX of 1817 is silent as to the mode in which the salary of a chowkeedar is to be realized and paid. It is evident there were no chowkeedaree funds provided for in that law, and the chowkeedars were appointed and paid by the landholders and other persons of the village to which they belonged. Under such a case, I am at a loss to understand why a chowkeedar, who has failed to realize his legitimate due after service done, from a party who is encumbered with the maintenance of the chowkeedar, should be debarred from resorting to the Civil Court for redress. The plaintiff's salary in the present case is proved to have been fixed by the heads of the village, who also ascertained the rate at which every householder of the village is to contribute towards meeting the charge unobjected by any. I should, therefore, decide this point in favor of the plaintiff.

With regard to the second point, I am inclined to think that the nature of the plaintiff's appointment does not admit him as a servant within the meaning of Clause 2, Section 1, Act XIV of 1859. The servant therein contemplated apparently has reference to a domestic menial servant. A chowkeedar under the Regulation under notice, is, properly speaking, a servant of the State, but maintained by the village people, because his services are entirely at the disposal and under the control of the Police Darogah.

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But if this Clause does not apply, what Clause would ? I think Clause 9 will govern the case, as the apportioning of the salary without objection is an implied contract. I, therefore, decree the two cases in favor of the plaintiff contingent upon the order of the High Court.

The judgment of the High Court was delivered as follows by—

Couch, C. J.—A liability on the part of the defendant to pay the chowkeedar cannot be inferred from the facts stated in the case. He can only sue the defendant upon the ground that he was employed by him or by some person who was the defendant's agent for that purpose. This does not appear, nor does it appear that the defendant had admitted his liability. The chowkeedar should sue the person or persons who employed him. It is difficult to define what is a servant within Clause 2 Section 1 of the Limitation Act, but we think that a chowkeedar is one ; being under the control of the Police Darogah does not make him not one.

The 20th June 1872.

Present :

The Rt. Hon'ble Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Lawrence Peel.

Practice of Privy Council—Special Leave to Appeal on Facts—Evidence.

*On Appeal from High Court at Calcutta.**
Golam Ally,

versus

Kalikisto Tagore and another.

The Privy Council will only, under very special circumstances, grant an appellant from a judgment of the High Court passed in special appeal, *nunc pro tunc*, special leave to appeal, on the facts.

In this case the Privy Council declined to grant that leave, and agreed with the High Court that a certain *chitta* was fairly admissible as evidence, and that it tended very much to negative the case put forward by the appellant.

[In this case the counsel for the appellant on the hearing of the appeal, which was from a decree of the High Court at Calcutta made on special appeal, applied to their Lordships, if they should think it necessary for the due administration of justice, to recommend Her Majesty to grant to the appellant, *nunc pro tunc*, special leave to appeal from the decree of the inferior Court in India, on the facts.

Upon this preliminary application, their Lordships delivered the following judgment :—]

Their Lordships have considered Mr. Doyne's application, and the conclusion they have come to is this, that, for the reasons which I am about to state, they would not be justified in the present case in giving special leave to include in this appeal an appeal against the decisions of the two Judges who have dealt with the questions of fact in the cause,—the Deputy Collector and the Judge to whom there was an immediate appeal from him.

They have looked at the petition of appeal to Her Majesty, and it is perfectly clear that appeal is preferred simply against the order of the High Court on the special appeal. It is undoubtedly true that it has, recently at least, been the practice to allow the whole case to be opened upon questions of fact, as well as questions of law, although the High Court, the appeal to it having been merely a special appeal, has been able to deal only with the latter. The mode of accomplishing this, if the party thinks it necessary for the justice of his case, is to apply to their Lordships in due time for special leave to appeal against the decisions of the Subordinate Courts ; an application to be granted, not as of course, but on sufficient grounds. No such application has been made in the present case ; but it is stated by Mr. Doyne that the Board has been in the habit of granting this privilege at the hearing *nunc pro tunc*, if they thought the justice of the case required it. We are not aware of, nor is Mr. Doyne able to refer us to, any case in which this was done, nor does our recollection supply one ; although, if their Lordships saw clearly that the justice of the case could not be reached without allowing such an application, they do not say that they would not grant it under any circumstances, or upon any terms. They are of opinion that nothing but very special circumstances ought to justify the granting of leave to appeal against the other decrees at so late a period as the hearing of the appeal ; and that no such circumstances exist in the present case. The question is one of those which it is extremely difficult for a tribunal like this to deal with,—the simple question of parcel or not parcel, whether a certain portion of *chur* land is included in a particular tenure, or remained liable to assessment for rent. It

* From the judgment of Bayley and Macpherson, JJ., dated 5th August 1868.

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is emphatically one of those questions which are best decided, and can only be satisfactorily decided, upon the spot; and in re-opening the decisions on the facts in the present case, we should be running counter to that general rule which governs the proceedings of their Lordships, namely, that, where there have been two concurrent findings upon questions of fact, this tribunal will not, except upon very special grounds, disturb them. Therefore their Lordships think they would not be justified in granting this application. Of course, they are ready to hear whatever may be argued further upon the question whether the decision of the High Court upon the special appeal was correct or not; and if it were not correct, what order that Court ought to have made on the grounds before it.

[*Counsel proceeded further to address their Lordships, who ultimately pronounced the following judgment:*—]

This litigation began in the Court of the Deputy Collector, in consequence of a notice by the respondent served upon the appellant with a view to the assessment of rent upon land which had been measured, and was stated to contain 10 drones and some odd kanees. The land was the land indicated in the first map to which their Lordships were referred, being map No. 18. The appellant resisted the claim of the respondent upon the ground—at least this is the only ground which it is now necessary to consider—that the land in question, or a portion of it, was included in the *durputnee* lease, or the *putnee* lease which had been granted to him by the respondent at a fixed rent. In the course of the litigation, which it is not necessary to pursue particularly, it became an admitted fact that all the land from the east of the *kole* on the map was land which the appellant, the defendant in the suit, admitted was liable to be assessed, but that the land to the west of the *kole* was still, as he contended, included within his *putnee* tenure, and was therefore incapable of any further assessment. In that state of things one would have supposed, though it is not necessary for their Lordships' decision to rule that it was so, that the burden of proof lay rather upon the defendant than upon the plaintiff, the former relying upon his title as zemindar to receive rent for the land of which the other was in occupation, and that claim being met by the allegation that the land in question was protected from further assessment by being included in a perpetual tenure at a fixed rent. However that may be, the issue upon which the parties went to trial upon the last remand was whether that land which was situated on the western side of the *kole*, and which, by one of the documents in the record, appears to have comprised little more than 6 drones of land, was or was not included within the *durputnee* tenure. Now what was that *durputnee* tenure? It may be described as such, although the title of the appellant to it rested upon two distinct grants; one made by the respondent in the character of zemindar, the other in the character of a *putneedar;* and it is not very clear whether these grants were each a grant of an undivided 8-anna share in the same subject, or whether they were grants of different subjects. It is immaterial, on the present appeal, to express any opinion on that point; because it is perfectly clear that certain land, described as *lukht kole chur* lands of Mouzah Bowsia, was excepted out of the tenure granted, and that the question in dispute between the parties was ultimately reduced to the issue whether the land west of the *kole* was such *lukht kole chur* land of the mouzah, and therefore excepted from the *durputnee* tenure, or whether it was included in it. That case when remanded was tried again, first by the Deputy Collector, and afterwards on appeal by the Judge, and both Courts, proceeding upon a local investigation, came to the conclusion that the land in question was within the excepted land, and that it did not fall within the *durputnee* tenure of the appellant.

The decision which their Lordships pronounced upon Mr. Doyne's application in an early stage of the hearing precludes any consideration of the propriety of this finding upon the mere question of fact; and they have now only to decide whether the High Court, in dealing with the special appeal brought before it after these last decisions of the Lower Courts, was correct or not.

Now, the grounds of special appeal are stated in the record. They are summarized by the learned Judges. The summary does not, perhaps, entirely agree with the grounds filed, for the first is stated to be "that the *chitta* "of 1261 was not receivable as evidence; "2ndly, that even if receivable, it can be "treated only as corroborative evidence;" whereas in the grounds of special appeal, as filed, it was rather that there was not evidence sufficient to support the judgment that the land in dispute did not appertain to the *putnee;* and that, admitting for argument's sake, that the *chitta* filed by the plaintiff was genuine, the *dags* relied upon did not show

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that the disputed *chur* was excluded from the *putnee*.

The High Court, in dealing with what they understood to be the special grounds of appeal, put a construction upon the lease in these words :—Mr. Justice Bayley said :— "Again, 11 drones 9 kanees are stated in the "lease as the area of Geirlaik, unculturable, "*i.e.* (sandy *chur*) ; and if we look to the "terms of the lease, we find that the contract "was that a certain quantity of *chur* land "was to go with the lease ; but if there were "any deficit by diluvion, the deficit was to "be made up from the accretion, and that "every further accretion beside that was to "be considered as being beyond the defendant's lease. Therefore, when the Lower "Appellate Court refers to the area of the "lands, it only refers to it as one item of "evidence on which the case is decided in "plaintiff's favor. I cannot think that this "objection is one which in special appeals "affects the case on its merits." The inference which their Lordships would draw from that passage of the judgment is this, that the High Court, putting upon the lease and the grants the construction most favorable to the appellant,—a construction which it may be admitted for the sake of argument was not consistent with the construction upon which the Lower Courts appear to have acted,—still thought that the *chitta* being admissible as corroborative evidence, and there being a considerable body of other evidence in the cause, there was a sufficiency of evidence upon which the Courts below might properly have decided in the plaintiff's favor.

Their Lordships, as I said before, are merely, on this occasion, in the position of the High Court. They are by no means prepared to say that, if they had to construe the terms of the grant for the first time for themselves, they should put the construction which the High Court has put upon it. The documents are ambiguous, and there are considerable difficulties, they think, in the way of that construction. It might well be held that the stipulation which has been so much relied upon might import only that, in case there was a loss by diluvion, that that loss should be afterwards made up by any accretion that might take place ; but they do not think it necessary for them to say to what construction, if the question was really open before them, they would finally adhere. It is sufficient for them to say that they agree with the High Court in thinking that the *chitta* was fairly admissible as corroborative evidence ; that it tended very much to negative the case which appears to have been put forward as the case of the appellant, and which it was almost necessary for him to put, namely, that the land which he claimed, as included in his tenure, had been included in the tenure of the *modafat*, and that it is impossible to say that the High Court was wrong in coming to the conclusion that the grounds for special appeal had not been made out, or that there was no evidence upon which the Courts below might have properly decided in the plaintiff's favor.

Their Lordships therefore, under these circumstances, can only humbly recommend to Her Majesty that this appeal be dismissed with costs.

The 25th June 1872.

Present :

The Right Hon'ble Sir James W. Colvile, Lord Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Act VIII of 1859 *ss.* 26 *and* 29—*Titles* (*Omission of*)—*Plaint* (*Rejection of*).

On Appeal from the High Court at Madras.

The Hon'ble Sri Maharajah Meerja Vijaya Rama Gajapati Raz Munea Sultan Bahadur Garu, of Vizianagram, K.C.S.I., sued as Sri Rajah Vijayarama Gajapati Raz Bahadur, Zemindar of Vizianagram, *v.* Sri Rajah Lakshmi Challaya, Ranee of the Zemindary of Bobbili, widow, and heiress of the late Respondent, Sri Rajah Sitaramakristna Rayudappa Ranga Row Bahadur Garu, Zemindar of Bobbili.

The Privy Council held, upon the proper construction of the Code of Civil Procedure, that the description contemplated by s. 20 includes all those titles by which a party is known ; and that if the plaintiff from animosity, pique, or anything in fact but a *bonâ fide* dispute as to the right to a title, obstinately refused to give his adversary that title by which he is generally recognized, the Court ought not to permit or sanction that species of insult, but will exercise a sound discretion, under s. 29, in first requiring the plaintiff to amend his plaint, and afterwards in rejecting the plaint should the first order be contumaciously disobeyed.

THIS is an appeal against the judgment of the High Court, which reversed the decision of the Judge of the Civil Court of Vizagapatam, dated—and the date is material for the decision of the present question—the 5th July 1865. The question which the appeal raises is the effect to be given to the 26th and 29th Sections of the Code of Procedure. The 26th Section requires that the

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plaint shall contain the name, description, and place of abode of the defendant, as far as they can be ascertained, and the 29th Section provides that, if the plaint does not contain the several particulars therein before required to be specified therein, the Court may reject the plaint, or, at its discretion, may allow the plaint to be amended.

In the present case a plaint was filed by the Rajah of Bobbili, against the appellant, whom I may shortly describe as the Maharajah of Vizianagram. The objection taken to the plaint was that the defendant was described on the face of that plaint by titles which did not correspond with the full titles to which he was entitled, and by which he ought to have been described. The Judge thought that objection was made out, and he directed that the plaintiff should have liberty to amend his plaint by amending the description of the defendant, in accordance with the description which had been given to him in the Gazette, by which he was appointed a member of the Governor-General's Council for making laws, namely, the "Honorable Maharajah Meerja Vijaya "Rama Gajapati Raz Manea Sultan Bahadur "Garu, of Vizianagram." He gave the plaintiff a "week's time to amend his plaint "by entering the name and distinction of the "defendant as above set forth, and in default "the plaint will stand rejected." The plaintiff, the respondent, declined to amend his plaint, and failed to do so. The Judge then rejected the plaint under the 29th Section, and upon appeal to the High Court, that order of rejection was reversed, and it was held that the identity of the appellant having been ascertained by the imperfect description, the order to reject the plaint ought not to have been made.

The dispute between these parties seems to have been a very ancient one. There appears to have been a feud between these two great proprietors for a considerable time as to the titles to which they were respectively entitled. It further appears, however, that as early as 1861, the then agent of the Governor of Madras in Vizagapatam had ascertained what titles were the titles by which these parties were respectively known. I think the phrase is what titles "were in vogue," and he ordered that in all official documents, those titles should be given by the one to the other. The respondent or his father raised an appeal against that order. There was an elaborate report made by a Mr. Carmichael to the Government, and the Government of Madras passed an order upon that, which is dated the 26th April 1865, by which they ruled that the order of the agent should stand, and that those titles should be treated as the titles necessary to be given in official documents. That, therefore, was a recognition by the Local Government of Madras that the appellant was entitled to the titles specified in the order of the agent, Mr. Fane. It was also something more, because, while this question was pending before them, the Government of India, by the then Viceroy, had formally conferred upon the appellant the title of Maharajah. Therefore, if there had been any question upon his claim to that title at an earlier date, that doubt was entirely removed by the formal act of Government, and the grant of the title from that which must be taken to be in India the fountain of honor.

Now it is no doubt the fact that the plaint in the present case was filed before that order of the Government of Madras to which I have just referred. It was, however, filed after the grant of the title of Maharajah; and after the appointment of this gentleman to be a member of the Governor-General's Council for making laws, by the notification in the Gazette in which he received his full titles, and was described in the manner in which the Judge afterwards required the respondent to describe him; and, further, it is certain that the order of the Government of Madras was passed and issued before the question raised upon this objection under the Code came to be tried, and the decision of the Judge upon it was passed, because that, as I stated, was not until July 1865.

In these circumstances the question for their Lordships' consideration is, whether the order of the Judge, which was competent to pass, and indeed ought to have passed, under the Code of Procedure, or whether the decision of the High Court reversing it, is the correct one.

No doubt the question which is now brought before their Lordships might by some persons be considered frivolous. It does not appear to their Lordships, however, to be by any means a light question. It is certainly (as one of their Lordships remarked in the course of the discussion) strongly against the policy of the law that anything should be done which tends to increase that which has been always one of the great social evils of India, *i. e.*, the indisposition of persons of consequence to appear as suitors in Courts of justice. It appears to their Lordships that, upon the proper construction of the Code, the description contemplated by the

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26th Section includes all those titles by which the party is generally known; and that if a plaintiff from animosity, from pique, or anything in fact but a *bonâ fide* dispute as to the right to a title, obstinately refuses to give his adversary that title by which he is generally recognized, the Court ought not to permit or sanction that species of insult, as insult, no doubt, it would be treated, not only in India, but even in other countries.

In the present case it is not necessary for their Lordships to consider whether, if there were a *bonâ fide* dispute in the suit, or otherwise, as to the existence of the title, or as to the right of the party to bear a particular title, the Judge would in every case exercise a sound discretion in rejecting the plaint. For it appears to their Lordships that here the matter was entirely put by the proceedings already referred to beyond dispute, and that it was impossible to say that the titles, if properly treated as falling within the term of description, could not be ascertained. An order had been passed in the district, with the view, apparently, of keeping the peace between these great proprietors, that in all official documents each should describe the other by a certain title; that order had been recognized after appeal and discussion and enquiry by the Government of Madras; the titles themselves had been recognized by the authority in India,—by the Governor-General in Council, and confirmed by a distinct grant of the principal title, that of Maharajah,—and therefore there could be no pretence or excuse for saying that there was any doubt whatever as to the legal right of the appellant to bear those titles which he claimed to bear. Their Lordships are therefore of opinion that the Judge of the Civil Court was competent to pass the orders which he passed; and that he exercised a sound discretion in first requiring the respondent to amend his plaint, and afterwards in rejecting that plaint when the first order had been contumaciously disobeyed.

The only point on which their Lordships have entertained a doubt is whether it was essential for the Judge to require the term "Honorable," which seems to be less matter of description than a mere honorary distinction, applying to those who are members of the Council, to be stated in the plaint. It is, however, to be observed that the respondent, when he appealed to the High Court, did not raise any point as to that. He raised broadly the question whether he was bound to give the appellant what he called his honorific titles, or whether it was not sufficient simply to describe him in a way in which he could be distinguished from any other person.

Their Lordships are aware that, in coming to the before-mentioned conclusion, they are ruling that which is in some degree in conflict with a decision passed by the High Court of Bengal in the case cited from the 12th Weekly Reporter, page 450. It is to be observed, however, that, as it was fairly admitted at the bar, that case is in one particular distinguishable from the present, inasmuch as there the defendant had not taken the objection in the first instance, but had asked for further time, and afterwards took the objection by way of after-thought. It is, however, scarcely necessary to observe that even, if the case had been on all fours with the present, it would not have been a decision, passed as it was by a Division Bench of the High Court, which would have been binding upon their Lordships; and for the reasons which I have stated, their Lordships are of opinion that it is not the true construction of the Act in question to say that, where a man has titles, the claim to which titles cannot rationally be disputed, and by which he is generally known, all that the Code requires is that he should be described in such way as has been contended for by the respondent.

Their Lordships, under these circumstances, will humbly advise Her Majesty that the decree under appeal be reversed, that the order of the Zillah Judge be affirmed, and that the respondent do pay the costs of this appeal and in the High Court.

The 27th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Pleader and Client—Carelessness—Costs and Interest.

Case No. 5 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 12th of October 1871.

Prince Mahommed Ruhimooddeen (Decree-holder) *Appellant*,

versus

Baboo Beer Protab Suhai (Judgment-debtor) *Respondent*.

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Baboo Chunder Madhub Ghose for Appellant.

Baboo Kally Kishen Sein for Respondent.

A tabular account having been drawn out and submitted for some days to the examination of the vakeels of the different decree-holders before it was finally settled, the Court declined to allow the matter to be re-opened for the purpose of correcting a mistake (the omission of costs and interest) at the instance of the appellant, one of the decree-holders; and observed that the appellant, if he has suffered loss through the carelessness of his pleader, may not be without a remedy.

Couch, C. J.—We do not think we ought to interfere. What is now sought is to get rid of the omission to put the costs and the interest in the statement of the account which was drawn out. It arose from the present appellant's pleader not putting the particulars where they ought to have been, and where alone the Court was bound to look for them, *viz.*, in the tabular statement. It appears that the account was submitted for some days to the examination of the vakeels of the different decree-holders before it was finally settled, and we think that is a circumstance which ought to have weight with us. In fact, it was a kind of arrangement come to with the Court by these claimants by which an account of what was due to each was made out and agreed upon. Certainly, after the opportunity which the vakeel of the appellant had of correcting the mistake, and having a proper account made, we ought not to allow it to be re-opened, unless we had the parties who had an interest in keeping the accounts as settled, before us; they might reasonably object, after what has taken place, to the Court altering the account in such a way as to affect them, as it must to some extent.

The present appellant has suffered loss through the mistake, or possibly the carelessness of his pleader. If it was carelessness, he may not be without a remedy.

The appeal must be dismissed with costs, pleader's fees being fixed at Rs. 16.

The 27th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Jurisdiction—Small Cause Court—Deferred Dower (Muwajjal).

Reference to the High Court by the Officiating Judge of the Small Cause Court at Sealdah, dated the 21st June 1872.

Hayatunnissa Bibee, *Plaintiff*,

versus

Shaikh Asirooddeen and another,

Defendants.

A suit for deferred dower or *muwajjal*, payable to the wife by the husband upon her divorce, or upon the husband's death by his heirs out of his estate, is cognizable by a Small Cause Court.

Case.—Plaintiff in this case sues defendants upon a *kabinnamah*, or deed of dower, executed and duly registered by her husband now deceased. The dower claimed amounts to 500 rupees, of which while one half is exigible dower or *muajjal*, the other half, about which I submit this reference, is deferred dower or *muwajjal*. *Muwajjal* is payable to the wife on divorce, or on decease of the husband where there has been no divorce. In this instance there was no divorce, and plaintiff now comes into Court upon her husband's death to sue his heirs. The point upon which I solicit the orders of the Hon'ble High Court is as to whether, under these circumstances, her suit is cognizable in a Small Cause Court.

Deferred dower is payable alternatively upon the dissolution of marriage by divorce, or death, as the case may be. In this case, as there was no divorce, it is payable on the death of the husband, and not before, and all material parts of the deed of dower may be read as though the alternative of divorce were not mentioned in the deed. The effect of the deed is that the husband settles a certain sum of money on his wife, payable on his decease. The consideration of this arrangement is marriage. The dower deferred is exactly in the nature of a conditional bequest. It is unlike an ordinary debt, inasmuch as it is the heirs of the husband who are liable to pay it, and not the husband himself.

Paragraph 2 of Section 6 of Act XI of 1865 declares that an action shall not lie in a Small Cause Court "for a legacy or part of a legacy under a will." The expression "will" is defined in the Indian Succession Act "as the legal declaration of the intentions "of a testator with respect to his property, "which he desires to be carried into effect "after his death." This definition would seem to me to include in its terms that part of the deed of dower under which plaintiff in the present case sues for *muwajjal*, and I am therefore of opinion that this suit is non-cognizable.

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The judgment of the High Court was delivered as follows by—

Couch, C. J.—The dower is money due upon the contract of the husband, payable either upon divorce or on his death. The fact of one of the contingencies being his death, and the money being payable by his heirs out of his estate, does not prevent the suit from being cognizable by the Small Cause Court.

The 27th July 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Markby, *Judge.*

Hindoo Law of Inheritance—Insanity—Madman—Evidence—Maintenance—Sale of immoveable Property—Conditions of Sale—Title.

Appeal from the judgment of the Hon'ble A. G. Macpherson, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Dwarkanath Bysack and others (Plaintiffs) *Appellants,*

versus

Denobundoo Mullick and another (Defendants) *Respondents.*

The Standing Counsel for the Appellants.

Mr. Lowe for Denobundoo Mullick.

According to Hindoo law a party need not be absolutely incurably insane in order to be incapable of inheriting; nor is it necessary to show, by clear and positive evidence, the absolute impossibility of a cure.

A madman, though excluded from inheritance, is entitled to maintenance.

Per Macpherson, J.—Although, when parties do not possess a title prior to a particular date, they may fairly make it a condition that no title prior to that date shall be required, it is not fair or honest to say that the title commences on a certain date when it does not commence then, and when the vendor has prior deeds in his hands which show his title to be bad.

THIS was a suit to recover possession of certain lands and premises from the defendant Denobundoo Mullick, to have the rights of the plaintiffs and the defendant Denobundoo Mullick therein ascertained and declared, and for an account and payment of mesne profits by the defendant Denobundoo Mullick.

The facts of the case will appear sufficiently from the judgment of the Lower Court, which was as follows :—

Macpherson, J.—In this case the plaintiffs sue to recover the estate of Rajkisto Bysack, who died in 1826. He died, leaving a childless widow, Sreemutty Opoorva Chundra Dossee, who took his property for the estate of a Hindoo widow, and who lived till October 1869. The plaintiffs say that they, as the next heirs (along with the defendant Mohendronath Bysack) of Rajkisto Bysack, on the death of Sreemutty Opoorva Chundra Dossee, are entitled to possession of the property. No doubt, if in 1869 the plaintiffs were the next heirs, they are entitled to recover, unless the defendants can show that Sreemutty Opoorva Chundra Dossee, who was once in possession, parted with the estate under such circumstances as to make the transfer binding against the next heirs of her husband on her death. The plaintiffs have gone fully into the circumstances of the case, and have shown exactly the various dealings which have taken place with the property since the death of Rajkisto Bysack. They show that, in 1828, Sreemutty Opoorva Chundra Dossee instituted a suit in the Supreme Court, praying for a declaration of her right to the share of Rajkisto Bysack in the joint property belonging to him and his brothers (they being all sons of one Russickloll Bysack), and for an account and partition. On the 4th March 1829, there was a decree for partition with a declaration of Sreemutty Opoorva Chundra Dossee's right to a one-third share of the joint estate. In 1832 the commission of partition was returned, and the properties, the subject of this suit, were (among others) allotted to Sreemutty Opoorva Chundra Dossee, who thereupon got possession. Subsequent to that we find that Mr. Templeton, an attorney of the Supreme Court, who had acted for her in her suit, issued execution against her on two judgments which he had obtained on two bonds and warrants of attorney ; and in 1834 he caused the whole of the share allotted to Sreemutty Opoorva Chundra Dossee, that is the whole of the property, the subject of this suit, together with other properties belonging to Sreemutty Opoorva Chundra Dossee, to be seized under writs of *fi-fa*, and sold. In April 1834, the sheriff conveyed the right, title, and interest of Sreemutty Opoorva Chundra Dossee in these properties to Mr. Templeton himself, the amount paid by him being about Rs. 5,000. In August of the same year, 1834, Mr. Templeton conveyed these properties to Gooroodoss Dutt, the brother of Sreemutty Opoorva Chundra Dossee. Gooroodoss Dutt had a brother, Shamuldoss Dutt, who was joint in estate with him ; and, on partition

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being made between the brothers, the properties now in dispute were alloted to Shamuldoss Dutt, who, having died, was succeeded by his son Rajender Dutt.

In 1861 a suit was pending between this Rajender Dutt and Doyamoyee Dossee, his step-mother. In that suit an order was made on the 27th September 1861, that these properties should be sold, and that Mr. Carapiet, the attorney for Rajender Dutt, should be trustee for sale. The parties were ordered to bring in all the deeds necessary for the purposes of the sale, and to join in the conveyance. The property was sold under that order on the 14th December 1861, and was purchased by the defendant Denobundoo Mullick, to whom, in January 1862, a formal conveyance was given by Rajender Dutt. Denobundo Mullick then was put in possession, and he has been in possession ever since.

It now appears that Denobundoo Mullick bought from Rajender Dutt, without any notice whatever that the property had come through Sreemutty Opoorva Chundra Dossee; and it certainly does appear, on the evidence of Mr. Carapiet, that Denobundoo Mullick had the utmost reason to complain of the manner in which he was induced to become the purchaser. The sale was ordered by the Supreme Court to be held for certain purposes set out in the order of September 1861. Under that order Rajender Dutt, on the 21st September 1861, made over to Mr. Carapiet all the title-deeds he had in his possession relating to the property, and among these title-deeds were four deeds of April 1834, by which the sheriff conveyed this property to Mr. Templeton. These deeds show, on the face of them, that Mr. Templeton had purchased only the right, title, and interest of Opoorva Chundra Dossee, and that he had nothing more than that right, title, and interest at the time he conveyed to Gooroodoss Dutt in the month of August 1834, and Mr. Carapiet seems to have been of opinion that, inasmuch as it would be detrimental to the sale if it were known that Mr. Templeton had no more interest than what he got by the sheriff's sale, it was right, in advertising the property for sale, to insert a condition to the following effect:—"The title commences with the indentures of lease and re-lease bearing dates respectively the 21st and 22nd days of August 1834, and no evidence of title prior thereto shall be required by the purchaser or purchasers." Now, the lease and re-lease of August 1834, which are in this clause stated to be the commencement of the title, are the conveyance by Mr. Templeton to Gooroodoss Dutt, and the recital contained in that conveyance is simply that Mr. Templeton is seised in fee of the property. The statement that the title commenced with the deeds of lease and re-lease of 1834 seems to me to be false in fact. It was an express statement on the part of the vendors that they were not able to show any title antecedent to that date, whereas they could show their title antecedent to that date. The condition does not bear the construction which Mr. Carapiet puts on it. As a matter of fact, the vendors gave no notice to any one that their title really commenced earlier, and that they had in their possession the conveyances of April 1834.

The sale under the order of Court having taken place on the 14th of December, Mr. Carapiet, on the 16th of December, on the application of Mr. Beeby as attorney for Denobundoo Mullick, the purchaser, sent to him such documents as he considered the purchaser to be entitled to, which went no further back than the deeds of August 1834. At that time Mr. Carapiet had in his hands the earlier deeds of April 1834. In January 1862 the conveyance was executed, the purchaser believing that the deeds of August were the commencement and foundation of the title. Subsequently Denobundoo Mullick got possession, and, on the 28th April 1862, Mr. Carapiet gave up the original conveyance of April 1834, not to Denobundoo Mullick, who alone had a right to them, but to Debender Chunder Dutt (now an attorney of this Court), the cousin of Rajender Chunder Dutt, who duly made them over to Rajender Chunder Dutt, who has had them in his custody ever since, and has (under considerable pressure) produced them to-day before me in Court.

Before leaving this part of the case, I wish to say distinctly that, although, when parties do not possess a title prior to a particular date, they may fairly make it a condition that no title prior to that date shall be required, it is not fair or honest to say that the title commences on a certain date when it does not commence then, and when the vendor has prior deeds in his hands which show his title to be bad. In this case it is clear that the production of the earlier title-deeds would have put purchasers on their guard. It is much to be lamented that the existence of these earlier deeds was concealed.

However, whether Denobundoo Mullick can complain or not of the circumstances under which he bought this property, the present

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plaintiffs are not affected by these circumstances in any way, and, therefore, the case comes round to the one question, whether Denobundoo Mullick can prove that the property has been transferred in such a way that the transfer is valid against the reversioners.

I think the defendant has entirely failed to show that the transfer to him is valid against the plaintiffs. There is a probability that Mr. Templeton caused the property to be sold to recoup himself the costs of the partition suit. But there is no evidence that such is the case. And the judgment against Sreemutty Opoorva Chundra Dossee was against her personally, and not her husband's estate. Moreover, in the bonds on which the judgments were signed, though she is described as widow, in the obligatory part her husband's estate is not bound, but only she herself personally. Even supposing the money was due to Mr. Templeton for the costs of that suit, it would by no means follow that Sreemutty Opoorva Chundra Dossee was justified in allowing the property to be sold as she did. The decree of the 4th March 1829, in the partition suit, orders all costs to be paid out of the estate of Russickloll, and the defendants in that suit in their answer admit the possession of personal property belonging to the estate of Russickloll to the extent of Rs. 23,000. With that admission it would require much further proof than is now before me to show that the property was sold for costs, or that, if sold, it was properly so sold, although it is true that the decree of the 20th July 1832, orders the costs of the commission of partition to be paid by the parties in proportion to their several shares.

But there really is great reason to doubt altogether the *bona fides* of the sales by the sheriff, for we find that, within four months of the sale, the whole property was conveyed to, and was actully in the hands of, her brother Gooroodoss Dutt. And it is in evidence that, from the time of her husband's death, Opoorva Chundra lived with her own, and not with her husband's, relatives.

The question then arises as to the defendant Mohendronauth Bysack, who is admittedly entitled to a share but for the fact of his being a lunatic. He was not born a lunatic, and was not formally found to be a lunatic till 1864. His position depends upon this question, *viz.*, whether, at the time of Opoorva Chundra's death in October 1869, he was incurably insane. The evidence is that, though not born insane, he had attacks of insanity from time to time, which gradually increased in frequency and intensity. He was more than once an inmate of the lunatic asylum here, and was finally admitted into the asylum in 1862, and has remained there ever since. After 1862 he had lucid intervals. As Dr. Payne says, he was at times perfectly insane, and at times tolerably rational. His lucid intervals grew less and less frequent, and, for a good many years past, have disappeared altogether. Dr. Payne is distinctly and decidedly of opinion that he is now incurably mad. Without in any way doubting the value of Dr. Payne's opinion, formed as it is after many years of observation of the patient, I am not prepared to find as a fact that Mohendronauth Bysack was, in October 1869, absolutely incurably insane within the meaning of the Hindoo law, so as to be incapable of inheriting. He has a wife, and he having once (and even comparatively recently) admittedly been sane, and the malady with which he is affected having grown upon him, I should not be justified in declaring him absolutely incurable, unless he was conclusively and positively proved to be so.

Taking this view of Mohendronauth's position, it is unnecessary for me to decide the question discussed by Mr. Marindin at some length as to whether insanity, if not from birth, makes a man incapable of inheriting.

The plaintiffs are entitled to a decree declaring their right as next heirs of Rajkisto to this property. When Opoorva Chundra died, the next heirs were Mohendronauth (the son of Rajnarain) and Gopaul Loll and Dwarkanauth (the sons of Joykisto) who each took one-third. Gopaul Loll having died, those plaintiffs who represent him are now entitled to his one-third. I shall declare accordingly, and I shall order possession to be given to them. The defendant, Denobundoo Mullick, must pay the plaintiffs' costs on scale No. 2. Under the circumstances, there will be no account of mesne profits. Mohendronauth Bysack's share is not liable for any portion of the costs of this suit, one chief object of which was to have him declared incurably insane.

The plaintiffs appealed from this judgment so far as it declared the defendant Mohendronauth Bysack to be entitled to a share in the immoveable property in dispute jointly with the plaintiffs, and ordered possession thereof to be given to Sreemutty Thacooranee Dossee, the committee of the estate and person of the said defendant, and from the order

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of the learned Judge refusing a review of judgment, on the following grounds :—

1*st*,—That the learned Judge ought to have held that the defendant Mohendronauth Bysack, at the time of the death of Sreemutty Opoorva Chundra Dossee, was a madman incapable of inheriting according to Hindoo law, and that the plaintiffs alone, as next heirs of Rajkisto Bysack thereupon became entitled to possession of the immoveable property.

2*nd*,—That, if the learned Judge was right in holding that the evidence adduced at the hearing of this suit was not sufficient to establish that the defendant Mohendronauth Bysack was a madman incapable of inheriting, the learned Judge ought to have granted a review of judgment.

3*rd*,—That, if the learned Judge was right in holding that the defendant Mohendronauth Bysack was entitled to a share in the said immoveable property and premises, he ought to have held that such share of the said defendant ought to be charged with a proportionate share of the attorney-and-client costs of the plaintiffs in this suit.

The appeal was heard on the 6th and 7th June 1872.

The Standing Counsel.—I appear in support of this appeal. I believe that only one of the respondents appears. The plaintiffs appeal. They were successful as to a very large proportion of the suit below. The suit was brought by the plaintiffs against Denobundoo Mullick and Mohendronauth Bysack. Against Denobundoo, we have succeeded ; but against Mohendronauth Bysack we have failed. Our contention is that Mohendronauth Bysack is a person in the position of a lunatic, and therefore disqualified to inherit under the Hindoo law. The case we put is that Kussick Lall Bysack died in 1821, leaving a widow, Sreemutty Kissoreemonee Dossee and three sons, Rajnarain Bysack, Rajkisto Bysack, and Joykisto Bysack, having first executed an *unnomutto potro.*—[*Couch, C. J.*—The simple question we have to decide is whether Mohendronauth Bysack, a lunatic, is entitled to a share of the property in dispute.] The question arises simply in this way. Rajkisto Bysack, one of Russick Lall Bysack's three sons, died, leaving a widow Sreemutty Opoorva Chundra Dossee, who had instituted a suit in the Supreme Court, and obtained a decree for partition with a declaration of her right to a one-third share of the joint estate. Subsequently her property was sold under a decree, and became vested in Denobundoo Mullick. Upon the death of the widow, however, the heirs of her husband at once claimed the estate against the person who had succeeded to her interest, and it was held that Denobundoo Mullick took nothing, except a Hindoo widow's interest. Then the question arose between the plaintiffs and Mohendronauth Bysack as to whether he, being insane at the time of the falling in of the inheritance, was entitled to receive the inheritance; or whether it did not actually vest in the plaintiffs. Now, Dr. Payne's evidence was as follows :—"I am in charge "of the Native Asylum at Dolonda. I know "a patient there Mohendronauth Bysack. His "third admission was in October 1862. I "was then at the Asylum. His state varied "a good deal. At times he was insane, "at others rational. His lucid intervals grew "rarer, and there has been no evidence of "suspension of insanity for years. I have "had considerable experience. I don't consider his a curable case. There is no possibility of his being curable. I had no "hopes of his recovery from a year after his "admission in the Asylum. I mean 1863 or "1864. I don't remember he told me that "he had been in the Asylum before." That being the evidence, there was no reason for dissenting from the evidence given by Dr. Payne. Now, there is very considerable doubt as to whether the incurability of the insanity is a necessary ingredient for exclusion from the inheritance. See the Vyavahara Mayukha, 107. [*Couch, C. J.*—Mr. Justice Macpherson has not pronounced Mohendronauth Bysack incurably insane upon the evidence. Does nobody appear for him ?] It is unfortunate for us that no one appears. Summons was served on the Committee. [*Couch, C. J.*—There is no question raised on your part as to whether, if there was a son, he would be entitled to succeed. You had better show us whether a son is so entitled.] I do not think I could put the case better than was done by Sir Barnes Peacock in the case of Cally Dass *v.* Krissan Chunder Doss (11 W. R., O. J., 11). That was the case of a blind man, and it had been held in the lower Court that the blind man's son was entitled to inhreit ; but afterwards the case came before a Full Bench, by whom it was held that the blind man's son could not inherit. Although the present question did not arise in that case, yet it will be seen that Sir Barnes Peacock gives all the texts bearing upon the subject of exclusion from inheritance. [*Couch, C. J.*—Does the son take by way of substitution ?] In every collateral case of inheritance, the nearer relatives exclude the more remote ;

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and lineal descendants take by representation. See Gooroo Gobind Shaha *v.* Annund Lall Ghose (13 W. R., F. B., 49).

In Brijo Bhookun Lall Abustee *v.* Bechun Dobey (14 W. R., 329), the marginal note was as follows :—"A reversioner obtained a decree declaring that he was then the nearest heir to certain ancestral property, and would be entitled to succeed on the death of two widows of his cousin who were in possession. That event having occurred, it was found that the reversioner had became insane, and was therefore incapacitated by Hindoo law from inheriting. Upon this his son who had been appointed manager on behalf of his father under Act XXXV of 1858 applied for execution of the above-mentioned decree as his representative. HELD that it was necessary to look to the *status* of the heir at the time the succession opened out to him, and that the applicant in the capacity of representative of the reversioner (who was not the heir of the widow's husband) was not entitled to execute the decree. [*Couch, C. J.*—The son was here suing as manager.] What I want your Lordships to see is that Mohendronauth is the heir of Rajkisto. Now, the Daya Bhaga, in dealing with lineal descent, lays down in c. 5, s. 11, that, when the father is dead (as well as in his lifetime), an impotent man, a leper, a madman, an idiot, a blind man, &c., are debarred from inheriting, but entitled to maintenance. And the same principle is laid down in the Vivada Chintamani. The whole doctrine proceeds on the principle that insanity is in the nature of a civil death which removes the person who is afflicted from the succession. He is to be treated as if he were not in existence, save for the purpose of maintenance.

Mr. Lowe (*contra*).—My learned friend's clients are not entitled to take the property of Mohendronauth. When we look at the allegations in their plaint, the plaintiffs have got what they asked for. They did not allege in their plaint that, by reason of lunacy, he was not entitled to inherit, and that they themselves were the only persons entitled. In 1 Madras H. C. Rep., 216, Mr. Justice Holloway thus concludes his judgment :—"We are fully satisfied that an idiot in "Hindoo law is one of unsound and im-"becile mind who has been so from his "birth. The question of unsoundness and "imbecility is to be determined not upon "wire-drawn speculations, but upon tangible "and unmistakable facts." There are no tangible facts in this case to establish the lunacy. [*Markby, J.*—There is the fact that he was found a lunatic before.] Yes, but that is not conclusive evidence in this case. In 2 Tayler on Evidence, s. 1487, it is mentioned that "it has been repeatedly ruled that an inquisition in lunacy, though admissible against strangers, is not conclusive proof of what was the state of mind of the supposed lunatic at the time of the inquiry." In Baboo Shamachurn's Vyavastha Durpana, 1024, appears the case of Issur Chunder Sen *v.* Ranee Dossee, which is reported in the 2 W. R., 125. In that case it was laid down that, where it is contended that a Hindoo is incapable of inheriting by reason of an incurable disease, the strictest proof of the disease will be required. Now, I contend that there is no evidence whatever of Mohendronauth being a madman. Dr. Payne in his evidence only says that he is a lunatic. But according to the Hindoo law, as it seems to me, he must be proved to be a madman or an idiot. In the Mitakshara, c. 2, s. 10, cl. 2, it is laid down : "'An impotent "person,' one of the third gender or (neuter "sex.) 'An outcast,' one guilty of sacrilege "or other heinous crime. * * * "* * * 'A madman,' affected by any "of the various sorts of insanity proceeding "from air, bile, or phlegm, from delirium, or "from planetary influence. 'An idiot,' a "person deprived of the internal faculty : "meaning one incapable of discriminating "right from wrong."

In 2 Macnaghten's Principles and Precedents of Hindoo Law, 135, an *idiot* is defined to be "a person not susceptible of instruc-"tion," "one who cannot support the performance of duties," "devoid of knowledge of himself, and one whose intellectual faculties are imbecile ;" and the same is referred to in the case cited from the 1 Madras H. C. Rep. as the definition of idiot. In the case cited by Mr. Kennedy from the 11 W. R., O. J., 11, it will be seen that Sir Barnes Peacock says at p. 18 :—"This "shows that a son, begotten after his father "has been separated from his brothers, "alone inherits the share which his father "took after partition, as well as any wealth "acquired by his father himself ; but that the "allotment, once vested in his brothers by "such partition, cannot be divested in his "favor : and even as regards the allotment "taken by the father on partition, neither the "after-born son nor the blind son whose dis-"qualification has been removed subsequent "to the partition, would take anything if the "father should alienate his own share or "allotment during his lifetime ;" and further

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on he goes on to say :—"And I apprehend "that, if the incapable son should have a son "born afterwards, that son, if capable, would "stand in his father's place, and if in exist-"ence at the time of his grandfather's death, "would inherit that property which his father "would have inherited, if capable."

The case in the 14 W. R., 329, is distinguishable. There the son sued in a certain capacity (as manager), and it was held that he was not entitled to recover, but the Court did not discuss the question as to whether he was or was not entitled to inherit.

In 2 Macnaghten's Principles and Precedents of Hindoo Law, c. 4 (Exclusion from Inheritance), p. 130, the following question was put to the Pundits :—"Does the right of "succession which an insane person would "have had to his father, provided he had "been of sound mind, devolve on his mother "or on his wife? And supposing such insane "person to have had a son, born subsequently "to the death of his (the insane's) father, "which son is since dead; in this case, was "the grandson entitled to inherit immediate-"ly from his grandfather by reason of his "father's insanity; and if so, on his death, "has his mother any title to succeed him!" The answer of the Pundit was as follows :—

"The insane person's wife has no title to "inherit from her father-in-law. The widow "of the original proprietor excludes her "daughter-in-law; but the insane person and "his wife must be provided by her with the "necessaries of life out of the estate. If, "however, after the death of the grandfather, "a son of the insane person have been born, "and subsequently die, the original proprie-"tor's daughter-in-law will, as mother of the "child, take the heritage in succession to her "child, and supply food and raiment to her "mother-in-law and husband. This doctrine "is contained in the Daya Bhaga and other "authorities."

In 1 Strange, 152, c. 7, we read :—"Ex-"clusion from Inheritance with the Hindoo "rests, in general, upon the same principle "with succession to it, *i. e.* it is connected "with the obsequies of the deceased; from "their incapacity to perform which the ex-"cluded are incompetent as heirs. The "causes of it are sufficiently numerous; de-"fects both of body and mind, together with "vice, constructive as well as actual, being "attended with this effect; and, lastly, devo-"tion to any of the religious orders. At "first sight it appears harsh to divest of their "heritable rights, not only idiots and madmen, "but the deaf, the dumb, &c. * * * * "but when it is considered how unfitted these "in general are for the ordinary intercourse "of the world, and that they are, by the same "law, anxiously secured in a maintenance "for life, chargeable upon those who replace "them as heirs, the severity of the enactment "is not only in some degree abated, but it "even admits of comparison with our own "institutions;" and Strange goes on to show the analogy between the English and the Hindoo law. According to English law a committee would be appointed, and the property would be vested in the committee. According to Hindoo law, the result of the text seems to be that *a capable son is substituted for an incapable father.* See the Daya Bhaga, c. 5, ss. 18, 19; Shamachurn's Vyavastha Darpana, 1014; the Dharma Shastra (Röer's and Montriou's), p. 46, v. 140. As far as I am able to make out from the text, it is not limited, as Mr. Kennedy puts it, to the estate in the direct line like the estate of the grandfather. If the son is incapable of inheriting according to Hindoo law, on his becoming insane, the son is substituted. The reason is very well given by Strange at p. 152. As I contend, the son in this case would take the father's share. My first objection therefore is that it is altogether a matter of fact. Upon the evidence which the learned Judge had before him, his Lordship could not and ought not to have done what it is now said he ought to have done. They ought to have given his Lordship ample evidence. [*Mr. Kennedy*—We are quite willing to do so now if the Court should think that there has not been a perfect investigation.] On the question of fact, I hold that the decree is a right one; and on the question of law, my learned friend has not made out that his clients are entitled to the property in dispute. Moreover the appeal, being from an order upon an application for a review of judgment, ought to be dismissed.

The Standing Counsel (in reply).—Special demurrers have been abolished. At any rate this was a matter which might have put Mohendronauth or his advisers upon enquiry. They ought to have come in. The committee had a duty cast upon her. But because she does not choose to appear, it would be very hard to make my clients suffer. If the evidence of Dr. Payne had been impeached, I take it it could have been supported. But Mr. Justice Macpherson expresses his most perfect confidence in it, and does not in the least suggest any doubt as to the insanity. My learned friend seems to think that the learned Judge was not satisfied with the evi-

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dence. But it appears to me that the learned Judge did accept the evidence as to insanity to be quite sufficient, sitting as he did as a Judge and Jury, and having a most respectable Government officer to come and swear that he was insane. [*Couch, C. J.*—Mr. Justice Macpherson said that there was not sufficient evidence to show that the man was *absolutely incurably insane.* He seems to have treated it as insanity.] It would be impossible to satisfy a man that another is absolutely incurably insane. Unless your Lordships are prepared to exclude that branch of Hindoo law which treats of exclusion from inheritance, I think it is impossible to say that any man can be pronounced to be absolutely incurably insane. But Dr. Payne has pledged himself to the word of a gentleman that Mohendronauth is absolutely insane, and we have Dr. Payne's clear testimony carrying back the insanity to 1863 or 1864. Unless your Lordships suggest this idea that, whenever a person is unrepresented in Court, a host of witnesses should be brought to shake one incredible witness, I do not see how the judgment of the Court below can be supported on the ground on which the learned Judge proceeded. There is a precise distinction between a madman and a lunatic. It is so in our law, and it is the same in the Hindoo law. Mr. Justice Holloway, in the Madras case cited by me before, says :—" Lord Coke classes " idiots as one of the species of '*non compos* " *mentis*' distinguished from lunatics by the " circumstance that the idiot is he, which " from his nativitie, by a perpetual infir- " mitie, is *non compos mentis.*"

I cannot understand what other possible distinction can be made between an idiot and a madman. One always speaks in ordinary language of supervenient insanity as madness. Under the Mitakshara an insane person is excluded from inheritance, but the penalty of degradation is imposed on those who do not maintain him (c. 2, s. 10, v. 5). The passage from Vyavastha Darpana (v. 657, p. 997) is not Shamachurn's own, but is a text of Devala, the import being the same with that of the text of Narada (*see* p. 1001). See also Montriou's Edition of Yajnavalkya v. 141, 2nd Book, p. 46, and the Daya Bhaga, c. 5, ss. 9 and 10. There was one case mentioned by Mr. Lowe which has some little bearing on the matter in this way. Your Lordships will remember how closely united, according to Hindoo law, the wife is to the husband. I am not quite sure that the union of the two, according to the Hindoo law, is not possibly a closer one than is contemplated by the English law, for it is one not to be terminated even by death. So long as the wife represents a part of the husband, the union survives. But a son's widow is not an heir to the father under any imaginable circumstance. [*Couch, C. J.*—Do I understand you to say that, if the property does not go to Mohendronauth, he would have a right to maintenance ?] Just so.

The Court took time to consider.

The judgment of the Court was delivered as follows on the 27th July 1872 *by*—

Couch, C. J.—This was an appeal from the judgment of Mr. Justice Macpherson, by which he declared the defendant Mohendronauth Bysack to be entitled to a portion of the property in dispute, the claim of the plaintiffs being to the whole of the property, on the ground that Mohendronauth Bysack was insane, and, therefore, not entitled to inherit any share of it. The other portion of the judgment, to which we need not further allude, relates to the title of the plaintiffs and Mohendronauth Bysack, supposing he was not disqualified from inheriting, as against the first defendant. Having disposed of that, the learned Judge says :—" The question arises as to the defendant Mohendronauth Bysack, who is admittedly entitled to a share but for the fact of his being a lunatic. He was not born a lunatic, and was not formally found to be a lunatic till 1864. His position depends upon this question, *viz.*, whether, at the time of Opoorva Chundra's death in October 1869, he was incurably insane;" and then, taking that to be the question, he says :—" I am not prepared to find as a fact that Mohendronauth Bysack was in 1869 absolutely incurably insane within the meaning of the Hindoo law, so as to be incapable of inheriting."

Now, the question is whether the proposition there put forward, and upon which the judgment is founded, that a party must be absolutely incurably insane, in order to be incapable of inheriting, is in accordance with Hindoo law.

Most of the texts upon the subject are to be found in the *Dayabhaga*, Chapter V, the chapter as to exclusion from inheritance. The first is from *Menu*, which says :—" Impotent persons and outcasts are excluded from a share of the heritage, and so are persons born blind and deaf, as well as madmen, idiots, and dumb, and those who have lost a sense (or a limb)." Another text is from *Yajnavalkya*, which says :—" An outcast and his issue, an impotent person, one lame,

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a madman, an idiot, a blind man, a person afflicted with an incurable disease, as well as other similarly disqualified, must be maintained, excluding them, however, from participation. One who cannot walk is lame;" and, in the next clause, there is a text of Devala:—"When the father is dead (as well as in his lifetime), an impotent man, a leper, a madman, an idiot, a blind man, an outcast, the offspring of an outcast, and a person wearing the token (of religious mendicity) are not competent to share the heritage." The same text is in other books of authority, as the *Daya Krama Sangraha*, where it is given thus:—"An outcast, his offspring, an impotent person, one lame, insane, or an idiot, a blind man, one afflicted with an incurable disease, should be supported, since they are excluded from the inheritance."

The words of the *Mitackshara*, in Chapter II, Section 10, on exclusion from inheritance, are:—"The author states an exception to what has been said by him respecting the succession of the son, the widow, and other heirs, as well as the re-united parcener. An impotent person, an outcast, and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified,) must be maintained, excluding them, however, from participation," being the same text as is in the *Dayabhaga*.

I may also notice that in *Elberling on Inheritance*, Section 151, it is said:—"As succession takes place in consideration of the benefit conferred on the deceased by the funeral offerings, those who cannot, either for a general or special cause, or those who will not perform the ceremonies, are necessarily excluded from becoming heirs;" and he refers to Section 189, where it is said:—"The being impotent, or born blind and deaf, or having lost a sense or a limb, or being a madman, an idiot, or dumb, because these defects are considered as a punishment for crimes committed in a former state." The texts speak of incurable disease, but madness is a separate head of disqualification, to which incurability is not attached. They do not support the proposition that a person must, as Mr. Justice Macpherson says, be absolutely incurably insane. He goes beyond what the texts warrant.

The evidence in the case with regard to the state of mind of Mohendronauth Bysack was the deposition of Dr. Payne, who said that he was in charge of the native asylum, and that he knew a patient there of the name of Mohendronauth Bysack: "His state varied a good deal. At times he was insane, at others rational. His lucid intervals grew rarer, and there has been no evidence of suspension of insanity for years. I have had considerable experience. I don't consider his a curable case. There is no possibility of his being curable. I had no hopes of his recovery from a year after his admission into the asylum."

It appears to us that this evidence shows a state of madness for a long period of time, and certainly, if not without an absolute possibility of cure, without a probability of it. It is not necessary to show, by clear and positive evidence, the absolute impossibility of a cure. There is no authority for that either in the texts or decisions. According to Dr. Payne's evidence, this person might well be described as a madman, and in 1869, when the succession fell in, he was certainly a madman, and was not at that time in a condition to offer the funeral oblations, which is given as the reason why such a person should be excluded from inheritance. For that reason we think the decree of the learned Judge cannot stand, and that part of it which relates to the share of Mohendronauth Bysack must be set aside. The texts which exclude a madman from inheritance declare that he is entitled to maintenance; and this was not questioned in the argument before us. It must, therefore, be referred to one of the Judges of this Court (unless the parties can agree on it, which they will probably be able to do) to ascertain what is a proper sum to be allowed for Mohendronauth Bysack's maintenance from his share of the property. The parties will respectively bear their own costs of this appeal to be taxed as between attorney and client on scale No. 2.

Markby, J.—I am of the same opinion.

The 27th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Jurisdiction—Act XXIII of 1861 *s.* 4—*Party to Suit (Person living within* 20 *Miles).*

Reference to the High Court by the Ex-officio Judge of the Small Cause Court at Darjeeling, dated the 12*th June* 1872.

Mohur Ram Moodee, *Plaintiff*,

versus

Karbaree Sirdar and another, *Defendants*.

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In this case the High Court, under s. 4 Act XXIII of 1861, allowed the Small Cause Court to make a person concerned in a suit who lived within 20 miles of the jurisdiction of that Court, to be made a party to the suit.

Case.—THE plaintiff brought this case before the Court of Small Causes at Darjeeling, explaining that Karbaree Sirdar, who lived beyond the jurisdiction of the Court, had, in the belief of the plaintiff, received the goods, on account of which claim was brought, but that he (Karbaree) denied his liability, asserting that he had given the defendant Rughoobir, who lived within the jurisdiction, no authority to write the several items of the account. The Court of Small Causes being of opinion on the face of it that Karbaree, who did not dwell or personally or through agent carry on business or work for gain within its jurisdiction, was the principal defendant, declined the case, and referred the plaintiff to the Moonsiff's Court. The Moonsiff returned the case, saying that he felt equal difficulty in dealing with it, as the defendant Karbaree alleged that the goods had been received, not on his account, but on that of Rughoobir, who was within the jurisdiction of the Small Cause Court.

The question for decision is, should the case be tried by one Court with all parties concerned before it, and if so, by which Court.

Opinion of the Judge of Small Cause Court.

I am of opinion that it would be more convenient for the Small Cause Court to try the case with all parties concerned before it. My reasons for this opinion are that the claim is valued at less than Rs.500, and that defendant Karbaree, although resident beyond the jurisdiction of the Small Cause Court, is still said to be within 20 miles of that jurisdiction, *viz.*, in the neighbourhood of Kalimpong, and from the letter of the Registrar of High Court, Civil side, No. 2567, dated 4th September 1868, to my address, I learn that the High Court will, on cause shown, allow a person concerned in a suit who lives within 20 miles of the jurisdiction of a Court, within whose jurisdiction the other parties to the suit reside, to be made a party to suit. The permission of the High Court is asked for this Court to try the case, set forth with Karbaree as a party to the suit.

The judgment of the High Court was delivered as follows by—

Couch, C. J.—Make an order in this case, under Section 4 Act XXIII of 1861, for the Judge of the Small Cause Court to try the case.

The 29th July 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Illegal Ejectment — Intervenor — Allegation—Error—Procedure—Onus Probandi—Evidence.

Case No. 125 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 18th August 1871, affirming a decision of the Moonsiff of Monghyr, dated the 13th March 1871.

Nunhoo Mahtoon (Plaintiff) *Appellant,*

versus

Musst. Teeloco Kooer (one of the Defendants) and another (Objector) *Respondents.*

Mr. Lingam and *Baboo Boodh Sen Singh* for Appellant.

Mr. C. Gregory and *Baboo Bhowanee Churn Dutt* for Respondents.

In a suit to recover possession, by tenant against landlord, in which an intervenor was made a party, plaintiff failed to prove the illegal ejectment upon which he relied, and judgment was given against him. Plaintiff now appeals specially on the ground that the Lower Courts were wrong in allowing the intervenor to be made a party, inasmuch as the allegations of the intervenor were contrary to those either of the plaintiff or of the original defendant. HELD that the error, if any, was one of procedure only, and that the *onus* was on plaintiff to show that the determination against him of the issue as to illegal ejectment was erroneous, or was affected by the evidence adduced by the intervenor.

Mitter, J.—THIS suit was instituted by the plaintiff, now special appellant before us, under the provisions of Act VIII of 1869 (B. C.) to recover possession of 11 beegahs of land from which he alleged he had been illegally dispossessed by the first and second party defendants, his alleged landlords.

The first and second party defendants urged in their written statements that, though the lands in question had been originally included in the plaintiff's jote, the plaintiff had voluntarily relinquished the same in their favor on a date different from the date of dispossession mentioned in the plaint.

The third party defendants then came forward as intervenors, alleging that the lands in dispute belonged neither to the plaintiff nor to the first and second party defendants, and that the whole case was

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fraudulently got up between those individuals in order to deprive them (the third party defendants) of their just rights in those lands.

The Court of first instance allowed the intervenors to be made parties to the suit, and after laying down certain issues for adjudication, and taking evidence thereupon, gave judgment against the plaintiff.

This decision having been upheld by the Lower Appellate Court, the plaintiff now comes before us in special appeal, urging that the Lower Courts were wrong in law in allowing the intervenors to be made parties to the suit, inasmuch as the allegations of the said intervenors were altogether contrary to those put forward either by the special appellant himself or by the original defendants, *viz.*, his alleged landlords. In support of this contention, the special appellant relies upon two decisions of this Court; one reported in page 369, Volume X, the other in page 202, Volume VII, of the Weekly Reporter.

We are of opinion that this objection ought not to prevail. Assuming that the Lower Court was wrong in law in making the intervenors parties to the suit, the error was one of procedure only; and it is therefore clear that, before the special appellant can ask us to reverse the concurrent decisions of both the Lower Courts on the ground of such an error, it is incumbent upon him to show that it has produced an error in the decision of the case on the merits. Now, leaving aside the other issues laid down and determined by the Court of first instance, there seems to be no doubt that the plaintiff was bound to prove the affirmative of the issue relating to the illegal ejectment relied upon by him in his plaint, before he could succeed even as against the original defendants, *viz.*, his alleged landlords. This issue was laid down by the Moonsiff, and determined against the plaintiff upon the evidence adduced in the cause. That decision has been upheld by the Lower Appellate Court, and we do not see that we are in a position to interfere with it, it being a decision on a question of fact based upon evidence.

It has been said that the Lower Courts have been improperly influenced by their decisions upon the other issues which were in fact issues not between the plaintiff and the original defendants, but between the plaintiff and the original defendants on one side, and the intervenors on the other. But the special appellant has failed to show that there is any ground for this contention. The issue arising from the allegation of illegal dispossession has been determined upon the evidence produced by the plaintiff himself, both the Lower Courts having rejected that evidence on the ground that it was unworthy of credit. The appellant does not attempt to show that this opinion, concurrently arrived at by both the Courts, is in any way erroneous, or that it was in any manner affected by the evidence produced by the intervenors. We may add (though it is not necessary for us to decide the point in this particular case) that even if it be held that the Lower Court was wrong in law in making the intervenors parties to this suit, it is too late now to ask this Court to exclude the evidence produced by those intervenors when the consideration of that evidence has upon the special appellant's own showing enabled the Lower Courts to arrive at a correct determination of the issue relating to illegal ejectment, which, as we have already observed, was one of the most material issues in the case even as originally framed. That evidence is already upon the record, and we do not think that we should be justified at this stage of the proceedings in directing the Lower Courts to exclude it from their consideration, and in compelling them thereby to look at the case from a false point of view; particularly when it is borne in mind that the witnesses examined by the intervenors might be re-examined, if necessary, at the instance of the Court itself.

For the above reasons, we dismiss this special appeal, but without costs.

The 29th July 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Intervenor—Suit against Representatives of Ancestor's Vendor—Evidence—Ancient Document—Attestation—Relative Value of Documentary and Oral Evidence.

Case No. 219 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 16th September 1871, reversing a decision of the Moonsiff of Bigoosorye, dated the 18th May 1871.

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Mohesh Roy and others (Plaintiffs) *Appellants*,

versus

Boodhun Mahtoon and others (Defendants) *Respondents*.

Moulvee Syed Murhumut Hossein for Appellants.

Baboo Umbika Churn Bose for Respondents.

A party is not bound to intervene, because he cannot be affected by any decision passed, in a suit brought not against him, but against certain representatives of his ancestor's vendor.

Mere absence of attestation cannot be fatal to the admission of a document purporting to be of a very ancient date, and coming from the proper custody.

No Court, much less an Appellate Court, is justified in ruling that, in the absence of documentary evidence, mere oral evidence is not sufficient to prove the plaintiff's case, when the plaintiff adduced 11 witnesses whose testimony was fully believed by the first Court.

Mitter, J.—This suit was instituted by the plaintiff, special appellant, to recover possession of 5 cottahs of *brohmutter* land, upon the allegations that the said land had been purchased by his ancestors in the year 1236 Fuslee, and that he had been dispossessed therefrom by the defendants in Srabun 1275 of the same era.

The defendants urged in their written statement that the allegation of purchase set up by the plaintiff was false, and that neither the plaintiff nor his ancestors had ever been in possession of the lands in dispute.

The Moonsiff who tried the case in the Court of first instance decreed the plaintiff's suit, relying upon the direct testimony of 11 witnesses, as also upon certain documents produced by the plaintiff, regarding the legal admissibility of which no objection whatever has been raised before us by the pleader for the respondent.

On appeal, the Subordinate Judge has reversed the Moonsiff's decision, chiefly relying upon the failure of the plaintiff to intervene in a certain suit which was brought about in the year 1867, not against him, the plaintiff, but against certain representatives of his ancestor's alleged vendor.

We are of opinion that the Subordinate Judge is quite wrong in law in holding that the plaintiff was bound to intervene in that suit. Nay, it has been often held by this Court that in a suit framed, as the one above referred to, a party standing in the position of the plaintiff would have no right to intervene, inasmuch as he is not likely to be affected by any decision which might be arrived at in it. It is true that the Subordinate Judge has made some remarks upon the suspicious character of the *kobalah* of 1236 produced by the plaintiff, and those remarks might at first sight appear to be a bar to our interfering with his decision in special appeal. But not only de we find those remarks altogether unsupported by the actual condition of the document, but the Subordinate Judge's own words clearly go to show that his mind was chiefly influenced by the omission of the plaintiff to intervene in the suit above referred to. The Subordinate Judge says:—"But such a total silence "on the part of the plaintiffs, and the deposi-"tion of Shib Dyal, brother of Mohesh Roy, "repudiating the purchase of Asman Mahtoon "and others, upon whose purchase the plain-"tiff's purchase is founded, are direct proof "of total dispossession," that is, want of possession "of the plaintiffs." If, after having taken this view of the case, the Subordinate Judge thought it proper to make some obviously erroneous remarks on the condition of the plaintiff's deed, we do not think that our hands are tied up, even by the law special appeal strict as that law is. The document purports to be of a very ancient date, it has come from the proper custody, and in the face of these circumstances, mere absence of attestation cannot be considered as fatal to its admission. The Subordinate Judge was, therefore, wrong in rejecting it in the perfunctory way in which he has rejected it in the latter part of his decision. The only notice which the Subordinate Judge has taken of the testimony of the 11 witnesses produced by the plaintiff, which testimony was fally believed by the Court of first instance which had the best opportunity for determining its value, is contained in a passage in which he says that, in the absence of documentary evidence, mere oral evidence is not sufficient to prove the plaintiff's case. We think this is not a reasonable or legal way of dealing with the evidence of witnesses, particularly on the part of an Appellate Court which has only to deal with the evidence as it stands on the record.

For these reasons, we reverse the decision of the Subordinate Judge, and remand the case to Moulvee Syad Abdoollah, the second Subordinate Judge of the District, for a fresh decision on the merits. The costs of this appeal and of the lower Courts will abide the result.

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The 30th July 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Venue of Appeal—Execution Proceedings—Act VI of 1872 *s.* 22—*Interest subsequent to Decree.*

Case No. 164 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Dinagepore, dated the 23*rd April* 1872, *affirming an order of the Subordinate Judge of that District, dated the* 29*th December* 1871.

Roy Dhunput Singh Bahadur (Decree-holder) *Appellant,*

versus

Modhoo Motee Dabia, *alias* Jhootoo Dabia (Judgment-debtor) *Respondent.*

Mr. R. T. Allan and *Baboos Sreenath Dass* and *Rash Beharee Ghose* for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

In determining the venue of appeal against an order passed in execution, the "subject-matter in dispute" used in s. 22 Act VI of 1871, must be taken to exclude the interest which accrued subsequently to the date of the decree.

Mitter, J.—We think this case falls within the purview of the Full Bench decision in the case of Doolee Chand passed on the 11th July last.* In that case it was unanimously held by the Full Bench that the words "subject-matter in dispute" used in the 22nd Section of Act VI of 1871, meant the subject-matter in dispute in the original suit. In the present case the original suit was for a sum below Rs. 5,000, and the decree also which is now sought to be executed was for a sum below that amount. An execution proceeding must be considered as a mere continuation of the original suit; and we do not think that, in determining the venue of appeal, we should take into consideration the interest which accrued subsequently to the date of the decree. It is true that the question directly decided by the Full Bench was somewhat different from the one we have now to determine, but the principle appears to us to be the same, the only difference between the Full Bench case and this case being that the former related to an appeal from an original decree, whereas the present case arises out of an appeal against an order passed in execution.

We reverse the decision of the Judge below, and remand the case to him to try it on the merits. The respondent must pay to the appellant two gold mohurs as costs of this appeal.

* *Ante*, p. 261.

The 30th July 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Review of Judgment—New Document.

Case No. 161 of 1872.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 25*th September* 1871, *affirming a decision of the Moonsiff of Lushkerpore, dated the* 30*th December* 1870.

Huro Gobind Pal (Plaintiff) *Appellant,*

versus

Huro Soondaree Chowdhrain (Defendant) *Respondent.*

Mr. M. M. Ghose and *Baboo Grish Chunder Ghose* for Appellant.

Mr. G. Gregory and *Baboos Mohinee Mohun Roy* and *Gopal Lall Mitter* for Respondent.

The objection to the admission of a review of judgment on the strength of a new document was not allowed to prevail in a case where the so-called new document was not the sole reason for the admission of the review.

Mitter, J.—The main ground urged in this special appeal is that the Lower Appellate Court has committed an error in law in admitting a review of its original judgment on the strength of a new document not produced at the first hearing without satisfying itself upon legal evidence that the existence of that document was not known to the applicant for review or that it would not be produced by him when the case was tried in the first instance.

We are of opinion that this objection ought not to prevail. The application for review was made not only upon the ground of the new document above referred to, but upon several other grounds, and the Subordinate Judge distinctly admits in his present judgment that he had committed several mistakes in his first decision which had pro-

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duced an error in the decision of the case on the merits. It is true that the Subordinate Judge did not record these reasons in his proceeding for the admission of the application for review of judgment; but that circumstance cannot in our opinion invalidate his present judgment, when it is quite clear that, besides the document objected to, there were several other grounds for admitting the application. Much stress has been laid by the learned counsel for the appellant on a decision reported at page 458, Volume XVII. Weekly Reporter. We do not think it necessary in this case to decide as to how far this Court has the power to interfere with an order admitting a petition for review of judgment, which order is declared by law to be final.

But the case referred to by the learned counsel is clearly distinguishable from the one now before us. In that case, the learned Judges observed that "there were no other reasons for admitting the application" (*viz.*, the application for review of judgment) "than the so-called new evidence." Here, however, there were other reasons; and as after a careful perusal of the concurrent judgments of both the Lower Courts we are unable to see that the error complained of by the special appellant has produced an error in the decision of the case on the merits, we cannot interfere with those judgments merely upon the ground urged by the special appellant.

The other grounds which were only incidentally referred to by the learned counsel for the special appellant appear to us to be of no importance. It may be that the Subordinate Judge was not strictly correct in saying that the Moonsiff had personally identified the *Daghs* recorded in the measurement *chittahs;* but the proceeding of the Moonsiff which was read to us by the learned counsel clearly shows that he (the Moonsiff) had found on personal investigation that the objections taken by the special appellant to the Ameen's report were without foundation.

The error complained of by the special appellant does not in our opinion amount to such an error as would justify us in reversing the judgment of the Lower Appellate Court.

For these reasons, we dismiss this special appeal with costs.

The 30th July 1872.

Present:

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Review of Judgment (several years old)—Decision of Privy Council.

Application for review of judgment passed by the Hon'ble Justices Loch and Seton-Karr, on the 5th December 1864, *in Regular Appeal No.* 271 *of* 1864.*

Punchanun Bose and another, Defendants (Respondents) *Petitioners,*

versus

Gooroo Doss Roy, Plaintiff (Appellant) *Opposite Party.*

Baboo Doorga Mohun Doss for Petitioners. No one for Opposite Party.

It would give rise to considerable confusion and great inconvenience if suits which were considered to have been finally disposed could be opened by review after the lapse of several years from the date of decree, upon the ground that in some other suit the Privy Council had come to a different decision.

Markby, J.—THIS is an application under Section 276 of the Civil Procedure Code for admission of a review of a judgment passed in the year 1864 by two Judges of this Court, of whom one is no longer a member of the Court, and the other is absent in England. Section 377 provides that "the application shall be made within "ninety days from the date of the decree, "unless the party preferring the same shall "be able to show just and reasonable cause, "to the satisfaction of the Court, for not "having preferred such application within "the limited period."

Now, it appears that a suit was brought against the present applicant and four other defendants; and in respect of 12 or 13 different properties, this applicant being concerned only with one. The main point in dispute was whether a certain deed under which the plaintiff claimed—how is not now material—was fraudulent and collusive; and the first Court dismissed the plaintiff's suit, finding the deed to be so.

On the appeal of the plaintiff, in which all the defendants were made respondents, this Court found the deed genuine. Thereupon, one of the defendants appealed to the

* 1 W. R., 272.

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Privy Council; the present applicant and the other defendants not joining in the appeal, and the Privy Council has now reversed the judgment of this Court, and has affirmed the decree of the first Court, and the result of the appeal to the Privy Council is the only ground laid before us as the "just and reasonable cause" why the application was not made within 90 days.

If we were to grant this application, and were ultimately to admit the review, we should have to re-hear the appeal from the decision of the first Court, and consider whether or no we would affirm it; and obviously the object of this application is that, upon the question of fact on which the discussion has hitherto turned, we should alter the decision of the two Judges who decreed the appeal in 1864, by deciding in conformity with the decision of the Privy Council.

Of course, this present application assumes, and, therefore, we assume it also, that the decision of the Privy Council which we have not seen does not apply to the present applicant; and this Court would then have to consider how far the decree of the Privy Council, upon a matter of fact between other parties, was conclusive when the same question of fact came before this Court in another case. But it seems to us that we ought not to put this Court on any such embarrassing enquiry. We do not consider that any "just and reasonable cause" for the delay has been shown in this case; in fact, we do not think that any cause at all has been shown.

It was open to the defendant, had he so chosen, to appear as an appellant before the Privy Council. There was but one suit, and he was a party to that suit, and the whole suit was carried before the Privy Council, and he had a right to appear in it; and if in consequence of not doing so, he has lost the benefit of the Privy Council decision, he has only himself to blame.

We are referred to a decision of Mr. Justice Kemp and Mr. Justice Glover to be found at page 154, XII Weekly Reporter. But in that case it appears that there were five separate suits, not one only, and one only was of the value which gave the party a right of appeal to the Privy Council. That alone is sufficient to distinguish that case from the present. But apart from that, we must hold that it seems to us it would give rise to considerable confusion and great inconvenience if suits which were considered to have been finally disposed of could be opened by review after the lapse of several years from the date of decree upon the ground that in some other suit the Privy Council had come to a different decision. I think there is great force in the observation thrown out by Mr. Justice Ainslie in the course of the argument, namely, that, in the years which have elapsed since the decree was given, the property may have been dealt with on the faith that the decree of this Court was a final one. If, therefore, we were called upon to say whether we concurred in the decision referred to in XII Weekly Reporter, we should, with the greatest respect for the two Judges who passed it, have considerable hesitation in saying that we do so.

The 30th July 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Dispossession—Wrong-doer—Mesne Profits.

Case No. 180 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 24th January 1872, *modifying an order of the Subordinate Judge of that district, dated the 7th July* 1871.

Ram Pershad Dass (Judgment-debtor) *Appellant,*

versus

Shah Wajid Ali (Decree-holder) *Respondent.*

Baboo Rajendra Nath Bose for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

Merely keeping another out of possession may not be wrongful dispossession, nor is the party who so keeps another out of possession necessarily a wrong-doer against whom everything must be presumed, so as to render him liable for mesne profits which he was prevented from realizing by virtue of a judicial decree. To be a wrong-doer, the party must have power and control, and then act wrongfully.

In this case the Judge found that the judgment-debtor had, under color of an auction-purchase, wrongfully dispossessed the decree-holder; and that although the judgment-debtor had failed in a suit which he had brought against the *ticcadar* (lessee) for rent after Falgoon 1273, on the ground that the sale under which he purchased had been

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annulled, yet in a case of wrongful dispossession, everything must be assumed against the wrong-doer; that, had the judgment-debtor not wrongfully dispossessed the decree-holder, the decree-holder would, in all probability, have realized the rent after Falgoon 1273 in the same manner that the judgment-debtor had realized the rent up to Falgoon 1273, for the lessee might have paid his rent without demur had there been no dispute. The Judge was therefore of opinion that the amount of rent which the party wrongfully ousted might have ordinarily received had he been in possession, was the principle applicable to this state of facts, and decided against the judgment-debtor.

The judgment-debtor now appeals on the following grounds:—

1*st*,—That his suit against the lessee for rent due after Falgoon 1273 having been dismissed on the ground that his purchase had been annulled, he should not be made liable for any mesne profits subsequent to Falgoon 1273.

2*nd*,—That even if it be assumed that everything must be assumed against the wrong-doer in a case like this, any presumption that might arise against the wrong-doer is rebutted by the fact found by the Court that the judgment-debtor did not appropriate the rents subsequent to 1273, and by the fact that he has not in any way interfered with the decree-holder obtaining the same from the *ticcadar*.

Bayley, J.—The record shows that the respondent was duly served with notice, and the deposition on oath of the peon who served it proves this.

The case of the special appellant rests on one point only, *viz.* that he cannot be liable for the wassilat for which the Judge has held him liable from Cheyt 1273 to Falgoon 1277.

It appears that in 1273 the special appellant brought two suits against the ticcadar for rent, one of which was decreed, and the other dismissed, on the ground that the sale under which the auction-purchase was made by him had been annulled. The plea therefore is that the special appellant cannot be held liable for an amount which the decree put it absolutely beyond his power to collect.

The Lower Appellate Court seems to have proceeded upon the supposition that, because the acts of the defendant kept the plaintiff out of possession, therefore he was a wrong-doer, and as a wrong-doer the Court must presume everything against him. Now to be a wrong-doer, the party must have power and control, and then act wrongfully. In this case the decree against the defendant absolutely put it beyond his control to collect the rent, and so act wrongfully against the plaintiff. It is to be presumed that from the date up to which he claims wasilat, *viz.* Falgoon 1277, he was in possession, and it is also clear that he himself had given a ticca lease for these very lands, and therefore could have made the lessees liable for the payment of the rent, and might have realized the rent by means of his relation of landlord and tenant with them. Further, there was no bar of limitation in such a case.

Under these circumstances the appeal is decreed with costs.

The 6th July 1872.

Present:

The Right Hon'ble Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Jurisdiction (of Principal Sudder Ameen)—Act V of 1836—Execution of Decree—"Striking off" the File.

*On Appeal from the High Court at Calcutta.**

Gourmonee Dossee

versus

Jogutindronarain.

The jurisdiction of a Principal Sudder Ameen to deal with a decree referred to him for execution by the Zillah Judge under Act V of 1836 does not cease by his striking the case off his file after partial execution, so as to render necessary a subsequent reference by the Judge to enable the Principal Sudder Ameen, upon a fresh application being made for execution, to restore the case to the file.

In this case the sole question was whether an execution of a judgment taken out in January 1862 was or was not barred by the statutes of limitations applicable to India. Those limitations depend, in the first place, upon the third Bengal Regulation of 1793, Section 14, whereby "the Zillah and City "Courts are prohibited hearing, trying, or "determining the merits of any suit whatever against any person or persons, if the "cause of action shall have arisen 12 years "before any suit shall have been commenced," which Regulation has by subsequent constructions been applied to decrees. The construction of April 1802 is to the effect that "a decree not carried into execution at the

* From the judgment of Loch and Seton Karr, JJ., dated 9th January 1865, 2 W. R., Misc. Rul. 20.

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"time of its being passed, or within a year "from that time, may be executed on appli- "cation being made for that purpose within "12 years from its date, after the opposite "party has been called upon to show cause, "and so on." Twelve years from its date has been further construed to mean 12 years from the date of the last application made to a proper Court to enforce it. Again, by Construction 136 of the 28th October 1813, it was laid down by analogy to the 12 years rule of limitation that, "If the application "be not made within 12 years, it cannot be "entertained unless the applicant satisfies "the Court that there has been good and "sufficient cause for the delay."

By a statute passed in the year 1859, number 14, it was enacted that, "No process of execution shall issue from any Court not "established by Royal Charter to enforce any "judgment, decree, or order of such Court, "unless some proceeding shall have been "taken to enforce such judgment, decree, or "order, or to keep the same in force within "three years next preceding the application "for such execution."

Section 21 is:—"Nothing in the preceding "Section shall apply to any judgment, decree "or order in force at the time of the passing "of this Act, but process of execution may "be issued either within the time now "limited by law for issuing process of exe- "cution thereon, or within three years next "after the passing of this Act, whichever "shall first expire." The application in January 1862 was within three years of the passing of the Act, and the only question is whether it was within 12 years of the application to a Court having jurisdiction to enforce the decree.

The facts material to the decision of this case may be very shortly stated. The decree in the original suit was obtained on the 26th June 1837, in the Court of the Judge of the Zillah Rungpore. On the 10th November 1838 this decree was referred by the Judge of Rungpore to the Principal Sudder Ameen of the Zillah Rungpore, to be executed in pursuance of Act V of 1836, which is in these terms:—"It is hereby enacted that it "shall be competent to the Zillah and City "Judges, within the presidency of Fort "William in Bengal, to refer to the Principal "Sudder Ameen subordinate to them, appli- "cations for the enforcement of decrees, to "be executed by the said Principal Sudder "Ameens, under the rules prescribed in the "general regulations applicable to such "cases."

It appears that an order was made in pursuance of this Section directing the Principal Sudder Ameen to execute this decree. The order is not before their Lordships; but it must be assumed, in the absence of any impeachment of it on the part of the appellants, to have been regularly and properly made upon the proper petition and proper application, whatever that may have been, to the Judge of the Zillah Court.

It appears that various applications have been made to the Principal Sudder Ameen in pursuance of this order for execution of this decree. One appears to have been made in 1839, another appears to have been made in 1849, one in 1853, and another in 1861, and, possibly, there may have been others. Their Lordships infer, though it is not very clearly stated, that some of these executions have been partially successful in levying the goods of the defendants, but to what extent does not very distinctly appear.

It would seem that the Principal Sudder Ameen has, as it is called, struck this case off his file on several occasions. He struck the case off the file in the year 1839, after the application for execution at that time; and it appears from the copy of his order on the 2nd June 1864 that he struck it off on several occasions, for he says it was "executed and struck off" consecutively on the 2nd June 1849, 7th January 1853, 2nd May 1861, 2nd January 1862, and so on. As far as their Lordships are able to infer, in the absence of any information on this subject, which the appellants were bound to furnish if they relied upon it, the Principal Sudder Ameen appears from time to time when an application has been made for execution of this decree and that execution has been issued and whatever was leviable has been levied, to have struck the case off the list of the current business before him, and on a fresh application being made for execution to have restored it.

The contention of the appellants, and their sole contention is this, that when he first struck off this proceeding from his file (as it is called) in 1839, thereupon his jurisdiction to deal with the decree altogether ceased, and that he could not deal with it again until a subsequent order had been made by the Judge of the Zillah Court, sending it back to him again. On that ground they say that these applications were made to a Court altogether without jurisdiction.

The appellants have not shown what this striking off the file amounts to. They have not shown the grounds on which the case

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was struck off the file, whether for non-prosecution, whether for some default on the part of the decree-holders, whether from inadverture, or whether from the business of the Court being so conducted that causes which are not immediately before it are not kept upon the paper. Without affording any information on these subjects they have called upon their Lordships to infer that by the proceeding of the Principal Sudder Ameen in 1839, striking off the case from the file, without any explanation of the meaning of this proceeding or the cause of it, the order of the Court referring the decree to the Principal Sudder Ameen for execution was got rid of.

The order having been in force, it is for the appellants to satisfy their Lordships that for some good reason it has ceased to be so. Their Lordships are not disposed to infer that a valid order has ceased to be valid, or that a Court of competent jurisdiction having jurisdiction over this subject-matter has ceased to have it unless some clear proof is given of those propositions.

In the absence of such proof, their Lordships have come to the conclusion that the applications to the Principal Sudder Ameen, including that of 1862, were to a Court of competent jurisdiction, and, therefore, that the execution was valid.

Taking this view it becomes unnecessary to determine another question which was raised, *viz.* whether assuming the Principal Sudder Ameen not to have jurisdiction in 1862, that jurisdiction could be conferred on him by the retrospective effect of an order made by the Judge in 1864.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal be dismissed with costs.

The 18th July 1872.

Present :

The Right Hon'ble Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Construction of Sunnud — Jagheer — Service Tenure—Resumption—Evidence.

*On Appeal from the High Court at Calcutta.**

* From the judgement of Peacock, C.J. and L. S. Jackson, J., dated 31st July 1866, 6 W. R., 121.

Rajah Nilmoney Singh Deo,

versus

The Government and Beer Singh.

Where a sunnud granted to the holder of a jagheer was only a confirmation by the Government and the Rajah of the tenure under which the jagheer was held, and authorized the jagheerdar to remain in possession and in the performance of the services with his brothers, without describing the kind of service, HELD that the Rajah could not resume the land without proof that the services to be performed by the jagheerdar were personal services only to the Rajah.

THE questions of fact in this case on which the right to resume depends were found against the appellants by two Courts below, and the High Court, on special appeal, were bound by these concurrent judgments. Their Lordships, no special leave to appeal having been applied for, have also felt themselves bound by these findings. But it was suggested that the Courts below had erred in the construction of a sunnud, and therefore it was competent to this tribunal, on that ground, to hear the appeal. This sunnud appears to be granted to Mohogur Singh, who, at the time it was granted, held the jagheer, and it professes to be only a confirmatory sunnud. It appears really to emanate from the Government of India. It was issued with the sanction of the Rajah, which is proved by his signature, but it does not appear to be a grant by the Rajah, and his seal is not affixed to it. A grant from him was necessary. The effect of it appears to be no more than a confirmation by the governing powers, that is the superior governing power which was then the East India Company, and the Rajah, of the tenure under which Mohogur Singh then held the jagheer. It does not prove what it is necessary for the appellant to prove in this case before he has any ground upon which the claim to resume this land can rest, namely that the tenure was a tenure of service, by which personal services only to the Rajah were to be performed by the jagheerdar. This sunnud, purporting to be granted by those who had power over the land at that time, is merely this, that the jagheerdar shall remain in possession and in the performance of the service with his brothers. The kind of service is not described, and what it really was must, therefore, depend on the extrinsic evidence. A great deal of evidence appears to have been given in the Courts below on that subject, and the two Courts have found on that evidence that the services were of a public nature, and not solely private or personal. It must be admitted, that,

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if the former was the nature of the services, the Rajah cannot resume the land.

Their Lordships think they are bound, as the High Court felt itself bound, by the findings in fact of the two Courts before whom the case first came; and therefore, acting on the ordinary rule, their Lordships have no other course but to recommend Her Majesty to affirm the judgment under appeal, and to declare that this appeal must be dismissed with costs.

The 31st July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, the Hon'ble W. Ainslie, *Judge.*

Bond-debt—Interest (for Period subsequent to Time fixed for Payment).

Case No. 258 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 28th July 1871.

Gossain Luchmee Narain Pooree (Plaintiff) *Appellant,*

versus

Tekait Het Narain Sing (Defendant) *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Kalee Kishen Sen for Respondent.

Where a debtor by his bond stipulated to pay interest at 12 per cent. per annum up to the time fixed for payment, but the money remained unpaid for a long time, the High Court refused to interfere with the decree of the Lower Court awarding plaintiff interest at the rate stipulated for up to the time fixed for payment, and a lower rate afterwards.

PLAINTIFF sued upon two bonds for principal and interest at the rate of 1 per cent. per mensem (the rate mentioned in the bonds). Defendant, among other things, urged that, as there was no stipulation for payment of interest for the time subsequent to the stipulated date of repayment, the plaintiff's claim to interest for that period was invalid. The Subordinate Judge found that the bonds did not contain any stipulation for payment of interest at any rate after the promised date of repayment; that there had also been considerable delay in the institution of the plaintiff's suit; and that, according to the terms of the bonds, the plaintiff could not get interest at the rate entered in them. He accordingly decreed to plaintiff the amount of principal and interest at the rate specified in the bonds up to the stipulated date of repayment, and at one-half of the said rate up to the date of decree, and costs in proportion with interest thereon from that date to that of realization at 4 per cent. per annum.

The plaintiff appealed so far as regards the amount of interest disallowed on the ground that, with reference to the terms of the bonds, and the true intention thereof, interest should have been awarded at the rate of 1 per cent. per mensem, and that the grounds upon which the Lower Court had awarded interest at a less rate are erroneous.

Couch, C.J.—The suit is brought upon two bonds which are mentioned in the plaint, and the plaintiff seeks to recover the amount of these bonds with interest by the sale of the mortgaged and the unmortgaged property, and also from the person of the debtor, the defendant. It may be observed (although we do not say that it would make any difference) that this is not the case of a defendant seeking to get his property discharged from the mortgage, and coming to the Court for relief, not having paid the money at the time it became due. Here we must see what was the rate of interest stipulated for; and that depends on the terms of the contract between the parties. The bond, with regard to the money which is now claimed, expressly provides that the plaintiff, Gossain Luchmee Narain Pooree, shall be paid the whole and entire sum aforesaid, together with interest, specified in this deed, in the month of Chyet 1272, and the interest specified in this deed is at the rate of 1 per cent. per month. Therefore the agreement on his part was that he would at that time pay the principal with interest at 1 per cent per month. He did not pay at the time named, and the plaintiff was entitled to claim subsequent interest as damages for the non-payment. If, instead of a suit by the plaintiff to recover the money, it were one by the defendant to get back his property, it would be for the Court to say what interest it would be equitable to allow for the time subsequent to when the bond became due; and so in the present case it was for the Court to say what interest should be allowed as damages for the non-payment of the money at the fixed time. That being so, it is not the interest at 12 per cent. which was the rate stipulated for the period before the date on which the money was agreed to be paid, but interest at such

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rate as the Court thinks right that is to be decreed. It may well be that the defendant, in making this contract, contemplated that he should pay interest at 12 per cent. up to time fixed for payment, but he might not have contemplated that if, from any circumstance, the money should remain unpaid for a long period of time (here one sum remained unpaid for six years and five months, and another for three years and nine months), he should be required to pay interest for the whole period at that rate. It seems to us that to allow interest in that way would be giving an encouragement to creditors to allow money to remain unrealized for a long time. The question for us is, do the bonds show an intention to pay interest at 12 per cent. up to the time of payment; if they do, the Court is bound to give effect to it, but if they do not, the rate is in the discretion of the Court. We do not think we can say that the Lower Court was wrong in giving interest at the rate it has. Whatever may have been the practice, we do not agree in the propriety of allowing interest at a high rate, and encouraging parties not to enforce payment of their debts; and this Court has only lately endeavoured to introduce into the Subordinate Courts the practice of allowing interest on decrees at the rate of 6 per cent. only to prevent decrees remaining unexecuted for a long time. We cannot say that we ought to interfere with the Judge's order. This appeal must be dismissed with costs.

The 31st July 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Proc dure—Error—Evidence (Relative Value of Oral and Documentary).

Case No. 232 of 1872.

Special Appeal from a decision passed by the 1st Subordinate Judge of Bhaugulpore, dated the 21st September 1871, reversing a decision of the Sudder Moonsiff of that district, dated the 6th July 1871.

Girdharee Lall Singh (Defendant) *Appellant,*

versus

Modho Roy (Plaintiff) *Respondent.*

Mr. Woodroffe and *Baboos Taruck Nath Dutt* and *Chunder Madhub Ghose* for Appellant.

Baboos Hem Chunder Banerjee and *Taruck Nath Sein* for Respondent.

In this case the High Court, after pointing out the defects in the judgment of the Subordinate Judge regarding the identity of the lands in dispute, remarked on the omission of the Subordinate Judge to refer to the oral evidence and on an error frequently made by him in thinking that oral evidence, not supported by documentary evidence, is of no importance whatever for the determination of the true merits of a case.

Mitter, J.—In this case, the pleader for the special respondent has very properly admitted that the decision of the Lower Appellate Court cannot be supported, and that the case ought to be sent back to that Court for a fresh decision upon the merits.

The suit was brought by the plaintiff to recover possession of 51 beeghas and odd cottahs of land. The material allegations in the plaint were that the lands in question constituted a resumed *Jageer Mehal* which had been permanently settled by the Government with the plaintiff's vendor in the year 1861, and that the plaintiff had been wrongfully dispossessed therefrom by the defendant about the year 1870.

The substance of the defence put forward was that the boundaries mentioned in the plaint were not in existence; that the lands settled with the plaintiff's vendor had been washed away some time previous to the institution of this suit; that the claim was barred by the law of limitation; and that the plaintiff had neither right to, nor possession in, the lands in dispute which had been all along enjoyed by the defendant without any interruption whatever. In this state of the pleadings it seems to be clear that the main question which the Lower Courts had to determine in this case was whether or not the lands now sued for by the plaintiff were identical with those which had been permanently settled by the Government with his vendor in the year 1861. For the elucidation of this question the Moonsiff who tried the case in the first instance deputed an Ameen to hold a local investigation. But the Ameen, instead of making any attempt to determine either the correct boundaries or the identity of the disputed lands, contented himself with drawing what may be justly characterized as an exteremely unsatisfactory and rough sketch of the locality merely recording on the face of that sketch the contradictory statements made by the parties with reference to those boundaries.

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The Moonsiff, however, after going through the whole oral and documentary evidence in the cause, made a decree for the defendant on the grounds that the suit was barred by the law of limitation, that the plaintiff had failed to shew that the lands in dispute were identical with those which had been settled with his vendor in 1861, and that the allegation of possession and subsequent dispossession was altogether without any foundation.

This decision has been reversed by the Subordinate Judge in appeal, and it is now urged before us by the defendant, special appellant, that the Subordinate Judge has utterly failed to deal with the only two questions which he had to try in this case *viz*:—1*st*, whether the suit was barred by the law of limitation, and, 2*ndly*, whether the lands in question are identical with those which had been settled by Government with the plaintiff's vendor in the year 1861.

It appears to us that this contention is correct. After repeatedly going through the decision of the Subordinate Judge we find ourselves unable to discover any substantial finding on the question of limitation.

With reference to the other question, *viz.* the identity of the land, no doubt there is a somewhat long and elaborate judgment of the Subordinate Judge, but this judgment also appears to us to be extremely defective; and, as the defects are defects in law in the investigation of the case affecting the decision on the merits, we think it necessary to reverse the decision of the Subordinate Judge and remand the case to him for a fresh decision upon the two issues above referred to.

In the first part of the Subordinate Judge's judgment he enters into a long discussion about the lands which had been settled with the plaintiff's vendor in 1861, and adds that, as the plaintiff has shewn that he and his vendor had been paying revenue for the Mehal so settled, no question of limitation could possibly arise in this case. This portion of the judgment appears to us to be clearly erroneous, for the validity of the conclusion arrived at by the Subordinate Judge depended chiefly upon the determination of the other question, *viz.* whether the lands now in dispute are identical with those measured by Government in 1858 and afterwards settled by it with the plaintiff's vendor in 1861. With reference to this question the Subordinate Judge says that, because the plaintiff got a decree against his vendor for possession of certain lands defined in the measurement *chittas* of 1858, it follows that the disputed lands are those lands. This is clearly arguing in a circle, for the defendant in this case does not deny that the plaintiff is entitled to the lands settled with his vendor in 1861, but what he says is that the disputed lands are different from those lands and that the plaintiff is not entitled to them. The decree obtained by the plaintiff against his vendor was passed in a suit to which the defendant was not a party; but leaving aside this technical objection, that decree merely proves that certain lands situated within certain boundaries defined in the settlement proceedings of 1861 were awarded to the plaintiff against his vendor. The very map drawn by the Ameen clearly shews that the real dispute between the parties to this case was whether the boundaries of the disputed lands were those described by the plaintiff or those described by the defendant. The only attempt to determine this question which appears to have been made by the Subordinate Judge is to be found in the last part of his judgment in which he says that, inasmuch as the disputed lands are situated on the banks of a *Murgong*, and inasmuch as the *chittas* of 1858 show that there was a *Murgong* in the vicinity of the lands then measured and ultimately settled with the plaintiff's vendor in 1861, there can be no doubt whatever that the disputed lands are identical with those lands. But this portion of the Subordinate Judge's judgment is manifestly erroneous. In the first place the mere identification of one out of four boundaries is not sufficient to determine the identity of the land; and in the next place it is clear that the mere existence of a *Murgong* towards the south of the disputed lands is by no means sufficient to shew that the portion of the *Murgong* referred to by the Subordinate Judge is identical with that mentioned in the settlement proceedings. Before leaving this point, we wish to make another observation. The settlement map clearly shews that there was a strip of land belonging to one Tiluck Chand Sahoo alleged by the special appellant to be his predecessor in title intervening between the *Murgong* and the lands which formed the subject-matter of the settlement. The Ameen's map also shews a similar strip of land admittedly belonging to the owner of Mahkabad, intervening between the disputed lands and the *Murgong* referred to by the Subordinate Judge. The Subordinate Judge is therefore clearly wrong in saying that the disputed lands are situated "*on the bank*" of the *Murgong*.

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In conclusion we wish to add that the Subordinate Judge makes no reference whatever to the oral evidence produced by either of the parties. We have had frequent occasion to remark this serious omission on the part of this officer; and although we do not mean to say that a mere omission of this description is to be treated in every case as tantamount to a non-consideration of the oral evidence, we still feel ourselves bound to bring to the notice of the Subordinate Judge what we have observed in several cases tried by him, that he is entirely wrong in thinking that oral evidence not supported by documentary evidence is of no importance whatever for the determination of the true merits of a case. We also direct the Subordinate Judge to take into consideration the question of the alleged dispossession both with a view to determine the plea of limitation as well as that relating to the identity of the disputed lands. Mere payment of Government revenue for certain purposes is quite compatible with want of possession; and in all cases of this description it is of the utmost importance to enquire into the allegation of dispossession upon which the plaintiff comes into Court, inasmuch as that allegation always gives an important clue to the real origin of the dispute.

We leave it to the discretion of the Subordinate Judge to make any further local investigation he may think proper. Should he think that such an investigation is necessary for the ends of justice, he should have it done through a competent Ameen.

The 31st July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Adjournment—Act VIII of 1859 *s.* 147.

Cases Nos. 156 and 157 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 24th February 1872.

Baboo Seetaram Sahoo (Opposite Party) *Appellant*,

versus

Roy Baboo She Gollam Sahoo Bahadoor (Petitioner) *Respondent*.

Mr. Woodroffe for Appellant.

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Respondent.

Without defining what is the right mode of exercising the discretion vested in the Judge with regard to adjournments, the HIGH COURT held that the Judge ought to have granted an adjournment in this case when it was applied for, on the first day after the Judge's return to the district that the applicant really had an opportunity of appearing before the Judge, in order to enable the applicant to file his documents and produce his witnesses; s. 147 Act VIII of 1859 not applying to a case where no day has been fixed for the hearing of the case.

Couch, C.J.—THE petition for the certificate was presented by the respondent on the 8th of January, and the 8th of February was fixed for claimants to come in, and for the petitioner to put in evidence. The present appellant came in as an objector on the 5th of February, and it seems that the Judge left the station on the 8th, and so the case was not taken up on the day fixed. The time the Judge went away for was uncertain, and it does not appear that the appellant knew or could know the precise time of his return, or that there is any settled practice as to what should be done when the Judge has to leave the district. In this instance the Judge left the Court in the charge of the Subordinate Judge. We understand that that is the practice, but it may not be distinctly understood what powers the Subordinate Judge will exercise. Although it might be that the Appellant, strictly speaking, ought to have made some application to him, yet we think he might reasonably suppose that, during the absence of the Judge, he was not bound to take any proceeding; and if he wished to send the deed to Calcutta, he may have done so without any improper motive.

The Judge returned on the 19th of February, and it would seem that the first day on which he sat to hear Miscellaneous cases after his return was the 23rd, but it does appear that any day was fixed for hearing this case. As a miscellaneous case it would come on for hearing on that day, and the appellant applied to the Judge for a fortnight's time to file his documents and produce his witnesses.

We think that the respondent cannot rely upon the provisions of the Code as to adjournments. Section 147 will not apply, no day having been fixed for the appearance of the appellant. The only question is whether, under Section 146, the Court has acted in such a way that, on the case coming before us in Regular Appeal, we ought to allow the decision to stand. The Section provides that the Court may, if "sufficient cause»

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"shown, at any stage of the suit, grant time "to the parties or to either of them, and "may from time to time adjourn the hearing "of the suit; and in all such cases the Court "shall fix a day for the further hearing "of the suit." It seems to us that, looking at the circumstances, there was here a sufficient cause for the Judge to grant the adjournment of a fortnight, and to fix that date for the parties to appear before him and produce their evidence. We think that an order of this kind, refusing to give an adjournment on the first day that the claimant really had an opportunity of appearing before the Judge, is one which should not have been made, and that we ought to reverse it, and direct the Judge to hear the case.

The Judge seems to us to have gone rather into the extreme. Some Judges are very ready to grant adjournments, but sometimes we find that a Judge becomes just as strict about adjournments as other Judges are easy. It is difficult to define what is the right mode of exercising the discretion. In this case, we think, the Judge ought to have granted the adjournment and had the question properly tried. The decision of the question who is entitled to have the certificate is certainly not conclusive, but the party has a right to have the questions tried and determined. We think the Judge ought to hear the case and decide it one way or the other. The order must be reversed, and the Judge directed to re-hear the case and receive such evidence as may be offered by either party. Both parties will pay their own costs in this Court.

The 1st August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Lunatic Enquiries—Act XXXV of 1858.

Case No. 179 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 9th March 1872.

Baboo Gunga Pershad Sahoo (Petitioner) *Appellant*,

versus

Musst. Wooma Koower (Objector) *Respondent*.

Baboos Romesh Chunder Mitter and *Kalee Kishen Sein* for Appellant.

Baboos Dabender Narain Bose and *Rajender Nath Bose* for Respondent.

An enquiry into the state of mind of an alleged lunatic should not be instituted under Act XXXV of 1858 without its being clearly shown to the Court that there is ground for supposing that the person is of unsound mind.

Couch, C.J.—THIS Act (XXXV of 1858) requires that notice should be given to the alleged lunatic of the time and place at which the enquiry is to be held, and the lunatic may be required to attend for the purpose of being personally examined. A proceeding of this kind ought not to be taken without its being clearly shown to the Court that there is ground for supposing that the person is of unsound mind. It would be most harassing, if upon vague statements an enquiry of this kind could be instituted. We think the Judge was right in refusing to make the order. The appeal must be dismissed with costs.

The 2nd August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Stamped Paper—Plaint.

Application for setting aside an order of the Subordinate Judge of Sarun, rejecting a plaint on the ground that the whole of it had not been engrossed on the stamp papers filed.

In the matter of the Land Mortgage Bank, *Applicant*.

The Advocate-General for the Applicant.

There is no rule which requires as much as possible of the substance of the plaint to be engrossed on stamped paper; and so long as the rule against the use of a larger number of stamps than is absolutely necessary is complied with, it is not material whether the plaint be taken to commence or end on the plain paper.

Couch, C.J.—BY Government Notification of the 8th March 1872, published in the *Gazette of India* of the 9th idem, it is declared, under Section 26 of Act VII of 1870, that stamps used to denote any fee chargeable under the said Act may be either impressed or adhesive, or partly impressed and partly adhesive.

The Government of Bengal by a Notification dated the 1st July 1872, published in the *Calcutta Gazette* of the 3rd July last,

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has directed that, when a single stamp of required value is not available, the necessary amount shall be made up by the use of the least possible number of supplementary stamps.

The stamp required for the plaint in this case is Rs 1,035. The Collector of Stamps, Calcutta, has certified that no stamp of that value was in stock on the 1st July 1872 (when the stamps for the plaint were purchased), and that the stamps used are the fewest in number available to make up the amount required.

The two stamps for Rs. 1,035 were presented to the Subordinate Judge, each marked with the title of the cause and subject-matter of the suit; the body of the plaint was annexed on plain paper. The Subordinate Judge seems to think it necessary to engross as much as possible of the substance of the plaint on the stamp papers, but we think there is no rule of the kind in existence: the rule against the use of a larger number of stamps than is absolutely necessary has been complied with, and it is not material whether the plaint be taken to commence or end on the plain paper.

The order of the Subordinate Judge, dated the 18th July 1872, must be reversed. The plaintiffs will be at liberty to present the plaint again; and if presented within 15 days from this date, it must be taken as filed on the date of original presentation, *viz.* the 11th July 1872.

The 3rd August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Private Butwarra (Efficacy of).

Cases Nos. 289 and 290 of 1872.

Special Appeals from a decision passed by the Subordinate Judge of Rajshahye. dated the 30th September 1871, affirming a decision of the Moonsiff of Serajgunge, dated the 9th March 1871.

Tripoorah Soondoree Chowdhranee and others (Defendants) *Appellants,*

versus

Kali Chunder Roy Chowdhry and others (Plaintiffs) *Respondents.*

Baboos Sreenath Dass, Mohinymohun Roy, and *Kishendoyal Roy* for Appellants.

Baboos Romeshchunder Mitter and *Doorga Mohun Doss* for Respondents.

A private *butwarra*, though not binding against the Government or against a purchaser at a sale for arrears of Government revenue, who derives his title directly from the Government, is binding as between the parties to that *butwarra* and persons claiming title under them.

Mitter, J.—THE plaintiffs in these two cases representing themselves to be the owners of a 4 gunda 1 cowrie share of a certain Government revenue-paying mehal, registered as mehal 28 in the *towjee* of the Mymensingh Collectorate, brought a suit against the defendants, their co-sharers in the said mehal for the declaration of their right to have a *butwarra* of the share claimed by them made by the Collector under the provisions of Regulation XIX of 1814.

In that suit the answer of the defendants was that the mehal in question had been divided between the different shareholders under a private partition effected between the predecessors of the plaintiffs and those of the defendants long prior to the decennial settlement, and that as each shareholder in the mehal had been since that time enjoying exclusive possession of the separate plots allotted to his share under the partition, the plaintiffs could not justly ask the Court to order a redivision of the estate in supersession of the long existing arrangement.

All the Courts which had to deal with that suit, found or admitted as a matter of fact that the lands of the mehal above referred to had been actually divided between the different shareholders long previous to the institution of that case, but they gave a decree to the plaintiffs, declaring their right to have a fresh *butwarra* made by the Collector upon the ground that the plaintiffs were not bound to abide by a mere private partition.

In order to carry out this decree, a precept was issued to the Collector, directing that officer to make a *butwarra* under the provisions of Regulation XIX of 1814; but the Revenue authorities refused to carry out the order declaring that no *butwarra* could be made, as the lands of mehal 28 were intermingled with those of other estates bearing distinct numbers on the Collector's *towjee.*

The plaintiffs have now brought these suits for the declaration of their respective rights to collect rents from each and every one of the occupants of the lands of the mehal.

The answer of the defendants was that the suit was not maintainable, as there was no cause of action disclosed in the plaint, that the plaintiffs' right to various portions of

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the lands in dispute was barred by the law of limitation, and that it was not competent to the plantiffs to go behind the private partition which was made with the full concurrence of their predecessors in title, and to ask the Court to declare them entitled to a joint undivided share of each plot of land in the mehal.

The first Court found as a fact that the defendant's allegation, with reference to the private partition, was good and well-founded, but nevertheless it gave a decree to the plaintiffs holding that the judgment in the previous suit had settled finally and conclusively, that they (the plaintiffs) were entitled to the joint undivided shares respectively claimed by them.

This judgment having been upheld by the Subordinate Judge, the defendants appeal to us, specially urging among other grounds that, upon the finding of the first Court with reference to the private partition relied upon by them, the plaintiffs were not entitled to have a declaration of their right to collect rent from each plot of land situated in the mehal.

We are of opinion that this contention is right. A private *butwarra* is certainly binding as between the parties to that *butwarra* and persons claiming title under them. No doubt such a *butwarra* is not binding against the Government or against a purchaser at a sale for arrears of Government revenue who derives his title directly from the Government. But it seems to us to be quite unjust and unreasonable to hold that the plaintiffs are at liberty to set aside a long existing arrangement deliberately entered into by their predecessors in title, merely because they think that they were entitled under the decree passed in the previous suit to have a re-division of the mehal under the provisions of Regulation XIX of 1814. Whether that decree was right or wrong, it is not necessary for us to determine. It is sufficient for us to say that it has proved infructuous in consequence of the inability of the Revenue authorities, to carry out the *butwarra*, the lands of the mehal in question being intermingled with those of other mehals bearing separate numbers on the Collectorate *towjee*.

It has been contended that the decree in the former suit not only directed a re-division of the lands of the mehal in proportion to the share of 4 gundas 1 cowrie belonging to the plaintiffs, but that it further declared that the plaintiffs were entitled to hold possession of a joint undivided share to that extent. So far as the wording of the decree is concerned it appears to us clear that no such declaration was made by it. But without giving any final opinion on this point, it is sufficient to say that, if the contention of the plaintiffs, with reference to the construction of the said decree, be adapted, the present suit must be dismissed, it being on that supposition a mere repetition of the suit previously instituted by them.

In this view of the case it seems to us clear that the only order we can pass in these two suits is that the decisions of the Lower Courts should be reversed, and that the plaintiffs' claims should be dismissed; the plaintiffs being liable to pay the defendants the whole costs of the litigation.

The 3rd August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Auction-purchaser—Rent—Prepayment to former Proprietor.

Case No. 306 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 11*th December* 1871, *modifying a decision of the Moonsiff of Pubna, dated the* 31*st July* 1871.

Ram Lall Shaw (Defendant) *Appellant,*

versus

Rao Joggendro Narain Roy (Plaintiff) *Respondent.*

Baboos Griza Sunker Mozoomdar and *Ishur Chunder Chuckerbutty* for Appellant.

Baboos Sreenath Doss and *Mohiny Mohun Roy* for Respondent.

An auction-purchaser, with notice of a payment in advance, made by the tenant to the former proprietors, of rent due for a period subsequent to the date of purchase, is bound by such payment.

Bayley, J.—In this case the plaintiff sued for rent, and the defence was that the payment had been made in advance to the former proprietors Brojonath and Radhanath, in proof of which a receipt dated the 24th Bhadur 1273 was produced.

The first Court found that the receipt was true, and that the defendant was not liable to pay the amount over again. The Lower Appellate Court does not seem to have gone upon the question of receipt and payment.

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It simply says that "the receipt in respect to the rent due for the period subsequent to the date of purchase made in auction cannot be admitted."

The plea taken by the defendant in special appeal is that, inasmuch as the plaintiff only purchased the right, title, and interest of the former proprietors Brojonath and Radhanath, with notice of the payment made by the defendant to those proprietors, he the defendant is clearly entitled to have a deduction for the amount so paid by him.

We think this contention right. The purchase by the plaintiff merely put him in the shoes of Brojonath and Radhanath. If therefore the act of Brojonath and Radhanath, in receiving prepayment of the rent due from the defendant, was legal for the considertion of a lease, the plaintiff purchaser merely standing in their shoes must be bound by that act.

The case is therefore remanded to the Lower Appellate Court, in order to try whether the payment alleged to have been made by the defendant was really made and in good faith.

The costs will follow the result.

The 3rd August 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Registration—Evidence—Suit on unregistered Document.

Case No. 160 of 1872.

Special Appeal from a decision passed by the Offg. Judge of Dinagepore, dated the 3rd October 1871, *affirming a decision of the Moonsiff of Maldah, dated the 6th June* 1871.

Deb Narain Mundul (Plaintiff) *Appellant,*

versus

Baharee Lall Ghose and others (Defendants) *Respondents.*

Baboo Aushotosh Mookerjee for Appellant.

Baboo Gopal Lall Mitter for Respondents.

Quære.—Whether a plaintiff can rely upon a document not registered as it ought to have been, and therefore not admissible in evidence under the Registration Act.

Mitter, J.—We are of opinion that this appeal ought to be dimissed.

The Lower Appellate Court has found as a fact that the alleged transaction of sale in favor of Hurry Poddar upon which the plaintiff's title rests was not carried out, although some preliminary steps had been taken for the purpose. This is a finding of fact upon evidence, and we cannot therefore interfere with it in special appeal.

We may further add that this *kubalah* was not registered as it ought to have been, and it seems to be extremely doubtful whether the plaintiff can under such circumstances rely upon a document which is not admissible in evidence under the Registration Act. It is not necessary for us, however, to express any final opinion upon this point. It is sufficient for the purpose of this suit to say that the Judge of the Lower Appellate Court was not satisfied upon the evidence that the plaintiff's vendor Hurry Poddar had purchased the property in question from the defendants Nos. 3, 4, and 5.

The appellant must pay the costs of this appeal.

The 5th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Conditional Sale—Possession—Prior Lien.

Case No. 14 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 6th October 1871.

Brojendro Coomar Roy Chowdhry (Plaintiff) *Appellant,*

versus

Mr. J. P. Wise (Defendant) *Respondent.*

Baboos Sreenath Doss and *Mohiny Mohun Roy* for Appellant.

Mr. C. Gregory, and *Baboos Doorga Mohun Doss* and *Ram Churn Mitter* for Respondent.

Held that the plaintiff, before he could obtain possession of the property in dispute, was bound to pay off the defendant's prior lien upon it subsisting at the time that the plaintiff obtained a conditional sale of the same.

Kemp, J.—This appears to be a very clear case. We think that the judgment of the Subordinate Judge is perfectly correct and that the appeal must be dismissed. The plaintiffs sued to recover possession of a one-third share or 5 annas 6 gundas 2 cowris 2 krants of Choo-

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nar chur and other properties, on the allegation that a former malik Radha Madhub Roy made a conditional sale of the said property to the plaintiffs on the 19th Srabun 1253; that subsequently the plaintiffs having foreclosed sued for possession and obtained a decree on the 17th December 1863; that the plaintiffs got possession of the mehals under that decree, by proclamation through the agency of the Court, but that they were opposed by the defendant Mr. J. P. Wise, in their attempt to collect the rents of the property in dispute.

Mr. Wise says that he has not taken possession of certain of the properties mentioned in the plaint, and in respect of the other properties, that he has a lien upon them, inasmuch as prior to the conditional sale by Radha Madhub Roy to the plaintiffs, Radha Madhub Roy had borrowed a sum of Rs. 2,700, from him, Mr. Wise, giving him an *ijarah* lease of the disputed mehal, from the usufruct of which he was to satisfy the debt due to him; that this debt has not been satisfied; that Mr. Wise brought a suit against his debtor Radha Madhub Roy, and obtained a decree declaring that there subsisted a lien upon the disputed property. Therefore the whole question to be decided in this case is whether at the time of the conditional sale made to the plaintiffs by Radha Madhub Roy a prior lien subsisted or not. We think it very clear that a lien did subsist at the time the plaintiffs obtained the *kut-kobala* from Radha Madhub, and that that lien was a prior lien which the plaintiff is bound to pay off before he can obtain possession of the property in dispute. On referring to the decree of the 24th of November 1860 by the Principal Sudder Ameen of Dacca, we find that it is distinctly declared that a sum of Rs. 2,919-12, with interest and costs of Court bearing interest at one per cent. per mensem, were due by Radha Madhub Roy to Mr. Wise, that that sum was to be paid by Radha Madhub to Mr. Wise, and that until that sum was paid, the leased mehals which were held to be pledged as security for the loan, were to remain in the possession of Mr. Wise, and that he was to recover the amount due from the usufruct of these mehals. We therefore hold with the Subordinate Judge that a lien binding the property in dispute existed at the time the conditional sale was made by Radha Madhub to the plaintiffs, and therefore if the plaintiffs wish to obtain possession he must pay off Mr. Wise's lien.

The second point taken in appeal, although not distinctly raised in the grounds stated in the petition of appeal, is that the sum of Rs. 4,343-2-10 which has been declared by the Subordinate Judge to be due to Mr. Wise, is more than ought to have been found to be due. Now we find that in November 1860 the sum of Rs. 2,919-12 was found to be due and from that period interest is running, and there are the costs of that suit also bearing interest, and therefore it is very clear that the sum of Rs. 4,343 does not in any way represent a larger sum than what is fairly due to Mr. Wise. We therefore dismiss the appeal with costs.

The 7th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act XXVII of 1860 *s.* 6—*Suspension of Certificate—No List of Debts filed.*

Case No. 136 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Hooghly, dated the 21*st March* 1872.

Mir Fyaz Ali (Petitioner) *Appellant,*

versus

Taleb Ali (Opposite Party) *Respondent.*

Mr. Kennedy, Moulvee Morahmut Hossein, Moonshee Mahomed Yusooff, and *Abdool Baree* for Appellant.

Baboo Kally Prosonno Dutt for Respondent.

The High Court, under s. 6 Act XXVII of 1860, suspended a certificate which had been wrongly granted in a case where no list of debts due to the estate of the deceased had been filed.

Kemp, J.—This was an application on the part of two parties claiming a certificate under the provisions of Act XXVII of 1860 to collect the debts due to Noor Ali, who died on the 20th Pous 1278. The Judge, after taking evidence, and referring to the genealogical table filed by the objector Taleb Ali, granted a certificate to Taleb Ali. On referring to the record, this being a Regular Appeal, we find that neither party filed any list of the outstandings due to the estate of Noor Ali. The appellant Fyaz Ali with his first petition filed a list of the immoveable property belonging to the deceased, and also mentioned an item of cash and certain gold and silver ornaments, but no list of debts was given, and subsequently in a peti-

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tion he said that the list of debts had not been given by a mistake. The Opposite Party, the objector below, Taleb Ali, also filed no written statement of the debts due to the estate of Noor Ali.

The object of Act XXVII of 1860 is to facilitate the collection of debts on successions, as also to afford security to persons paying debts to the representatives of deceased persons; and as in this case no list of debts has been filed, we think that the Court below was wrong in granting a certificate to either party. We therefore, under the provisions of Section 6 of Act XXVII of 1860, suspend the certificate which has been granted to Taleb Ali. Each party will pay his own costs of this appeal.

The 7th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Hindoo Law of Inheritance—Brother's Daughter's Son.

Case No. 142 of 1872.

Special Appeal from a decision passed by the Officiating Additional Judge of Patna, dated the 30th of June 1871, reversing a decision of the Officiating Subordinate Judge of that district, dated the 16th February 1871.

Mussamut Doorga Bibee and another (Defendants) *Appellants,*

versus

Janaki Pershad (Plaintiff) *Respondent.*

Baboo Kali Prosunno Dutt for Appellants.

Mr. R. E. Twidale for Respondent.

A brother's daughter's son can inherit in the absence of any nearer heir.

Couch, C.J.—THREE objections were raised in this special appeal on the part of the appellant; the first was that on the plaintiff's own showing there was a nearer heir to Boodh Nath Singh than the plaintiff, as one of the witnesses had mentioned in his deposition that there was a sister's son who might be entitled in preference to the plaintiff. But we thought and said during the argument that we could not take this mention of the sister's son as a fact that was found by the Court, and could not act upon it. We are to deal with the case upon the facts found by the Lower Appellate Court; that objection therefore could not be allowed to be raised.

Another objection was that the property which was the subject of the suit, was not the property of Boodh Nath Singh, but of his widow Mungla and her *stridhun,* and a passage in the judgment was referred to in support of this view. But it is clear, notwithstanding that passage, that the Lower Appellate Court, and, indeed, the parties also in the course of the suit, treated the property in question as that of Boodh Nath Singh, and the question in the suit being who was entitled to it as heir, it is certainly possible that the circumstance mentioned in the judgment of the purchase of some portion of it by Mungla might have been explained. That objection, therefore, could not be allowed to be taken.

The only question that remained was whether the plaintiff being a brother's daughter's son could inherit the property, and that is settled by the decisions of the Privy Council in the case of Gridhari Lal Roy *versus* The Government of Bengal, X Weekly Reporter, P. C., 31, and of a Full Bench of this Court reported in X Weekly Reporter, F. B., 76, where it was held that the enumeration of *bandhu* in Article 1 Section 6 Chapter 2 of the *Mitakshara* is not to be considered exhaustive; that being so, there is no ground for saying that a brother's daughter's son cannot inherit in the absence of any nearer heir; and as it is not found in this suit that there is a nearer heir, the plaintiff is entitled to a decree.

The appeal must be dismissed with costs.

The 8th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Admission by Defendant—Plea of Payment—Act VIII of 1859 s. 337—Appeal by one Defendant.

Case No. 277 of 1872.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 24th August 1871, reversing a decision of the Moonsiff of Oundah, dated the 31st May 1871.

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Sreestee Dhur Chuckerbutty and another (Plaintiffs) *Appellants,*

versus

Sreenath Biswas (one of the Defendants) *Respondent.*

Baboo Nil Madhub Sen for Appellants.

Baboo Anund Gopal Paleet for Respondent.

Whilst a plaintiff is entitled to a decree for such sums as the defendant admits, a defendant also has a right to the Judge's opinion upon the evidence which he adduces in support of his plea of payment.

One defendant can appeal, under s. 337 Act VIII of 1859, on grounds common to all.

Glover, J.—THIS is a suit for rent for the years 1274, 1275, and 1276, at the rate of Rs. 15 per year. The defendants admitted holding the land, but denied the rate which they said was Rs. 11. The Judge on the evidence gave a decree at the rate admitted by the defendants, namely Rs. 11, and the plaintiffs now appeal against that decision. The first point taken in special appeal is that in any case the Judge ought to have given a decree for the rents which were admittedly due by the defendants; the second, that, as regards the defendants who did not appeal, the Judge should have upheld the judgment of the Court of first instance. The Judge, no doubt, should have given the plaintiff a decree at the rates admitted by the defendants, but it appears, on looking into the record, that one of the defendant's pleas was that they had paid a great proportion, if not all the rents for which they were liable. The first Court decided that question adversely to the defendants, but the Judge has overlooked it entirely. Whilst the plaintiffs have a right to a decree for such sums as the defendants admit, the defendants have also a right to the Judge's opinion upon the evidence which they have adduced in support of their plea of payment.

The second ground, we think, is untenable. Section 337 Act VIII of 1859 applies to the case, inasmuch as the decision of the first Court proceeded on grounds common to all the defendants, and therefore one of the defendants was justified in appealing on behalf of all. Costs to follow the result.

The 8th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VI of 1862 (*B. C.*) *s.* 10—*Measurement—Co-sharer—Settled Estate.*

Cases Nos. 174 and 276 of 1872.

Special Appeals from the decisions passed by the Judge of Dacca, dated the 30*th September* 1871, *modifying and affirming the decisions of the Collector of that district, dated the* 30*th June* 1871.

Shoorender Mohun Roy and others (Defendants) *Appellants,*

versus

Bhuggobut Churn Gungopadhya and another (Plaintiffs) *Respondents.*

Baboos Sreenath Dass and *Shoshee Bhoosun Sein* for Appellants.

Baboos Nullit Chunder Sein and *Issur Chunder Chuckerbutty* for Respondents.

A co-sharer in an undivided estate or tenure is not entitled to apply under s. 10 Act VI of 1862 for a measurement, particularly when the estate is a settled estate and a measurement showing the holdings of every particular ryot took place at the time of settlement.

Glover, J.—THESE appeals have been heard together, and one decision will govern both cases. The matter has been extremely complicated by the action of the Courts below, and it is with some difficulty that we have been able to get to the real state of the case. The suit is by a 2-anna co-sharer in an estate called Roail for a measurement of the lands under the provisions of Section 10 Act VI of 1862, his ground of action being, in accordance with that Section, that he wishes to know and cannot ascertain who are the persons liable to pay rent in respect of the lands of his estate unless a measurement is made. The Collector, in the first instance, notwithstanding the objections which were made by the opposite party that such a suit would not lie, ordered the measurement to be made. The Judge on appeal confirmed that order and sent the papers back that an Ameen might be deputed to make the measurement. Some time afterwards a different Collector took up the case and expressed a very decided opinion that it ought never to have been brought under Act VI of 1862 at all; he ordered, however, the Ameen to get

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out and measure the lands, considering himself bound as no doubt he was, under the circumstances, by the decision of the Judge's Court. The Ameen thereupon went and measured the lands ; both parties objected to his measurement on various grounds, and the Collector gave a decision which was partly in favor of each. The case then went on appeal to the Judge who upheld the decision of the Collector, and it is against this decision that the present appeals are made. The only point necessary for us to consider in special appeal is the point of law, namely as to whether a co-sharer in an undivided estate or tenure is entitled to apply under Section 10 Act VI of 1862 for a measurement.

We are clearly of opinion that he is not so entitled. The words of the Section are that "If a proprietor of an estate or tenure or "other person entitled to receive the rents of "an estate or tenure." We understand "proprietor" to mean either the sole owner of the estate or the corporate body of owners acting together for that purpose, or any person or body of persons having the right to collect the entire rents of the entire estate. There is nothing in the Section which entitles a fractional shareholder in the property, against the wishes of the great mass of his co-sharers, to harass every ryot on the estate by insisting upon a measurement of the lands. The point in question has, on more than one occasion, been decided by Division Benches of this Court. In the case of Moolook Chand Mundul and others *vs.* Modhoosoodun Bachusputty, reported in Vol. XVI W. R. p. 126, it has been held that the word "proprietor" implies the sole proprietor or the whole body of proprietors of the land for the measurement of which application is made ; and again in the case of Mahomed Bahadoor Mozoomdar and another *vs.* Rajah Raj Kishen Singh (XVI W. R. p. 522) it was held that an applicant under Section 10 Act VI of 1862 B. C. must be "the proprietor of the estate," and not a shareholder only in the proprietary body. Another objection, and an equally fatal one to the plaintiff's case, would be that a party applying for a measurement must do so because he cannot ascertain who are the persons liable to pay rent to him. Now this is an estate which has been settled for very many years; the mehal was measured when it was settled, and, as observed by the Collector, there was a full record of the tenures of the estate, so that there could have been no difficulty in ascertaining from the Thakbust proceedings what were the holdings of every particular ryot on the estate. In every point of view, therefore, the decision of the Court below is erroneous. It is true that the Judge has not now decided the case on this particular point, but it is equally true that the objection was taken by the objector before him from the very beginning of the case, and it is on this point that the appeal is preferred. We reverse the decisions of the Courts below and reject the application for measurement.

Special Appeal No. 174 will therefore be decreed, and Special Appeal No. 276 will be dismissed with costs.

The 8th August 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Sale in Execution of Decree—Application to set aside—Discretion of Judge as to Time.

Case No. 144 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 23rd of April 1872.

Raj Coomar Singh, *alias* Nauhoo Lall (Objector) *Appellant,*

versus

Lalljee Sahoo and another (Decree-holder) *Respondents.*

Mr. M. L. Sandel for Appellant.

Mr. R. E. Twidale for Respondents.

Though the Judge was wrong, on the ground that he had no discretion at all, in refusing to receive an application to set aside a sale in execution of a decree when made to him after the lapse of 30 days but before the confirmation of the sale, the HIGH COURT in regular appeal held that the appellant was bound to show that there was any valid excuse for not making the application within the proper time.

Couch, C.J.—IT was held by two of the Judges of this Court in the case reported in III Wyman's Reports, page 180,* that the Court had power to receive the application, although not made within the 30 days. In that case the Judge had received the application, and had adjudicated upon the matter, and the question raised was, whether he was at liberty to do so. It was contended that he was not; and that unless the application was made within the 30 days, he had no

* 18 W. R., 11, foot-note.

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jurisdiction. That decision appears to have been recently followed by Mr. Justice L. S. Jackson and Mr. Justice Markby in the case reported in XVIII Weekly Reporter, page 11. The Judge appears in that case to have decided that he had absolutely no discretion to receive the application after the 30 days, and the Court say that he was wrong in that. We, therefore, think we must take it as decided by this Court that the application may be entertained, although not made within the 30 days, but then, if not made within that time, it is not a matter of right in the party who raises the objection to the confirmation of the sale; it is in the discretion of the Court whether he will be allowed to make the application, and he must show a sufficient reason in the judgment of the Court for not coming within the 30 days.

In the present case, the first day on which he could come was the 15th of November. The sale was on the 12th of October, but the Court was closed, and the Judge states that it was re-opened for business on the 15th of November. We think we must assume, according to the regular notice which is given for the closing and re-opening of the Courts, that the party was aware of this, but he did not present his petition on that day. The Court appears to have been closed again on the 24th of November, and re-opened on the 30th, and he then presented his petition, but he does not give any reason in it for not coming earlier. He treats it as an application, of course, as if he had come within the proper time; nor have we now any distinct information, certainly not any supported by affidavit, as to what reason there was for not coming on the 15th November, or what excuse he had for not doing so. The only information we have on that subject is afforded to us by the pleader, who, admittedly, had not received any instructions until this day. It appears to us that we have no materials upon which we can say that there was any reason for not making the application when the Court re-opened on the 15th. Regarding the case as a question of discretion, as to whether the application should be received or not after the 30 days, we have nothing upon which we can say that the Lower Court improperly exercised its discretion, or upon which we can exercise a discretion and say that it ought to be allowed. And we do not think we have put before us a case which requires that we should allow an enquiry now to be made. The appellant, we think, was bound to know that, when he presented his petition on the 30th November, some reasons should have been given for not presenting it before. If there were circumstances, as is now suggested, which might have led him to think that the application could not be made then, they ought to have been stated and assigned as a reason for that not being done.

Therefore, even supposing that the judgment of the Subordinate Judge proceeded on the ground that he had no discretion at all, and that he was wrong in that, still in deciding upon the case in a regular appeal, we cannot say that there was any valid excuse for not making the application in the proper time; the case comes within the two decisions to which we have referred.

With regard to the merits of the case which have been put forward to us, it is enough to say that we do not suppose that we have them sufficiently before us to say what the real merits are, even if we could allow them to influence us upon this point. The appeal must be dismissed with costs.

The 9th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Instalment Bond — Purda-nusheens—Tender of Payment — Deposit — Fraud—Sale of Mortgaged Property.

Case No. 241 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 17th July 1871.

Sreemutty Chittra Coomary Bebee and another (Defendants) *Appellants,*

versus

Ram Lall Mookerjee (Plaintiff) *Respondent*

Baboos Anshootosh Dhur, Romesh Chunder Mitter, and *Komalakant Sein* for Appellants.

The Advocate-General and *Baboo Umbica Churn Banerjee* for Respondent.

The defendants, *purda-nusheen* ladies, having unsuccessfully defended the suit throughout on the ground of tender of payment and deposit in Court, and that they had done all they could to induce the plaintiff to take the money due on a *kistbundee* or instalment-bond, HELD that it was too late for them now in appeal to urge that they had been overreached by the plaintiff, and made to execute a bond for money which they had never owed.

HELD also that the Sub-Judge was right in restricting the plaintiff to the property pledged in the *kistbundee*, plaintiff having sued upon the *kistbundee* and prayed to have his claim declared payable by the sale of the property mortgaged therein.

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Glover, J.—THIS was a suit to recover money due on a *kistbundee* or instalment-bond. The plaintiff lent the defendants Rs. 8,400, repayable by monthly *kists* of Rs. 500, on the understanding set out in the deed that, if two consecutive instalments remained at any time unpaid, plaintiff should be entitled to recover the whole balance then due at once. The bond was specially registered.

The plaintiff's case is that the defendants neglected to pay the *kists* for Bhadro and Aghun 1277, and that therefore he is entitled to recover at once the whole of the money lent.

The defendants in their written statement admit execution of the *kistbundee*, they admit also that the terms of repayment were as stated by the plaintiff. Their defence is that they duly remitted the two instalments in question to the plaintiff at his residence in Boichee: the first, *viz.* the instalment for Bhadro on the 19th of the following month of Aghun; the second, that for Aghun, on the 27th of Phalgoon. They allege that the plaintiff refused to take the money, which was then offered as a deposit in the Court of the Moonsiff of Burdwan, who, however, declined to receive it.

They say that they acted up to the stipulations of the *kistbundee*, and that the suit has been brought for the purpose of ruining them. The defendants, it may be remarked, are *purda-nusheen* ladies.

The Subordinate Judge held, on the evidence, that the defendants had failed to prove their tender of payment, and that the plaintiff was on the terms of the *kistbundee* entitled to recover the whole sum lent with interest.

The defendants appeal, urging, in the first place, that their tender of the Bhadro and Aghun *kists* is satisfactorily proved by their witnesses, and that in any case they ought not, under the circumstances, to be made liable for more than the instalments already due.

This part of the case may, we think, be disposed of very shortly. The defendants entered of their own accord into a certain contract whereby they agreed to submit to certain penalties in the event of their not fulfilling their engagements. It is too late now to urge, as their counsel has endeavoured to do, that in reality they were overreached by the plaintiff and made to execute a bond for money which they never owed. Their written statement is silent as to any such treatment, and they have defended the suit throughout on the ground that they did all they could to induce the plaintiff to take the money as it fell due, and are not therefore amenable to the penal clauses of the *kistbundee*. The case of Boley Dobey *v.* Sidheswar Rao Kur (XIV W. R., 437) which has been cited in support of defendant's contention is not in point, for in that case the original obligee of the bond had, before selling it to a stranger, third party, waived his right to exact the penalty. The circumstances of the present case are altogether different.

To prove their tender of payment, the defendants cited the plaintiff himself and four other witnesses. The plaintiff swears distinctly that no such tender was made to him; on the contrary that, when after the two instalments had fallen due, he sent a servant to the defendants for the money, they refused to pay. The plaintiff is a person of considerable *status* and respectability, and we should require to be shown very good reasons before we differed in opinion as to the weight of his evidence, which fully satisfied the Judge by whom it was recorded. The plaintiff moreover, it must be remembered, was the defendant's own witness. The utmost that can be said against his testimony is that it is vague in some particulars. It has been attempted to show that he contradicts himself in the matter of dates, that in one part of his evidence he states that he went to Monghyr on the 3rd of Poos, and in another part says that he sent his *khajanchee* to the defendants for the money from his house at Boichee on the 7th. But this is a mistake; he does not say that he sent his *khajanchee* from Boichee on that date, but only that the man was then sent. Motee Lall's evidence is not contradictory of this, for the plaintiff does not say that he gave him the *kistbundee* on the 7th, but only that he sent him to demand payment on that day.

Nitye, the defendant's witness, no doubt deposes that he took the Rs. 513-8 to the plaintiff at Boichee, when there were 3 days of the month of Aghun left; but this is absolutely opposed to the defendant's case that the money was tendered to the plaintiff on the 19th of Aghun, as well as to this witness' story of offering the money to the Moonsiff, for that offer, or pretended offer, took place, as appears from the endorsement on the back of the petition, on the 22nd of Aghun, when 8 days of Aghun were remaining, that is, and the defendant's case is that recourse was not had to the Moonsiff until the plaintiff had refused to take the money. The other witnesses examined by the defendants make the same irreconcilable statements

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regarding the dates when the money was sent to the plaintiff.

Then as to this alleged tender of deposit. Two witnesses do certainly say that the money was shown to the Moonsiff, but neither he nor his amlahs who were present at the time have been called. The sheristadar and peshkar were originally cited as witnesses, but their names were struck out of the list afterwards by the defendants themselves.

Then Nitye's story is very improbable on the face of it. He says that the defendant offered to endorse the payment on the back of the *kistbundee* after the money had been made over to his amlah. If this story be true, there is no conceivable reason for Nitye's not taking advantage of the offer, for he could hardly have expected a man in Ram Lall Mookerjee's position to have taken and counted the money himself. Any one in his place would naturally have asked that the money should be paid to his treasurer. There are other discrepancies in this, and in the other witnesses' evidence which have been fully commented on by the Subordinate Judge, and we are not disposed to differ from him in his estimate of that evidence. Had defendants been able to prove by credible testimony that they actually offered cash to the amount of Rs. 513-8 to the Moonsiff, it would no doubt have been a very strong point in their favor, for it could hardly be possible that the defendants, with the money at their command on the 22nd of Aghun, would allow the *kist* due in that month to remain unpaid considering the penalty that was to follow the non-payment of two successive *kists;* but for the reasons above given, we do not believe that the money was ever offered.

The same remarks apply, *mutatis mutandis*, to the alleged offer of the Aghun *kist* due in Phalgoon. The defendants seem to us to have failed altogether to prove their special plea, whilst there is the evidence of two respectable witnesses to the demand made by the plaintiff after the two instalments had fallen due, and had not been paid.

Taking all the evidence into consideration, and after giving full attention to what has been advanced on behalf of the appellants who, as *purda-nusheen* ladies, are necessarily in somewhat an anomalous and helpless condition in all matters of borrowing and lending, we do not feel justified in interfering with the decision of a Judge who had the witnesses before him, and had the best opportunity for coming to a decision as to their credibility. The defendant's appeal is dismissed with costs.

The Advocate-General filed a cross-appeal on behalf of the plaintiff. He objected to the Subordinate Judge's restricting his client to the property pledged in the *kistbundee*. In this, however, we think the Subordinate Judge was right. The plaintiff sued on the *kistbundee*, and prayed to have his claim declared payable by the sale of the properties mortgaged therein; moreover, if a decree was to be given as against other property, the jurisdiction would not have been with the Subordinate Judge of Beerbhoom. The cross-appeal is therefore dismissed also.

The 9th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Error—Execution—Decree—Zeraat Lands.

Case No. 147 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 3rd of February 1872, reversing an order of the Sudder Moonsiff of that district, dated the 30th of September 1871.

Bullee Roy and others (Decree-holders) *Appellants*,

versus

Mohunt Kishen Gir (Judgment-debtor) *Respondent*.

Moonshee Mahomed Yusoof for Appellants.

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Respondent.

The Moonsiff gave plaintiffs a decree for a share in a village, adding that, as plaintiffs had obtained a decree setting aside a foreclosure decree, they were entitled to a decree setting aside the sale of the *zeraat* lands included in the share. In appeal the High Court in review reversed the Moonsiff's decision as regards the *shares* and dismissed plaintiff's claim as to those shares, without specifying the *zeraat* lands in its decree. In execution it was contended that the High Court's decree did not interfere with the Moonsiff's decree as to the *zeraat* lands, but the Judge ruled that it did, and the High Court held that, if the decree was not properly drawn, and the judgment now appealed from had not put a right construction upon it, the error was not one which had affected the decision on the merits, but rather one which had led to a just and proper decision.

Couch, C.J.—In the original judgment in the case the Moonsiff appears to have made the question as to setting aside the sale of the *zeraat* lands depend upon the setting aside of the foreclosure and the recovery of

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mortgaged lands by the plaintiff. We can understand that the High Court, when it was dealing with the case, may, in consequence of that, have thought it unnecessary to specify in its decree the *zeraat* lands; it may have supposed that if it made a declaration or decree with regard to the lands of which there had been a mortgage and foreclosure, the sale of the *zeraat* lands would follow. Now it being clear that that was what the High Court should have done, if the decree is not properly drawn, and the judgment which is now appealed from has not put a right construction upon it, still it is not an error which has affected the decision of the case on the merits; it seems rather to be an error which has led to a just and proper decision. We cannot, therefore, allow a special appeal to set aside this order on that ground.

Then, with regard to the form of the order appealed from, to our mind it means that the present appellant is to have the share which is specified, namely, the 3 pies and 4 krants share both in the lands, the subject of the mortgage, and in the *zeraat* lands, and we do not see that in the grounds of appeal any objection was taken to its having been so drawn up. No difficulty ought to arise in the execution of it.

The appeal must be dismissed with costs, pleaders' fees being fixed at two gold mohurs.

The 10th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Splitting of Causes of Action—Act VIII of 1859 *s.* 7*—Recovery or Value of Property—Damages for Detention — Jurisdiction (of Small Cause Court)—Unsuccessful Claimant under s.* 246*—Measure of Damages—Interest.*

Reference to the High Court by the Officiating Judge of the Small Cause Court at Sealdah, dated the 17*th June* 1872.

Shaikh Punju, *Plaintiff*,

versus

Shaikh Oodoy, *Defendant*.

Baboo *Tarucknath Dutt* for Plaintiff.

No one for Defendant.

A suit for damages for wrongful detention of property (in this case a cart and bullocks seized in execution of decree against another party) is barred under s. 7 Act VIII of 1859, after a decree in a former suit for the recovery or value of the same property.

The case in 13 W. R. 99 is not an authority for extending to such a claim as the present the rule laid down in 10 W. R., 141, relative to the jurisdiction of the Small Cause Court in suits by unsuccessful claimants under s. 246 Act VIII of 1859.

Interest at the bazar rate on the value of the goods awarded and recovered may not be an adequate measure of damages. The Judge should take into consideration all the circumstances of each case presumably within the knowledge of the defendant at the time he committed the act which forms the cause of action, and allow for their natural and immediate consequences.

Case.—THE present defendant, Shaikh Oodoy, obtained a decree against one Shaikh Badol in this Court, and in execution attached a cart and two bullocks, to which the present plaintiff, Shaikh Punju, preferred a claim. That claim was investigated and rejected by this Court, and the properties were sold. Shaikh Punju then brought a regular suit under Section 246 of Act VIII of 1859 in the Court of the Moonsiff of Alipore, and obtained a decree against Shaikh Oodoy for the cart and oxen, or their value Rs. 59 and costs on that amount. After obtaining that decree, Shaikh Punju now comes into this Court with a suit for damages against Shaikh Oodoy for Rs. 180, at the rate of 12 annas a day from the date of the attachment on the 28th August 1871 up to the date of the Moonsiff's decree on the 30th April 1872. I have gone into the evidence in this case, and find as a fact that the attachment of properties by Shaikh Oodoy was made in good faith, and with reasonable care and caution.

Upon the above facts, I solicit the orders of the Hon'ble High Court, (I) as to whether the decree passed by the Moonsiff under Section 246 of Act VIII of 1859 was not such an order as could only be passed by the Sealdah Court of Small Causes?

With reference to this point, it has been authoritatively ruled that a suit under Section 246, being a suit of a nature of "a suit to establish a right," will be properly instituted in the Moonsiff's Court. But the order which it is in the Moonsiff's competence to pass is, I would submit, a mere declaratory order establishing plaintiff's right to the properties. Neither the properties themselves, nor their value should have been awarded in the decree, and the Moonsiff, if he does award them, clearly usurps the Small Cause Court jurisdiction, as defined under Sections 6 and 12 of Act XI of 1865. The proper course, it seems to me, would have been for the plaintiff to have armed himself with a declaratory decree from the Moonsiff, and to

See High Court's Resolution No. 1203, dated 17th April 1865, page 117 of Sutherland's Small Cause Court References.

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have sued in this Court for the properties or their money value.

The decree mulcting defendant in the value of the properties attached having however been passed by the Moonsiff, and the plaintiff having now come to this Court to sue for special damages, the second question arises (II) as to what, if any, damages he is entitled. My own opinion is that defendant is liable in damages, but that the amount of damages is a point for equitable consideration, and that in the present case where, as I contend, the suit for recovery ought to have been made in this Court, in which suit damages, if sought, should have been included, and where defendant's actions are found to have been *bonâ fide*, the calculation of damages alleged by plaintiff is wholly unreasonable, and that such expenses only as might fairly have been incurred by plaintiff if he had brought another cart and oxen to supply the place of that attached, with the bazar rate of interest upon that amount, and no more, should be allowed. In this particular case, the value of the properties themselves has already been awarded, though, as I conceive, invalidly, and (if the Moonsiff's decree is not a nullity) it would only, it seems, remain for this Court in the present case to award interest upon that decree as damages; but as I am doubtful if I ought to respect the Moonsiff's order, and as the facts are of a singular nature, and involve irregularities of procedure which it is desirable to determine, I shall keep this case pending without final orders until an answer is received to this reference.

See Mussamut Soobjan Bibee and others, *versus* Shaikh Shureeutoolla, XII Weekly Reporter, 329.

The judgment of the High Court was delivered as follows by—

Ainslie, J.—If the plaintiff in the present suit had any right to institute a suit in the Moonsiff's Court for the recovery of the cart and bullocks seized in execution of a decree of the Court of Small Causes, he was bound by Section 7 Act VIII of 1859 to put forward in that suit the whole of the claim arising out of the cause of action on which his suit was founded, and he has no right to institute a new suit in that or in any other Court to recover damages which he might have recovered in his first suit. Whether the Moonsiff had jurisdiction to make the decree which he has made, is immaterial for the purpose of determining the present suit. The plaintiff who holds that decree cannot be allowed to raise any question as to its validity (we understand that he has actually enforced his decree), and the Judge should not have done so in the interest of the plaintiff, whose suit was clearly barred by the Section above referred to.

It has been argued that the claim for damages arises out of a different cause of action, namely the detention, and not the seizure, of the cart and bullocks; and that the plaintiff is at least entitled to such damage as may have accrued subsequent to the date of institution of his suit in the Moonsiff's Court. But there is no such detention as would constitute a separate cause of action; it is only the consequence of the seizure. There was nothing to prevent the plaintiff from asking for, or the Moonsiff from awarding, such compensation as should entirely satisfy the plaintiff's claims against the defendant; and although the amount of compensation might be regulated by the period of detention, the right to sue, or cause of action, began when the property was wrongfully seized, and not at any later date. If this were not the case, we should come to this anomaly that a suit for damages for wrongful detention of property might be entertainable after a suit for recovery of the same property had become barred by the law of limitation.

The questions referred by the Judge of the Small Cause Court do not properly arise in this suit, but we think it desirable to make some observations on them for the guidance of the Judge. He observes that it has been authoritatively ruled that a suit under Section 246 being a suit of the nature of "a suit to establish a right" will be properly instituted in the Moonsiff's Court. Apparently, he is referring to the case in X Weekly Reporter, page 141, in which the plaintiff was the judgment-creditor who sought to establish his debtor's right to certain property which had been released under Section 246 Act VIII of 1859. There can be no doubt that such a suit can be tried only in the Moonsiff's Court, as the Small Cause Court would have no power to grant any remedy to which the plaintiff might be entitled on proof of his right. This case was cited and followed in another case reported in XIII Weekly Reporter, page 99: and apparently this latter case carries the ruling so far as to lay down that no claim by any party which has been the subject of summary enquiry under Section 246 can be heard in a Small Cause Court, although the remedy sought may be one which that Court is competent to award. But if this case is examined, it will be seen that it really goes no further than the precedent cited from Volume X. It is said in the judgment "that (the case

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in Volume X) was a case precisely on all four with the present; and I think that the decision in that case was quite correct."

There is no ground for questioning the authority of the case in Volume X; but if, as stated, it was "*precisely on all fours*" with the case in Volume XIII, neither of them apply to claims such as that before us; and if the facts of the present case agree with the facts of the case reported in Volume XIII, it is difficult to see how these cases can be said to be on all fours with the earlier case. We, therefore, think that the case in Volume XIII ought not to be taken as an authority for extending the rule laid down in Volume X, or as really conflicting with the cases in Volume II Weekly Reporter, Civil Rulings, page 44, and Small Cause Court References, page 5.

As to the measure of damages, we would observe that interest at the bazar rate (which the Judge has not determined) on the value of the goods awarded and recovered in the Moonsiff's Court, might possibly be very inadequate compensation to the plaintiff. In fact, in the present case, if we take the bazar rate to be 12 per cent. per annum, the plaintiff would get 9½ annas per month as compensation for the seizure of his cart and bullocks; if by the words 'bazar rate,' the Judge means such a rate as 1 anna in the rupee per mensem or 75 per cent. per annum, it may be that even then the plaintiff would be a heavy sufferer by the loss of his vehicle, if his trade is that of a cartman, and he has nothing but this one car to maintain himself by. The Judge should take into consideration all the circumstances of each case so far as they may reasonably be presumed to be within the knowledge of the defendant at the time when he committed the act which forms the cause of action, and allow for their natural and immediate consequences.

The 5th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Act X of 1859 *s.* 24—*Jurisdiction (of Revenue Courts) — Suit against Agent — Damages— Neglect of Duty—Set-off.*

Case No. 291 of 1872.

Special Appeal from a decision passed by the Commissioner of Darjeeling, dated the 30*th August* 1871, *modifying a decision of the Deputy Collector of Julpigooree, dated the* 31*st March* 1871.

Mohima Runjun Roy Chowdhry (Plaintiff) *Appellant,*

versus

Nobo Coomar Misser (Defendant) *Respondent.*

Baboos Hem Chunder Banerjee and *Kishen Dyal Roy* for Appellant.

Baboo Tarucknath Sen for Respondent.

Section 24 Act X of 1859 did not give jurisdiction to the Revenue Courts to try claims against agents employed in the collection of rent, for damages arising from an alleged neglect of duty.

A Revenue Court, acting under the provisions of the same Section, had jurisdiction to allow a set-off for any sums which the agent might either have paid to his principal directly, or used for the benefit of his principal with his sanction and authority.

Mitter, J.—After carefully going through the concurrent judgments of the two Lower Courts, we are of opinion that this special appeal ought to be dismissed with costs.

The Lower Appellate Court was quite right in rejecting the 17th ground of appeal urged before it by the special appellant. Section 24 Act X of 1859 provides for suits against agents employed in the collection of rent either for money or for papers in their hands, but there is nothing whatever in that Section to give jurisdiction to the Revenue Courts to try a claim for damages against such agents arising from an alleged neglect of duty.

The 12th and the 16th grounds of appeal urged before the Lower Appellate Court have also been satisfactorily disposed of by that Court. The first Court went into the whole evidence and recorded its reasons at great length for rejecting the testimony of the witnesses produced by the plaintiff. The reasons given by that Court appear to us to be *primâ facie* good, but whether they are so or not the Lower Appellate Court, after having gone through the evidence, has arrived at the same conclusion. It is true the Lower Appellate Court has not thought fit to enter into a detailed description of the evidence given by the plaintiff's witnesses, but the mere absence of such a discussion cannot of itself give the special appellant a right to ask us to set aside the judgment of that Court. It was quite within the discretion of either of the Lower Courts to believe or disbelieve the evidence of the plaintiff's witnesses and the reports submitted by the two Ameens who had been successively deputed in this case to hold a local investigation.

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The last objection taken in special appeal relates to an item of Rs. 1,506 which had been allowed to the defendant by both the Courts below in the general account. It has been argued that the Revenue Court, acting under the provisions of Section 24 Act X of 1859, had no jurisdiction to allow any set-off to the defendant in respect of amounts due to him from the plaintiff, but we think that in a suit of this nature, the defendant is fully entitled to get credit for any sums which he might have either paid to the plaintiff directly, or used for the benefit of the plaintiff with his sanction and authority.

With reference to the item of rupees 1,300 and odd, included in the sum of rupees 1,506 above referred to, there can be no doubt whatever that it is not even in the nature of a set-off. It consists of collection charges incurred by defendant while acting as agent of the plaintiff for the management of his estate, and, strictly speaking, it is nothing but the other side of the very account which the plaintiff seeks to obtain from the defendant.

There remains then the sum of rupees 166, to which the above remarks are not strictly applicable; but it appears to us that even that item, which has been paid by the defendant to the creditors of the plaintiff who held decrees against him, ought to be allowed in the general account which has been ordered in this case. The principle upon which our decision is based is fully supported by the case of Fagan *v.* Chunder Kant Banerjee, reported in page 452, Volume VII, Weekly Reporter.

The two other items of rupees 11 each also fall within the same category as the item of rupees 1,300 and odd.

In this view of the case, we dismiss the special appeal with costs.

The 6th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Lunatic's Estate (Management of)—Adoptive Mother—Uterine Brother.

Case No. 74 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 6th December 1871.

Huree Kishore Bhya, *Appellant,*

versus

Nullita Soonduree Goopta, *Respondent.*

Baboo Bhugobutty Churn Ghose for Appellant.

Baboo Okhil Chunder Sen for Respondent.

An adoptive mother, as next heir, was held entitled to the management of a lunatic's estate in preference to an uterine brother.

Bayley, J.—We cannot say that the Judge is wrong either in law or in fact, in appointing the adoptive mother to the charge of the estate of the lunatic Raj Coomar. It is stated and is not denied that, during the minority of Raj Coomar, she, the adoptive mother, managed his property without detriment to it.

The only opponent to this appointment is the appellant before us, the uterine brother. It is urged on his behalf that, after the disqualification of Raj Coomar by insanity, he managed the property for a time, but it is not stated how long he did so and with what success, and we are therefore not in a position to say that the property will be better managed by the appellant before us than by the adoptive mother. The rule of law is that in such cases the management should be with the next of kin, unless there be exceedingly strong causes to prevent the adoption of that course.

It is objected, however, that the adoptive mother does not now live with Raj Coomar, but it is clear that as the next heir she has a direct interest far greater than the brother in preserving the estate in its integrity.

It is also said that there is enmity between Raj Coomar and the adoptive mother, and that she brought a suit against him for maintenance; but as the Judge remarks, "that case was settled amicably, and Raj Coomar says he has no objection to her managing the property."

On the whole, we see no ground to say the Judge was wrong, or to interfere with the order of the Lower Court, and we therefore dismiss this appeal with costs.

The 6th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Evidence (of single Witness) — Ejectment—Service Tenure—Money payment—Rent.

Case No. 305 of 1872.

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Special Appeal from a decision passed by the Subordinate Judge of Durrung, dated the 13th December 1871, affirming a decision of the Moonsiff of Munguldeh, dated the 13th September 1871.

Rajah Balindur Narain Bahadoor (Plaintiff) *Appellant,*

versus

Kalla Messoo Koos (Defendant) *Respondent.*

Baboo Juggadanund Mookerjee for Appellant.

No one for Respondent.

There is no law which prevents a Court from finding a question of fact, not amounting to high treason or any other offence specifically laid down in the Evidence Act, even on the testimony of a single witness, if believed by the Court.

Where a plaintiff sues for the ejectment of the defendant on the ground that the latter has failed to render certain stipulated service, and the defence is that the defendant offered a money payment in lieu of service, as he had the option of doing, the Court, in deciding against the plaintiff, is not bound to take evidence as to the rate of rent to which the service ought to be commuted.

Mitter, J.—THE plaintiff in this case derives his title under a rent-free grant made in his favor by the Government in the year 1857.

The defendant is the holder of what is called in that part of the country an *ek-powa* tenure.

The substance of the plaint was that the defendant was bound, by the conditions of his tenure, to render personal service for three months a year; that he (the defendant) refused to render the stipulated service in the year 1274; and that the plaintiff has therefore brought the present action to eject the defendant from his lands and to recover mesne profits upon the ground that the defendant has forfeited his right to hold those lands in consequence of his refusal to serve.

The answer of the defendant was that the lands in question had been held by him and his ancestors for a very long period of time; that it was optional with him (the defendant) either to render the personal service referred to in the plaint or to make money payment in lieu thereof; that money was offered to the plaintiff in the year 1274, but on the plaintiff's refusal to accept it the defendant deposited in the Collectorate a certain amount for which he has produced a receipt.

The first Court, after recording an abstract of the evidence given by the witnesses on both sides, dismissed the plaintiff's claim upon the ground that a previous decision of his in a similar case had been reversed by the Appellate Court. It expressed no opinion as to the relative value of the evidence given by the respective parties, and contented itself with merely resting its judgment upon the decision passed by the Appellate Court in the case above referred to.

On appeal, the Lower Appellate Court has confirmed the decision of the first Court upon the ground that it was proved by the evidence produced by the defendant that it was optional with him (the defendant) either to render the service mentioned in the plaint or to make a money payment in lieu thereof, and that the defendant was ready and willing to pay the plaintiff at the rate of one rupee per month, which was proved by the testimony of the witnesses to have been the old customary rate; but as the plaintiff would not receive any money payment, the Court had no other alternative than to dismiss the suit which was for the ejectment of the defendant. The Lower Appellate Court further observed that the right of ejecting a tenant of this description in spite of his offer to pay a reasonable consideration for the lands in his possession was never claimed by the British Government to whom those lands originally belonged, and that the plaintiff, deriving title as he does from the Government, ought not to be permitted in justice or in equity to exercise such a right.

Against this decision it is objected here in special appeal, *firstly*, that the issue as to the customary nature of *ek-powa* tenures was not distinctly laid down by the first Court, and the Court of appeal ought therefore to have either remanded the case for laying down and adjudicating upon that issue, or disposed of the case by trying that issue itself.

Whatever apparent force there may be in this objection, it seems to us clear that the issue which was in point of fact laid down by the first Court was fully understood by the parties, each of them having given evidence in order to prove his own allegations,—those allegations being on the one side that the plaintiff was entitled to resume the lands on failure of the defendant to perform the annual service above referred to, and on the other that it was optional with the defendant either to render that service or to make a money payment in lieu thereof. The parties went to trial upon the issue joined by the first Court, and we find no reason to suppose that either of them has been taken by

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surprise or in any way misled by the vague form in which that issue was laid down by that Court.

The *second* objection taken is that the Lower Appellate Court is wrong in law in finding the custom alleged by the defendant on the strength of the evidence of two witnesses only. We are not aware of any law which prevents a Court from finding a question of fact, not amounting to high treason and any other offences specifically laid down in the Evidence Act, even on the testimony of a single witness, if that testimony is believed by the Court. It was quite in the discretion of the Lower Appellate Court either to believe the evidence of the plaintiff's witnesses or that of the defendant's. Sitting in special appeal, we cannot interfere with the judgment of the Lower Appellate Court merely upon the ground that the evidence upon which that judgment is based is not very large in quantity.

The *third* objection taken is that the evidence as to the rate of rent to which the service ought to be commuted is not very clear and satisfactory, and the Lower Appellate Court ought to have further enquired into that question in order to determine the reasonable amount of rent to which the plaintiff was entitled in lieu of the stipulated service above referred to.

We are of opinion that this objection also is unfounded. The decision of the Lower Appellate Court upon the main issue. *viz.*, whether it was incumbent upon the defendant to render personal service or optional with him to commute that service to money payment, is quite sufficient for the dismissal of the present suit as constituted by the plaintiff's plaint. That suit was for the *ejectment of the defendant upon the ground that he had failed to render the stipulated service.* The defence set up on the other hand was that the defendant had offered a money payment in lieu of that service and that it was quite optional with him to do so. Upon this state of the pleadings, the Lower Appellate Court has come to a finding on evidence against the plaintiff, and that finding of fact is quite sufficient to meet the requirements of this suit as laid in the plaint.

We therefore dismiss this special appeal upon the ground that the plaintiff was not entitled either to eject the defendant or to receive mesne profits from him upon the particular case with which he came to Court.

The 10th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale in Execution—Six separate Tenures sold as one Lot—Fraudulent and Illegal.

Case No. 178 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 30th September 1871, affirming a decision of the Moonsiff of Ousgram, dated the 16th September 1870.

Sreekunt Doss (Plaintiff) *Appellant,*

versus

Ramjeebun Roy (one of the Defendants) *Respondent.*

Baboo Mohendro Lall Mitter for Appellant.

Baboo Umbica Churn Banerjee for Respondent.

Where six tenures with separate recorded *jummas* were lumped together and sold in execution of decree as one lot, whereby the plaintiff and his co-sharers were precluded from buying up any one or more of the six tenures, and no description of the properties to be sold was given either in the sale proclamation or *lotbundee*, in consequence of which the defendant was apparently the only bidder, and he purchased six tenures at an inadequate price, the sale was reversed as fraudulent and illegal.

Kemp, J.—THE plaintiff is the special appellant. He sues on the allegations that there are six holdings assessed with separate jummas, the aggregate area of the six holdings being 96 beegahs 4 cottahs, and the aggregate jumma Rupees 142-8-6; that the defendant No. 5 sued for rent claiming Rupees 232-5-4½ and obtained a decree which was subsequently purchased by the defendant No. 1, and that in execution of that decree without issuing process against the moveable property of the plaintiff, the defendant No. 1 caused the six holdings to be sold as one lot and purchased them himself. The suit is, therefore, brought to set aside the fraudulent and illegal sale and for restoration to possession over a 4-anna share in the aforesaid six holdings. The valuation of plaintiff's 4-anna share is estimated at Rupees 150.

The principal defendant, No. 1, states that the sale is neither fraudulent nor illegal; that his purchase was *bonâ fide* in execution of a decree obtained by defendant No. 5 by whom it was sold to him. The other defendants did not appear.

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The issue was, whether the sale was legally conducted or fraudulently.

The Moonsiff was of opinion that, if the plaintiff could establish that he had sustained a loss by reason of the sale being fraudulent or illegal, he would be entitled to a decree. On the merits the Moonsiff finds that a decree for rent was obtained from a competent Court, and that the sale in execution of that decree was a good sale and in no ways tainted with fraud.

The Subordinate Judge has confirmed the Moonsiff's decision.

In special appeal, it is contended that the sale ought to be declared illegal and fraudulent on the following grounds :—

1*st*,—That the defendant could not lot and sell six separate tenures, consolidating them, and purchasing them as one tenure comprising 99 beegahs 5 cottahs paying a jumma of Rupees 142-8 annas 10 pie.

2*nd*,—That no description of what was to be sold was given in the sale proclamation.

3*rd*,—That owing to the fraud of the defendant No. 1, other purchasers were debarred from bidding, and the properties were purchased by the defendant No. 1 at a very inadequate price.

4*th*,—That at the time of sale, the rights and interest of only one of the judgment-debtors, *viz.*, Romanath, were put up for sale, appears from the lotbundee. Therefore the sale does not convey the rights of the plaintiff.

5*th*,—That, without proceeding first against the moveable properties of the judgment-debtor, it was illegal to sell other tenures than that in balance for the recovery of such balance.

We think that there is no force whatever in the 4th and 5th grounds of appeal. In the sale proclamation the name of the plaintiff is entered as judgment-debtor, it is omitted in the lotbundee ; but that is immaterial, for it is the istahar or proclamation which informs the public what is to be sold and the respective rights and interests of the judgment-debtors in the subject-matter of the sale.

On the 5th ground, we find that the rent suit, though numbered as one suit, was treated as a suit for the arrears of six under-tenures ; a decree was passed for an aggregate sum of Rs. 232-5-4½, but the arrear of each tenure was separately ascertained ; all the tenures were in balance and the sale of them separately for their respective arrears would clearly have been legal without first proceeding against the moveable properties of the judgment-debtor.

But we think that the sale must be set aside as fraudulent and illegal on the first, second, and third grounds.

There was no description of the properties to be sold either in the sale proclamation or the lotbundee. Six tenures with separate recorded jummas were lumped together and described as one tenure with an area of 99 beegahs 5 cottahs paying a rent of Rupees 142 ; by this fraud the plaintiff and his co-sharers were precluded from buying in one or more of the six tenures. The omission of a description of the property to be sold was also clearly an illegality. The public were not made aware of what was to be sold, and the consequence was that the defendant No. 1 was apparently the only bidder, and he has purchased six tenures for Rupees 300, of which a 4-anna share is valued at 150 Rupees ; and even that valuation was objected to by the defendant as below the market value, and by this the plaintiff has been clearly endamaged.

On the whole case, we are of opinion that the sale was, as far as the rights and interests of the plaintiff are concerned, *viz.*, over a 4-anna share in the six tenures, must be reversed as fraudulent and illegal.

We may observe that the illegalities in the sale proceedings were clearly set forth in the petition of appeal. The Subordinate Judge gets rid of those objections by observing that " they are useless and of no avail, and that he need not express any opinion upon them."

The decisions of the Lower Courts are reversed, and the appeal decreed with costs of all the Courts, payable by the respondent.

The 12th August 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Act VIII of 1869 *(B. C.)—Suit for Dustoorut—Rent—Special Appeal—Fresh Suit under Act VIII of* 1859.

Cases Nos. 150, 151, and 152 of 1872.

Special Appeals from a decision passed by the Judge of Midnapore, dated the 26*th August* 1871, *reversing a decision of the Sudder Moonsiff of that district, dated the* 30*th August* 1870.

Ram Churn Banerjee (Plaintiff) *Appellant,*

versus

Torita Churn Paul (Defendant) *Respondent.*

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Baboos Sreenath Dass and *Hem Chunder Banerjee* for Appellant.

Mr. M. M. Ghose, and *Baboos Unnoda Persad Banerjee* and *Jugut Chunder Banerjee* for Respondent.

A suit for *dustoorut* is not a suit for rent, and is therefore not cognizable under Act VIII of 1869 (B. C.)

The ground that, even supposing the suit was not a suit for rent, it was not liable to be dismissed in order that a fresh suit might be instituted under Act VIII of 1859, not having been taken in the Court below, nor in the grounds of special appeal, was over-ruled at the hearing of the special appeal.

Kemp, J.—It is admitted that one decision will govern these three cases.

The plaintiff is the special appellant. He sued claiming as rent a *dustoorut jumma.*

The Moonsiff held that *dustoorut* was not an *abwab* or cess, but that it was "an annual "demand due to the original zemindar which, "in the event of a sale of a talook, is reserved "as a debt payable by the purchaser." He further found that there was evidence which proved that the plaintiff had realized this *jumma* for 10 or 12 years.

The defendant, the Moonsiff says, has failed to adduce witnesses; he cited the plaintiff, but the plaintiff did not appear.

The claim of the plaintiff in the three cases was decreed.

On appeal the Zillah Judge, Mr. Bainbridge, reversed the decision of the Moonsiff. He, the Judge, was of opinion that the relation of landlord and tenant did not exist between the plaintiff and the defendant, and that the suit therefore was not cognizable under the provisions of Act VIII of 1869.

Mr. Bainbridge was also of opinion that the decision of the late Sudder Dewanny, dated the 13th December 1854, had only decided the right to *dustoorut*, and not that it was rent.

A decision of a former Judge of Midnapore, Mr. E. Jackson, was referred to in the Court below. This decision is dated the 18th September 1861, in which Mr. Jackson held that a suit to recover *dustoorut*, would lie under the Rent Law (then Act X of 1859), but Mr. Bainbridge declared that he was unable to follow that decision.

Holding, therefore, that the Moonsiff had no jurisdiction to try the suit under Act VIII of 1869, inasmuch as the relation of landlord and tenant as between the plaintiff and the defendant did not exist, the Judge decreed the appeal and dismissed the plaintiff's suit.

In special appeal it is urged :—

1st,—That the Lower Appellate Court is wrong in holding that the suit is not cognizable under Act VIII of 1869.

2nd,—That the decree of the Sudder Court distinctly established the relation of landlord and tenant between the plaintiff and the predecessors of the defendants.

3rd,—That the decision of the Judge is opposed to a former decision passed in 1795, in which a decree was obtained by the predecessors of the plaintiff against the predecessors of the defendants.

The first point for decision is whether *dustoorut* is rent or not.

In the Court below the pleaders on both sides were unable to solve this question, and we may say that the pleaders for the appellant have been equally unsuccessful in this Court.

It appears that, when the parent zemindaree was sold, the condition of sale stipulated for the payment of a small pittance by the purchaser as subsistence of the former *malik.* This *dustoorut* has been further subdivided by subsequent transfers of the different mouzahs which comprised the original zemindaree. It is admitted that the defendant pays revenue direct to the Collector and that he is an independent landholder. It is, therefore, not easy to see how the relation of landlord and tenant can exist between the plaintiff and the defendant.

Dustoorut is explained in Wilson's Glossary to be "an allowance for expenses "of collections granted by the Mahomedan "Government." The decision of the late Sudder Court, which was referred to during the argument, is to be found at page 504 of the decisons of 1854. The Court, in a judgment of a few lines, held that *dustoorut* was not a cess, such as is prohibited by Section 55 Regulation VIII of 1793, but that the term "seemed to imply a reservation of a certain "annual payment by the purchaser of the "talook to the seller, the original proprietor "of a small sum." The Court did not hold that *dustoorut* was rent.

The old decision in 1795, to which the grandfather of one of the defendants was apparently a party, did not decide that *dustoorut* was rent.

The letter of the Sudder Board of Revenue shows that *dustoorut* was "never paid." They were of opinion that "the term "seemed to imply the reservation of a cer-

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"tain annual payment by the purchaser to the "seller, the original proprietor, of a small "sum."*

But it was contended by Baboo Hem Chunder Banerjee, who admitted that *dustoorut* was not rent, that we must look to the conduct of the parties, as also to the finding by the first Court on the evidence that this *dustoorut*, call it rent or by any other term, had hitherto been paid by the defendants to the plaintiff. The Judge, no doubt, considered this point. The *jummawassil-bakee* filed by the plaintiff, in support of past payments, has been inspected by us; it has been clearly tampered with in the sheet which refers to payment of *dustoorut*. We concur with the Judge in holding that the relation of landlord and tenant as between the plaintiff and defendants is not made out, and that these suits are not cognizable under Act VIII of 1869.

As a last resource the pleaders for the appellant referred to a very late decision of a Divisional Bench of this Court, published in the Weekly Reporter, Volume XVIII, page 99, and contended that even, supposing the suit was not really a suit for rent, it was not liable to be dismissed, in order that a fresh suit might be instituted under Act VIII of 1859.

In answer to this argument we may observe that this ground was not taken in the Court below, nor in the grounds of special appeal.

The three appeals are dismissed with costs of all the Courts payable by the appellant.

The 13th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Jurisdiction—Transfer of Execution Proceedings (from Court of Sudder Ameen to Subordinate Judge.)

Case No. 154 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Patna, dated the 20th January 1872, affirming an order of the Officiating Subordinate Judge of that district, dated the 10th August 1871.

Shaikh Hamidooddeen (Judgment-debtor) *Appellant*,

versus

Bhadae Sahoo (Decree-holder) *Respondent*.

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondent.

The Judge had no power, when the Court of the Sudder Ameen of Gya ceased to exist, to make an order transferring certain proceedings in execution to the Subordinate Judge, and the appellant was not precluded from taking that objection in special appeal.

Couch, C.J.—It would seem that, when the Court of the Sudder Ameen of Gya ceased to exist, the suit properly belonged to the Moonsiff of Gya, but without determining that, or saying anything with regard to the proceedings before the Moonsiff of Patna, it is clear that the Judge had no power to make the order of the 2nd of August 1871 transferring the proceedings in execution to the Subordinate Judge. And it does not appear to us that anything has occurred which precludes the present appellant from taking that objection in special appeal. He went before the Subordinate Judge after that order had been made, and contested the case by raising the plea of limitation. It would have been useless for him to have raised the question of the validity of the order of the 2nd of August 1871 before the Subordinate Judge, as that officer would have felt that he had no power to deal with it; his business was to obey the order which had been made transferring the suit to his Court.

The present appellant, when he appeals to the Judge from the order of the Subordinate Judge in execution, does not, it is true, take the objection in the grounds of appeal; but when the case comes on to be heard, he takes it, and he was allowed to do so. He must therefore be considered in the same position as if he had taken it in his grounds of appeal. The Judge over-ruled the objection, and then he appealed to this Court.

We think we are obliged to give effect to the objection, and to hold that the order of the Judge is wrong in point of law, and we must reverse his order, and also reverse the order of the Subordinate Judge made in the execution proceedings, being an order made without jurisdiction. That having been done, it will be for the execution-creditor to consider what will be the right course to take. It is not for us to make any order on that subject. We make no order as to costs.

* These words are quoted by the Sudder Dewanny in their decision of the 13th December 1854.

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The 13th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sharers—Measurement—Demarcation — Weight of Evidence — Copy of Schedule Map — Admissions.

Case No. 278 of 1872.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 4th August 1871, *affirming a decision of the Moonsiff of Sulkiah, dated the* 16*th August* 1869.

Romanath Roy Chowdhry (Defendant) *Appellant,*

versus

Kally Proshad Roy Chowdhry and others (Plaintiffs) *Respondents.*

Mr. R. Allen and *Baboo Komolakunt Sein* for Appellant.

Baboo Ombica Churn Bose for Respondents.

Where a copy (the original having been filed in another suit) of a schedule map showing the different plots of land belonging to each of several shareholders and defining their boundaries, had, as appeared from various petitions on the record, been filed on more than one previous occasion, and relied upon by the parties to this suit, including the plaintiffs when it suited their purpose to do so, and where it appeared moreover that plaintiffs had on many previous occasions admitted the correctness of the map and that their shares had been demarcated therein,—HELD that the plaintiffs could not now sue for a fresh measurement and demarcation, and that the Judge, in not considering the copy of the map as binding on the plaintiffs, was wrong in his estimate of the weight to be given to it.

Glover, J.—THIS suit has been the subject of very protracted litigation. It has been twice remanded already by this Court, and is now before us for the third time.

The circumstances have been fully detailed in previous judgments, and the point we have now to decide is whether or not the Judge was right in his estimate of the weight to be given to a certain Schedule Map. In this schedule, the shares of each party were set down; and if it is to be taken as conclusive evidence of the rights of the parties, the plaintiffs must fail in their present suit.

The Judge has considered it not binding on the plaintiffs, *first*, because it is a copy only; *secondly*, because it is not signed by the plaintiffs, but by a Mookhtar who is not shewn to have been authorized to sign it on their behalf; and, *thirdly*, because it was not filed to show what the shares were, but merely to point out the position of the disputed land as regarded a neighbouring chur.

We have heard very full argument on the point, and have taken time to consider what our judgment should be. We have come to the conclusion that the Judge was wrong and that the plaintiffs must fail in their suits.

The schedule in question is dated in the year 1259. It contains the different plots of land belonging to each shareholder, and defines their boundaries. It is a copy no doubt; but it appears from the record that the original was already filed in another suit, and the Court was asked to send for it, and verify the correctness of the copy, which was the only document in the defendant's power to file.

The copy had already been filed on more than one previous occasion, and had been relied upon by the parties to this suit, as appears from various petitions which are to be found on the record. Thus in a petition dated February 3rd, 1859, filed by Kristo Proshad and Bykuntnath, plaintiffs, and Ram Koomar, defendant, in the Collector's Court in which they objected to the grant of a farm, it is stated most distinctly that the divisions of the land were noted in the Schedule Map (then filed), and that this map showed the rights of all the parties.

The schedule is again referred to as showing the co-sharer's rights in a petition filed by Bykunt Nath (plaintiff in this suit) in the case No. 699 of 1866.

And again in a petition by Kalee Pershad and Kristo Pershad (plaintiffs in this suit) where they bring forward the Schedule Map as shewing the non-existence of a certain road.

And again in the grounds of appeal in a suit brought by Grish Chunder Mitter against Kalee Pershad and Kristo Pershad.

It seems to us clear from all these petitions, the genuineness of which has not and indeed cannot be disputed, that the plaintiffs in this case have on several occasions admitted the correctness of the Schedule Map, and have relied upon it when it suited their purpose to do so.

It may be that the plaintiffs' share of the land was 4 annas, and that they are not now in possession of the full amount of land representing that share; but whether they are or are not, they cannot now sue to have the entire plot re-measured, and their title declared to 4 beeghas 6 cottas 8 ch. of the 17 beeghas 6 cottas of which the entire holding consists,

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when they have already, on many previous occasions, admitted that their shares had been demarcated in the Schedule Map. The truth appears to be that, when that map was constructed, the holding consisted of more than 17 beeghas 6 cottas, and that the loss (by diluvion) has fallen upon the plot which was demarcated to them, and they now seek by a fresh measurement to get possession of a full 4-anna share of the holding, which would make good their losses at the expense of the other shareholders.

We think that the plaintiffs are not entitled to more land than is shown by the schedule as falling within their share.

This the defendants are quite willing to allow them and to have the boundaries regularly marked off by authority, but the plaintiffs would not be content with that.

The plaintiffs have failed to prove their right to a re-measurement such as they ask, and their suit, we think, should have been dismissed.

We, therefore, allow this appeal and reverse the decision of the Court below with all costs.

The 14th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Sale—Postponement—Notice.

Case No. 162 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sarun, dated the 4th May 1872.

Roy Gowree Nath Sahoy (Judgment debtor) *Appellant*,

versus

Shah Fukeer Chand (Decree-holder) *Respondent*.

Baboo Taruck Nath Sein for Appellant.

Mr. C. Gregory for Respondent.

Where a sale was notified to take place on the 8th, and on that day the order for the postponement of the sale to the 9th was made in open Court,—HELD that that was a sufficient notification of the sale being held on the 9th, and that a fresh notice was not necessary.

Couch, C.J.—In this case the sale was duly notified to take place on the 8th, and the order for the postponement to the 9th was made in open Court by which the persons who came to bid at the sale on the 8th would have the means of knowing that the sale was postponed. They would probably enquire, when they found that the sale was not taking place, what was the cause of it, and learn that the sale was postponed to the 9th on which day it actually took place. We think that is a sufficient notification of the sale being held on the 9th; the operation of the notice was in fact continued, and it was good for the sale on the 9th. It is different from a case where a sale is postponed without any time being fixed for its taking place; it would be necessary then that a fresh notice should be regularly given. But if the appellant is right in his contention that a fresh notice should be given whenever a sale is postponed, it would be impossible ever to adjourn a sale for a period under 30 days. That is a state of things that ought not to be allowed, if there is a reasonable way of getting out of the difficulty. We do not think there is any ground for saying that the sale is irregular in consequence of this postponement. The appeal must be dismissed with costs, pleader's fees being fixed at 16 Rupees.

The 14th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Weight of Evidence—Admissions.

Case No. 45 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 11th of September 1871, *affirming a decision of the Moonsiff of Durbhanga, dated the 27th of March* 1871.

Janan Chowdhry and others (Plaintiffs) *Appellants*,

versus

Doolar Chowdhry and others (Defendants) *Respondents*.

Baboo Bama Churn Banerjee for Appellants.

No one for Respondents.

A mere admission is not conclusive. It is so only in certain cases, *e. g.*, where it has been acted upon by the party to whom it was made. Thus a statement made in a former suit in which the Court, so far from acting upon it, passed a decree opposed to it, cannot be treated as conclusive.

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An admission made by defendants' ancestor may be evidence of some weight that may be used against them; but it is only evidence upon which the Court which is trying the suit may act or not according as it considers it ought to have effect given to it.

Couch, C.J.—THE question of fact which had to be tried was whether the first defendants were only entitled to a less share than the one-fifth. The instrument of purchase by the five originally, did not specify any share which they were to take, and the construction to be put upon it would be that they took in equal shares, each taking one-fifth. That is much strengthened by the evidence as to possession, because the plaintiffs, who set up a title to more than the one-fifth, failed in proving possession of more, so that we have the presumption arising from the instrument itself, and the want of any evidence that the plaintiffs had ever been in possession of more than what according to the deed they would be entitled to. The plaintiffs rest their case upon what are called admissions by the first defendants in one or both of the suits (we think it was in both) brought by the other sharers; the present plaintiffs and the first defendants being defendants in those suits, and the case then set up by the first defendants being that they were only entitled to the share which the plaintiffs now say they are entitled to. The Court in both suits found that the property was held in equal shares, and negatived the truth of the admission. It is only an admission, and may be shown in the present suit not to have been true; and it was for the Court to consider whether it was true or not. If it thought that it was not true, it was not bound to give effect to it. A mere admission is not conclusive. It is only in certain cases that it is; for instance, where it has been acted upon by the party to whom it was made. That was not the case here. This was a statement made to the Court which, so far from acting upon it, passed a decree opposed to it. This admission cannot be treated as conclusive, nor can it be said that the Court was wrong in not giving effect to it.

Then, with regard to the *kobalah*, which is a very ancient deed, the ancestor of the first defendants states that the share was a 2-anna share. That certainly appears to be evidence of some weight upon that point; it is an admission made by the defendants' ancestor, and may be used against them. But that again is only evidence upon which the Court which is trying the suit is to act or not, according as it considers it ought to have effect given to it. Possibly, if we were dealing with the case in regular appeal, we should be inclined to give more effect to the *kobalah* than the Lower Courts have done; but both the Lower Courts, the Moonsiff as well as the Judge, have considered that they ought not to treat it as an admission upon which they should decide the case in favor of the plaintiffs. They had a right to look at the other facts in the case, and to consider the absence of any definition of shares in the original deed of purchase, and also the failure of the plaintiffs to give any evidence of possessions; and we cannot say that they were wrong in law in not giving effect to the admission in the *kobalah*, and passing a decree for the plaintiffs. If we were now to reverse their decrees, we should be in effect directing them to find for the plaintiffs upon that admission, which certainly we have no power to do.

The appeal must be dismissed, but without costs; no one having appeared for the respondents.

The 14th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Error—Mis-direction—Evidence—Nukdee kasht lands.

Case No. 214 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 23rd June 1871, modifying a decision of the Sudder Moonsiff of that district, dated the 24th March 1871.

Dinoo Singh and others (Plaintiffs) *Appellants,*

versus

Doorga Pershad (Defendant) *Respondent.*

Mr. R. T. Allan for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

A Judge who was of opinion that oral evidence would be of no value without a pottah and kubooleut to prove the quantity of the defendant's *nukdee kasht* land and the amount of its rent, was held to have mis-directed himself in point of law as to what was necessary in deciding the facts.

Couch, C.J.—THE language of the judgment which, though it has been read to us,

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we think we must refer to is:—"It is evident that the *onus probandi* with reference to the amount of the *nukdee kasht* land of the defendant, and also of its rent mentioned in pottah alleged by plaintiff, lies upon him" So far it is correct; then it proceeds:—"But he has not been able to prove his claim by any sufficient evidence. He has not filed any kubooleut executed by defendant from which the amount of land, and the rent mentioned in the pottah, might be proved according to law." That seems to us to amount to this, that the Judge was of opinion that for any sufficient evidence there ought to be a kubooleut. But it was argued that what follows qualifies it and shows that he did not mean that. "Nor has he filed any papers from the *serishtah* of his predecessors, from which the amount of land and the rent mentioned in the pottah might be ascertained." This does appear somewhat to qualify what precedes it, but we must see the rest of his judgment. He says:—"He "has filed only a *luggit* for the disputed "years written by *putwaree*, and has also "examined several witnesses who are his "ryots. But in my opinion the evidence of "such witnesses is not sufficient to prove the "amount of land and rent mentioned in the "pottah." Then he gives his reason for that opinion. He says:—"For it is clearly provided in law that pottah and kubooleut should "be granted and executed in respect of the "lands farmed out to the ryots for cultivation, and that the amount of land and also of "rent should be clearly mentioned therein." That certainly points to its being his opinion that the law required that there should be the pottah and kubooleut, and that oral evidence was of no use without them. Then he says, with reference to what he had just said as to what he considered the law required:—"Hence, in the absence of such legal evidence, the oral evidence on this point can by no means be satisfactory." We think that really means not sufficient evidence, as he had expressed it before, and such that could not be acted upon.

Up to that point it appears to us that he has gone too far. He appears to consider that oral evidence would be of no value and not such as the Court should act upon, if there was not the evidence of the pottah and kubooleut.

That this was his view is further strengthened by a passage in the judgment further on. After speaking of the *khusrah*, he says:—"If, after the preparation of this *khusrah*, any excess land had passed into the *nukdee* cultivation of the defendants, pottah and kubooleut thereof would have certainly been executed according to the provisions of law." There comes again the same opinion that certainly there would be a pottah and kubooleut. It seems to us that this erroneous opinion runs through the judgment; and although it is not unlikely that, if the case goes down again for trial, the result will be the same, the appellant has a right to have it re-tried, as this judgment appears to go further than is warranted by the law. There has clearly been an error. The Judge has misdirected himself in point of law as to what was necessary in deciding the facts. The decree must be reversed and the suit remanded for re-trial. Costs will abide the result.

The 11th May 1872.

Present:

The Right Hon'ble the Lord Chancellor, Lord Westbury, Sir James W. Colvile, Sir John Stuart, Sir Montague Smith, and Sir Lawrence Peel.

Resumption (of Jaidad Tenure)—Seizure of Arms and Stores—Act of State—Legal Right—Status of Begum Sumroo.

On Appeal from the Chief Court of the Punjab.

Forester and others,

versus

The Secretary of State for India.

As to Badshapore, the Privy Council, upon the fair construction of the treaty or agreement made by the British Government in August 1805 with the Begum Sumroo, that the Begum was for her life to hold her territories in the Doab from the East India Company as she had held them under Scindia, and that as she was not a Sovereign princess but a mere Jaidadar (*i. e.* a Jaghiredar under obligation to keep up a body of troops to be employed, when called upon, in the service of the Sovereign) under Scindia, she was to remain such under the Company; that the resumption of those lands by the British Government, upon the death of the Begum and the determination of the Jaidad tenure, was not an act of State but an act done under a legal title; that the direct evidence in favor of the sunnuds under which the representatives of the Begum set up a title to a hereditary and transmissible *lakheraj* or rent-free estate was not sufficient to rebut the presumption arising from the non-production of the original sunnud and the failure to account for it, as well as the still stronger presumption arising from the acts, representations, and conduct of the Begum in her lifetime. As to the Arms suit, the Privy Council also held that the seizure of arms and stores was not an act of State, but an act done as under a supposed legal right on the resumption of the Jaidad upon the Begum's death.

In this suit the representatives of the late Mr. Dyce Sombre claim to recover from the

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Government of India possession of a valuable estate called Pergunnah Badshapore Jharsa, with mesne profits since August 1836. They do not claim merely a zemindary interest in the lands. They claim to hold them rent-free; that is, free from assessment to Government revenue. And the total value of the claim is assessed in round numbers at a sum little short of a quarter of a million sterling.

The defence to this suit, on the part of the Government of India, is twofold. It is alleged, first, that, on the death of the Begum Sumroo in 1836, the estate, whatever were the nature and extent of her interest therein, was resumed by an act of Government which, having regard to the status of the Begum as an independent, or quasi-independent sovereign, was an act of State, the propriety and validity whereof are not cognizable by any municipal court. And in support of this proposition they rely on the case of the Rajah of Tanjore, reported in 7th Moore, 476,* and similar authorities. It is further alleged that, if the case is cognizable by the municipal courts, the appellants have failed to establish by trustworthy evidence the title to this estate on a rent-free tenure (capable of passing Mr. Dyce Sombre by the deed of gift, or subsequent will of the Begum Sumroo).

In order to test the sufficiency of the first defence, it is necessary to come to a clear conclusion touching the *status* of the Begum Sumroo both before and after the acquisition by the East India Company of the Doab and the territories on the west of the Jumna, comprised in the treaty of peace concluded with Dowlut Rao Scindia, on the 30th December 1803.

It will be convenient to consider the question with reference to the Begum's possessions at Sirdhana and elsewhere within the Doab; because the negotiations and correspondence with her were, up to the time of the final agreement or treaty with her in 1805, confined to those possessions; no mention being made therein of Badshapore, which is on the western side of the Jumna; and because the acts and powers of the Government in the resumption of Badshapore cannot be put upon higher ground than their acts and powers in the resumption of Sirdhana.

The status of the Begum, in respect of her Doab possessions before 1803, is admitted to have been that of a Jaghiredar, holding upon a Jaidad tenure, *i. e.*, upon a grant of a certain district together with the public revenues of it, on the condition of keeping up a body of troops, to be employed when called upon in the service of the sovereign of whom the Jaghire was held. The *de-facto* Sovereign of the Doab at this time was Dowlut Rao Scindia. There is nothing in the record to show what powers over the inhabitants of the district included in such a Jaghire were, as incident to the tenure, vested in the Jaghiredar. But it cannot be doubted that, practically, the whole administration of the territory included in her Jaghire, whether civil or criminal, was vested in the Begum, who exercised a sort of delegated sovereignty therein.

This being the condition of the Begum in the early part of 1803, Lord Wellesley, in pursuance of the policy by which he succeeded in detaching certain French adventurers from the service of Scindia, appears to have entered into negotiations with her before the actual commencement of hostilities with the Mahratta prince. War, though previously certain, was not declared until August 1803, and Lord Lake's force broke up from Cawnpore on the 7th of that month. But the earliest letter from Lord Wellesley to the Begum that is set forth in the Record (p. 37) is dated the 20th of May; that letter shows that a previous correspondence had taken place between them, having for its object the diversion of the Begum and her battalions from the service of Scindia to that of the English. The negotiation so begun was continued throughout the war. Though this negotiation may not have prevented such of the Begum's troops as were actually with Scindia under her Lieutenant-Colonel Saleur, from fighting against us at the battle of Assaye, yet it kept her friendly to us in her own district. Nor can it be doubted that, at the time when peace was concluded, and by the treaty of the 30th December 1803, the sovereignty over the Doab and the territories west of the Jumna, in which Badshapore is situate, passed from Scindia to the East India Company; the Governor-General had fully determined that the future relations of the Begum and the Company, though not as yet precisely defined, were to be friendly, and that our rights of conquest were not to be exercised to her prejudice. This appears from Lord Wellesley's letter to Lord Lake, of the 23rd of December 1803 (Appendix, p. 60), which admits that the Government could not in fairness establish British authority, or introduce British law into the terri-

* 4 W. R., P. C., 42; Suth. P. C. Cases, 373.

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tory composing the Begum's Doab Jaghire; and the nature of the equivalent proposed, in the event of her agreeing to exchange those possessions, is also a circumstance which has some bearing upon the present question. It appears for some time to have been in Lord Wellesley's contemplation to make the Jumna the western boundary of the purely British territory, and to form the territories conquered from Scindia on the western bank of that river into independent and protected principalities. And it being then considered desirable to remove the Begum out of the Doab, it was proposed to give her one of these principalities, reconciling her to the inconveniences of the exchange by the accession of dignity implied in treating her as *a sovereign* under the protection of the British Government. This seems to be the fair construction of Lord Lake's letter of the 23rd November 1803 to the Governor-General, and of all that was done upon it. This negotiation was continued (*see* Letters, p. 61) after the ratification of the treaty of 30th December 1803, and when the sovereignty of the East India Company in the territories ceded by that treaty had become complete. The project, however, was ultimately abandoned by Lord Cornwallis; and the final treaty or agreement with the Begum was made in August 1805. (Appendix, p. 41, No. 42.) The substance of that agreement is that, "Those places in the Doab which have formed the Jaidads of Zeboolnissa Begum shall remain to her (as before) from the Company as long as she may live." What follows may either be the expression of conditions *quæ tacité insunt* in a Jaidad tenure, on conditions superadded thereto.

But the fair construction of the instrument and of the correspondence which led up to it seems to be that the Begum was for her life to hold her territories in the Doab from the Company as she had held them under Scindia; and that, as she was not a sovereign princess, but a mere Jaidadar under Scindia, she was to remain such under the Company, the project of conferring upon her the new dignity of a sovereign princess having been only part of the larger project for an exchange of territory, and abandoned with it. Up to this time there is little, if any, express mention of Badshapore. It is, however, admitted on both sides that the Begum was *de facto* in possession of it when the cession of 1803 took place, and that she continued during her life to hold it, and to exercise therein the same powers of government and administration which she exercised at Sirdhana.

This view of the status of the Begum is confirmed by the 9th paragraph of Lord Metcalfe's letter of the 4th May 1836 (*see* Record in Arm's Suit, p. 66). The authority upon such a subject of a man of his experience and character is of the highest value. This being so, the present case is distinguishable from that of Kamachee Boye Saheba in the 7th Moore, I. A.* There the Rajah of Tanjore, though he may have had less substantial power than that exercised by the Begum Sumroo, retained at least the shadow of original and independent sovereignty. Lord Kingsdown thus puts the question:—"What was the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain on the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore in trust for those who, by law, might be entitled to it on the death of the last possessor. If it were the latter, the defence set up has no foundation." The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another Sovereign State; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under colour of a legal title, that title being the undoubted right of the sovereign power to resume, and retain or assess to the public revenue, all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent free. If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects would *primâ facie* be cognizable by the municipal courts of India.

The particular case was, no doubt, somewhat complicated by the peculiar nature of the power exercised by the Begum in her Jaghires, and the practical exclusion of her territories during her lifetime from the operation of British law and the jurisdiction of courts.

Their Lordships think that the regulations, which were the written law of that part of British India, and whatever else may be held

* 4 W. R., P. C., 42; Suth. P. C. Cases, 373.

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to constitute British law, were not introduced into these territories by Regulation VIII of 1805, or until after the passing of Act XVII of 1836. The Begum's territories were treated as excepted from the conquered territories; and although the sovereign rights of Scindia over these territories passed under the treaty of 1803, they passed subject to the rights of the Begum, the precise definition whereof was then the subject of the negotiations which resulted in the agreement of 1805. Accordingly, on the Begum's death, it was thought necessary to pass an Act of the Legislature in order to legalize the introduction of regulation law into these territories by order of the Governor-General. That this was done by legislation, and not by proclamation, affords, perhaps, another argument against treating the annexation of these territories as an act of conquest or arbitrary power, or as the exercise of an original right of conquest which had remained in suspense during the Begum's lifetime. It is probable, however, that the abnormal condition of these territories was one reason why the resumption took place, not as it would have taken place in a province or district wherein the action of Government is fettered by the regulations, by a resumption suit, but in what is called the political department; and thus both parties seem, for some time at least, to have considered that the act was in the nature of an act of State. For it is to be observed that Mr. Dyce Sombre himself asserted his supposed rights by memorials and appeals to one political authority after another, beginning with the Lieutenant-Governor of the North-West Provinces and ending with the Prime Minister; and that it was not until after his lunacy and the order of Lord Chancellor Lyndhurst in that matter, that any recourse to the municipal courts was had, or apparently even contemplated. These considerations, however, though they may explain much of what appears from the record to have taken place, cannot affect the determination of the question under consideration. They cannot alter the legal nature of the acts of Government, or make the resumption, under the assertion of a legal title, of lands claimed adversely by a subject, an arbitrary act of sovereign power against an independent State. And even if the state of the law in the territories in question at the time when the act of resumption took place gave—as perhaps it did—a larger power of resumption to the East India Company than it possessed in the regulation provinces, that circumstance would not exclude the jurisdiction of the courts. For these reasons their Lordships are of opinion that the first ground of defence, being that on which the courts below have mainly proceeded, fails. This being so, it is next to be considered whether the appellants have established their title to Badshapore Jharsi as held in perpetuity by a rent-free tenure; in other words, whether they have proved a grant by the sovereign power of the rent of the lands, which rent would otherwise be payable to the State.

The original suit having been brought in 1848, to recover the estate from the East India Company which had been in possession since 1836, the burden of proving a title sufficient to disturb that possession necessarily lies upon the appellants. This, however, would not have been otherwise had the commencement of the litigation been in 1836, and by proceedings in an ordinary resumption suit. For the regulations touching such suits cast upon the person who claims to hold land lakhiraj, or free from assessment to Government revenue, the burden of establishing a title recognized by law as sufficient to give that exceptional immunity, and require very stringent proof in such cases.

Regulation II of 1819, which the appellants in their original pleading at p. 8, invoke as one of those by which the claims of Mr. Dyce Sombre ought to have been determined in 1836, by its 28th Section provides, that an ancient sunnud shall not be treated as sufficient proof of its contents on the faith of it seal, or without confirmatory evidence. And Section 3 of Regulation XIV of 1825 also shows the high degree of proof required. Nor are such provisions unreasonable, since every grant of this kind implies a perpetual alienation in favour of some individual, and his heirs, of a portion of the land revenue (the impost, if impost it is to be called, which immemorial custom has made the most natural and tolerable to the natives of India), and thus operates not only in derogation of the rights of future Governments, but the injury of the subject on whom the incidence of taxation for the necessary purposes of Government will be the heavier, in proportion as the public revenue is wasted by such alienations.

It is of the utmost importance in a case like the present to observe in what manner and upon what proofs the case of any claimant is first advanced. In the plaint filed in August 1848 by the committee of Mr. Dyce Sombre, it was stated generally and

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without condescending on the name of the grantee, that the Altumgha Jaghire Badshapore Jharsa was originally granted by the Emperor Shah Allum, and subsequently confirmed by Madho Rao Scindia. But in the substituted plaint, which was filed in January 1864 by the appellants, and must be taken to be the foundation of the existing suit, the statement is more specific. It is this:—"The Pergunnah of Jharsa, inclusive of Badshapore, was granted as an Altumgha Jaghire to the Begum Sombre (or Sumroo) by his late Majesty Shah Allum, in the 30th year of the ascension, and this grant according to sunnud, dated the 2nd Zuffer, the 37th year of the ascension, was confirmed by the Maharajah Madho Rao Scindia." And the 4th, 5th, and 6th of the issues settled in the cause upon which the parties went to trial were, whether the Pergunnah of Badshapore Jharsa was granted by the Shah Allum to the Begum Sumroo, as mentioned in the plaint? Whether, if it were so granted, Shah Allum, at the time of such grant, possessed and exercised supreme power within the territory in which the lands were situated? And whether, if the same were granted, the grant was confirmed by Madho Rao Scindia, as in the plaint mentioned?

It will be convenient here to state the history and character of the alleged grant from Shah Allum as disclosed by the documents upon which the appellants mainly rely, *viz.*, the papers procured from Delhi.

The case which the counsel for the appellant make on these documents is, 1st, that in the month of Shuwal in the thirtieth year of Shah Allum, the Begum presented a petition, praying that a new and complete Altumgha sunnud of Pergunnah Jharsa might be granted to her in substitution for one previously granted to Zuffur Yaub Khan, the son of Sombre or Sumroo; 2ndly, that a report was made, recapitulating the prior devolution of the estate, showing that it had been held by certain great officers of the court of Delhi in succession, as part of their respective Jaghires, that it had for some time "continued released" as Jaidad of the battalion of Sumroo Bahadoor Feringee; and on the 15th of Rujub of that year (with the exception of certain villages) had been granted in Altumgha to Zuffer Yaub Khan on a representation that an Altumgha sunnud under the seal of Maharajah Puttail (said in one part of the record to be a title of Scindia) had been lost; 3rdly, that on this report and on the 19th of Shual the king issued a firman to the effect that an Altumgha grant of Badshapore Jharsa, with the exception of the villages excepted from the grant to Zuffur Yaub Khan, should be made to the Begum in the terms therein expressed; 4thly, that whether the formal grant sunnud was or was not issued to her in pursuance of that firman, she, two months afterwards presented another petition, in which she made no reference to the preceding grant to Zuffur Yaub Khan, but stated that all the estate, including the excepted villages, had, since the death of Sumroo, been in her possession as Jaidad; and that in consequence of that petition a sunnud of the whole estate, including the villages before excepted, was granted to her in Altumgha under the Khas seal and Golden Togra of the Emperor on the 9th of Zilhij in the thirtieth year of his reign.

If these facts are true, it follows that until the month of Shawul, or that of Zilhij, in the thirtieth year of Shah Allum, whatever interest the Begum had in Badshapore was in the nature of a Jaidad tenure; that Zuffur Yaub Khan never had an Altumgha grant of that estate under a sunnud of the Emperor except for a period of, at most, three months, and that, so far as appears, he was never in possession under that grant.

The original documents, of which the foregoing is the effect, were not produced, and the copies or alleged copies produced in evidence are admitted to have had no existence before 1847. They are said to have been copied from old records at Delhi at the instance of the committee of Mr. Dyce Sombre, or his legal advisers, with a view to the proceedings commenced in the following year. If the transactions which they represent to have taken place really took place, an original sunnud, in the terms of what in the record at page 32 is called "sunnud No. 3," must have been issued to the Begum Sumroo under the seal of Shah Allum. But of this original sunnud there is no trace. It is not produced; its loss is not accounted for. There is no evidence that anybody ever saw it.

It has been strongly argued for the Government that the non-production of the original not being accounted for, secondary evidence of its contents is not admissible. Their Lordships are by no means prepared to say that an Indian Judge would not do right, according to the practice of the courts of that country, in rejecting a copy if the absence of the original were not satisfactorily accounted for. There seems to be no reason for assuming that a rule requiring the best

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evidence producible to be produced, has no application to courts of which the Judges may be persumed to be, for want of professional training, less capable than they are elsewhere of weighing the effect of evidence. This Committe undoubtedly enforced the rule in the case of Syud Abbas Ali Khan, 3 Moore's I. A., p. 156. There have, however, been other cases in which their Lordships have declined to apply to Indian cases the strict rules of evidence which obtain in this country on trials at *nisi prius*. And, considering that in this case the Judge of first instance has commented on the copies in question, their Lordships propose to treat them as admitted in point of fact, and to consider what credit and effect ought to be given to them. Nevertheless, in weighing the whole evidence given in support of the appellant's title, the absence of proof that the original sunnud once existed, and was subsequently lost or destroyed, is a very grave circumstance, which cannot be excluded from consideration.

The case as to the copies of the sunnud, put forward by the learned counsel for the appellant, is that they are proved to be copies taken from ancient documents at Delhi, since destroyed in the mutiny, which, whilst they existed, were public records, and of the same value as a duplicate original of the missing sunnuds.

But what is the evidence to these papers? The proof of the most important of them, that called sunnud No. 3, depends on the testimony of the witness Balmokund, given in 1865, and set forth as p. 54 of this record. He has deposed that, in 1847, he was ordered by the then peshkar of the King of Delhi to make the copy in question from an old paper which the latter took out of a cloth. The words of the witness are, "It was out of a dozen or so of the papers of the former times which had 'escaped,' and had been tied up by them in his 'busta,' or record cloth." He goes on to say, "There had been countless papers in the charge of his (the peshkar's) forefathers; many of them had doubtless been destroyed by insects, or perished in other ways. By 'escaped,' I mean those old papers or records which had come down from his forefathers into his actual possession." In answer to the inquiry what had become of the paper from which he made the copy, he said, "The peskhar died in 1850, and all trace of his documents has disappeared;" and added, that the different servants of the king had each in their possession a few pounds' weights of documents that had been handed down from father to son, besides those relating to their own time. He had previously said when asked whether he lived in the peshkar's house, "No; I went there for business; after the taking of Delhi by the British" (which words as the peshkar died in 1850, must be taken to refer to the original introduction of British authority in Delhi, rather than to the taking of the city in 1857), "the 'duftur' (registry office) of the king hardly existed."

Hence it appears that the paper from which the copy is said to have been made was anything but a record regularly kept and preserved, which afterwards perished in the storming of Delhi, if full credit be given to the witness and to his means of knowledge. It came to the peshkar with a few pounds' weight of other documents, was accidentally preserved when many others perished, and disappeared with him. Their Lordships cannot treat such a paper as having the validity of an authentic record, the value of which depends on its custody in an authorized registry by a responsible officer. The evidence of Chujo Singh, as to the other and less important paper (No. 4), is of the same character.

An attempt was made to cast futher suspicion on these copies and the transactions which they are produced to prove by the dates. It is contended on the part of the respondents that the months of Shawul and Zilhij of the 30th year of Shah Allum, fall within the autumn of 1788, when he was a helpless prisoner in the hands of Gholam Khadir, the Rohilla, who put out his eyes. On the other hand, the appellants assert that the date in question corresponds with the autumn of 1789. There is much that may be urged to support the respondents' contention. It seems to be certain that Shah Allum's reign, notwithstanding a short interregnum, was calculated from the death of his father Alamgir II, which Mr. Elpinstone and the best historians fix in November 1759, corresponding with Rabi II, A. H. 1173. It follows that the "jalus" or accession of Shah Allum is correctly fixed by Mr. Prinsep in his tables as 1 Jumadi I, A. H. 1173; and if the 30th year of that Prince's reign is to be calculated in the ordinary way from that date, it would begin on the 1 Jumadi I, A. H. 1202, and end with the 1 Jumadi I, A. H. 1203. The months of Shuwal and Zilhij of the 30th year would then fall within 1203, and correspond with the autumn months of 1788. On the other hand, the appellants have referred to some coins and seals, from which it would appear

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that the 30th year of Shah Allum's reign was treated as identical with A. H. 1203; and from this and a passage in Mr. Seton's letter, afterwards referred to, they have argued that the dates in question must be taken to correspond with the autumn months of 1789. This view may, perhaps, be capable of being reconciled with the date of Shah Allum's accession by some peculiar mode of calculating the jalus year; and their Lordships would be sorry to make their decision turn in any way upon a disputed point of Indian chronology. They may observe, however, that even if the dates in question are taken to fall within the year 1789, there is reason to doubt whether Shah Allum was at that time in a condition effectually to alienate any part of the revenues of the territories within which Badshapore is situated—at least without the concurrence of Scindia; and that there is no suggestion that the alleged grant received the sanction of the Maharatta power until 1795.

Their Lordships, considering the nature of the documents under consideration, the testimony by which they are supported, have come to the conclusion that the appellants have not given evidence which can be accepted as sufficient proof of a grant, of which the original is neither forthcoming nor accounted for, unless the presumption of its existence can be assisted by the other evidence in the cause.

The corroboration chiefly insisted upon was of this kind. It was argued that copies of certain sunnuds, showing his title to Badshapore, were proved to have been sent by Mr. Dyce Sombre in 1836 to the officers of Government; that these were not shown to have been returned by the Government, and have not been produced by them in this suit; that they must therefore be assumed to have been identical, or, at all events, not inconsistent with the documents subsequently procured from Delhi. It was further insisted that, inasmuch as Government did not question the genuineness of these sunnuds in 1836, they must be taken to have been then satisfied of their authenticity. This argument is confined to the copies of sunnuds supposed to have been sent by Mr. Dyce Sombre after the Begum's death. It is hardly pretended that the Government ever received from her any document of title except a copy of Scindia's perwannah. The sunnuds sent to Mr. Fraser, whatever they may have been, were returned by her messenger. Mr. Forsyth, on the other hand, argued strongly that Government was not shown to have received from Mr. Dyce Sombre copies of any documents corresponding with those now relied upon; or, indeed, the copy of any document of title except Scindia's perwannah. The evidence on the point is as follows:—Mr. Dyce Sombre, writing in the beginning of March 1836 to Mr. Hamilton, says: "I beg to say I have already forwarded to you the copies of the sunnuds by which her late highness held her Jaidad, and the pergunnah of Badshapore in Altumgha assigned to her by the former rulers of Hindoostan, being antecedent to the British sway of this adjoining district." These words would be grammatically accurate, if nothing relating to Badshapore but a copy of Scindia's perwannah, previously called by the Begum in her letter of 1832 a sunnud, had been sent. And Mr. Hamilton writing to Mr. Hutchinson (page 116) says:—"I also annex a copy of the sunnud referring to Badshapore, having in the preceding sentence spoken of the sunnuds relating to Sirdhana." The argument that he would not have applied the word sunnud to the perwannah does not appear conclusive. Their Lordships can give no credit to the alleged copy of the letter set out at p. 29. It was hardly pressed by Sir Roundell Palmer in reply. But Mr. Hamilton's letters of the 20th May 1836 (page 169), and of December 1836 (page 121), have been strongly relied upon by the appellants. They were written by him as Collector of Meerut, with the object of having applied to the back rents of Sirdhana, which was within his jurisdiction, a more stringent rule than that which his superiors were disposed to apply either to Sirdhana or to Badshapore (with which he had no official connection). He draws a distinction between the two tenures; treating Sirdhana as Jaidad, and Badshapore, whether resumable or not, as the Begum's personal Jaghire. That this was the nature of the Begum's claim would perhaps appear from the copy of Scindia's perwannah; but it must be admitted that these letters are, on the whole, more consistent with the appellants' than with the respondents' theory, concernig the number and nature of the documents sent by Mr. Dyce Sombre.

One great and unexplained difficulty, however, touching the copies of sunnuds supposed to have been sent by Mr. Dyce Sombre is this:—From what were these copies made? If from originals, where are the originals? If from other copies (and it was admitted at the bar that he must be pre-

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sumed to have retained copies of whatever he sent), what became of those copies? Mr. Dyce Sombre was in correspondence with the home authorities touching his claim up to 1842 (page 4). He was presumably then in possession of all the documentary proof he ever had of his title. He was found a lunatic on the 30th of July 1843, and Mr. Larkins was appointed his committee in 1844. There was a faint suggestion at the bar that his documents of title were lost or destroyed during his lunacy. But there is not the slightest proof of this; and the non-production of any such documents in the suit affords grounds for supposing that neither Mr. Dyce Sombre between 1836 and 1842, nor Mr. Larkins, when he took the advice of counsel in 1847, had any copies of the alleged sunnuds from Shah Allum; and, if so, it seems difficult to fix the Government with clear notice in 1836 of the previous title now sought to be established by the copies procured from Delhi in 1847.

Their Lordships are of opinion that even if the Government were fixed with the notice of the claim of such title, it is not to be inferred that, because they did not then dispute, they admitted its genuineness. It is clear from all the proceedings that they did not profess to investigate the title. Their position throughout was that the tenure was, either in its nature or by arrangement, resumable on the Begum's death, and they resumed it when that event happened.

The appellants' case, however, presents still graver difficulties. When a doubtful title is in dispute the first question that suggests itself is—when was it first asserted? and has it been continuously and consistently asserted? In the present case it is clear that this particular title was never asserted by the Begum in her lifetime, but that, on the contrary, she repeatedly asserted a different one, and acted in a manner wholly inconsistent with the presumption of its having existed. The following is the short summary of the correspondence of the Begum in her lifetime with the Government touching Badshapore.

The first mention of any special title to the pergunnah is to be found in the printed correspondence in Mr. Seton's letter of the 24th February 1808, when he complains of the attempt of the Begum on the 25th of November 1807 to obtain from the King of Delhi a new firman, granting this pergunnah as an Enam Altumgha to Mr. George Dyce (the father of Mr. Dyce Sombre) and his descendants. Mr. Seton's statement as to the property is that it was bestowed as a Jaghire (which may be a mere estate for life) by Shah Allum in the thirtieth year of his reign, which he treats as corresponding to 1789 A. D., upon Zuffer Yaub Khan; that the Begum had obtained possession of it in that person's lifetime, and retained such possession after his death; and had now obtained a new firman bestowing pergunnah Jharsa and the town of Badshapore, formerly the Jaghire of Juffer Yaub Khan, as an Altumgha upon Mr. George Dyce and his descendants.

The Government of the day objected to this proceeding; insisted that Badshapore, like the Begum's possessions in the Doab, would revert to the East India Company on her death, and was obviously determined not to recognize as valid any grants of that nature which might be made at that date by the King of Delhi; but recommended that, in deference to the king and to her, she should be induced by friendly negotiations to give up the new sunnud. The negotiations for this purpose went on till 1811, when the Begum did give up the new sunnud. But the important fact in this transaction is that the case she then put forward (see her letter of the 16th February 1811, p. 83) was the following:—"I had, as I still retain, a firm conviction in my own mind that the pergunnah of Badshapore, and the villages of Bhijapoora and Bhudpore, were held as Altumgha to my late son, and would consequently revert to my adopted son, George Alexander David Dyce, in virtue of his marriage with my granddaughter. On this subject doubts have arisen respecting the nature of the grant, which is not now to be found in the family records. I consequently cannot urge a positive right, but," &c.

This letter contains most important admissions, which are utterly fatal to the title set up in the amended plaint. It shows that at that time no grant could be found; furthermore, it asserts "the firm conviction" in the Begum's mind that Badshapore was held as Altumgha to her late son, but that in consequence of doubts respecting the nature of the grant which could not be found in the family records, she could not urge "a positive right." Now, it is inconceivable that if she had obtained a grant to herself from Shah Allum, she should not, at this date (1811) have remembered it, and remembering it, should not have put it forward; and if such a grant ever had existence, and could not then be found among her family

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records, what reason can be suggested why she should not then have applied to the Registry of the King at Delhi for a copy of it?

In 1825, after an interval of fourteen years, she proposed to surrender the Jaghires held by her, including Badshapore, a proposal which was never carried into effect. She seems to have then made no statement of her title, but the representation of Colonel Dyce, with whom she was then on bad terms, was that the sunnud on which the Jaghire was held, whatever its effect, was in favour of Zuffur Yaub Khan. Had the Begum at that time been in possession of sunnuds in her own favour, superseding the grant to Zuffur Yaub Khan, she would hardly have failed to produce them.

In 1831 she first expressed a desire that her Jaghires should be assigned to Mr. Dyce Sombre, whom she designates as her adopted son and intended heir. In her letter to Government she speaks of Badshapore and its dependent villages as property "which the deceased Nawab, his grandfather, was possessed of on Altumgha tenure." The Government, as before, appears to have refused its assent to the alienation after her death of any of the lands held by her rent-free; treating the whole as revertible to Government after her death. Some time in 1832 as it is supposed, she made a further application to Government, by the letter of which the substance is set forth at p. 180 of the Record. This letter is the only one which can be taken to contain the assertion of an Altumgha title to Badshapore in herself. She speaks of the estate as "my Altumgha," and forwards with some other documents a copy of Scindia's perwannah; but even in this letter, when combating the supposed objection of Government that Badshapore was included in the arrangement made with her, through Mr. Guthrie, she says:—"I beg to observe that the country of the Doab only is mentioned in it (Mr. Guthrie's letter); while the pergunnah of Badshapore *alias* Jharsa, my Altumgha, and the gardens, &c., were bestowed on Nawab Zuffur Khan, the maternal grandfather of Mr. Dyce, for his expenses." This sentence would imply that the title was that of Zuffur Yaub Khan, though the *de facto* possession was hers.

In March 1833, she again renewed the attempt to get the Government to consent to the transmission of this estate to Mr. Dyce Sombre. The Government again refused to give its consent, treating the estate as held on a life tenure only. But on this occasion the Begum once more clearly (see p. 184) rested her claim upon an alleged Altumgha grant to Nawab Zuffur Yaub Khan, and referred to sunnuds importing such a grant as being in her possession. There was not on this occasion the slightest suggestion of a grant in her own favour.

The discussions, therefore, between the Government and the Begum touching Badshapore and the tenure on which it was held cover a period from 1808 to 1833. The Government throughout that period insisted that her interest was limited to her life, and that on her death the estate would revert to the State. The Begum, on three or four several occasions, at considerable intervals of time, contended that the tenure was Altumgha; sometimes appealed to the Government to continue it after her death as a matter of favour; sometimes attempted to raise a claim as of right; but on every occasion, except perhaps in her ambiguous letter in 1832, rested on the alleged grant to the son of Sumroo, and never pretended that that grant had been superseded by the sunnuds in her own favour, on which the appellants now rely. Her letters, moreover, point to a substantial grant of the estate to Zuffur Yaub Khan in Altumgha, and to the possession of it by him under that tenure. They are quite inconsistent with the case made by the Delhi document, *viz.*, that the Altumgha grant to him endured only three months, and was never perfected by possession. The correspondence also concerning the pensions and the negociations she entered into on that subject are wholly inconsistent with the theory that she held or claimed to hold Badshapore in Altumgha by a valid grant to herself.

Sir Roundell Palmer endeavoured to meet the strong presumption with this continued course of conduct, and these repeated representations on the part of the Begum raise against the validity of the alleged sunnuds, by an ingenious theory that she may have conceived that claims founded on an alleged grant to Nawab Zuffur Yaub Khan would be more likely to find favour with Government than one founded on sunnuds in her own favour; because they might treat the latter as superseded by the agreement of 1805. This suggestion, which after all is pure speculation, does not really afford a probable explanation of her conduct. If an Altumgha Jaghire had been granted to Nawab Zuffur Yaub Khan, the Begum had virtually usurped his rights before the cession of the territories west of the Jumna by Scindia to the

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East India Company. The British Government would in no way be bound, and certainly would be little disposed, to recognize a title which had been *de facto* defeated before the territories in question were ceded to them. They would be less inclined to recognize it if the title of Zuffur Yaub Khan had been of so flimsy a character and short duration, as the case now made represents it to have been, and had been *de jure* superseded by a grant to the Begum in 1789. If the case of the appellants is true, these circumstances might easily have been ascertained by inquiry through the British officers at Delhi. Again, the Begum could not make title to the estate through the son of Sumroo. In seeking to transmit the estate to Dyce Sombre, she sought to transmit it as from herself. It was, therefore, more natural, if she had a title in her by valid sunnuds from Shah Allum, that she should put forward and rely on that title, than that she should rest on the old grant to Sumroo's son which she herself had practically set aside. Nor is it easy to explain why, in 1807, she should have obtained from the Court of Delhi a sunnud, little likely to be recognized by the British Government, and founded on the alleged title of Zuffur Yaub Khan, when, if the present case be true, that title had been already superseded by a valid sunnud in her own favour.

If the validity of the documents on which the appellants now rely were supported by strong and independent evidence, it might be reasonable to endeavour to account for the Begum's silence concerning them by theories, more or less plausible, of the nature of that put forward by Sir Roundell Palmer. But if, as has been shown, the direct evidence in favour of the documents is weak and suspicious, then the presumptions arising from the acts and conduct of that astute woman should be allowed to have their full and natural weight against them.

The only remaining question is what effect is to be given to the perwannah alleged to be Scindia's confirmation of the sunnuds? Can it be taken to supply the deficiency in the proof of the sunnuds, and to establish or corroborate the title of the Begum? It is known to have existed in the Begum's lifetime, since a copy of it was sent by her to Government in 1832. There is no other proof, except the seal, of its origin. And the seal, if not fatal to it, casts the greatest suspicion on this document. It is pleaded as a confirmation by Madha Rao Scindia. But the evidence proves that, at its date, Madha Rao Scindia was dead. If, as it has been contended on behalf of the appellants, the confirmation pleaded is to be taken as a confirmation by Dowlut Rao Scindia, the difficulty arises that the document bears the seal of his then deceased predecessor. There was no proof that this seal was adopted and used by Dowlut Rao Scindia, but it was attempted to get over the difficulty by a reference to the case reported in 10th Moore's Indian Appeals, p. 192. In that case there was evidence that the seal of the deceased zemindar had in several instances other than that in question, been used after his death. Here there is no proof that Dowlut Rao ever in any other instance used the seal of his predecessor. It is highly improbable that he should do so, and it would be dangerous, as well as unreasonable, to hold that, because a loose practice has been shown in one case to have prevailed in the kutchery of a Bengal zemindar, it may be inferred in another that the same practice prevailed in the Durbar of a powerful sovereign prince. Their Lordships, therefore, cannot treat the alleged confirmation of the Begum's title by the Mahratta prince, in 1795, as established.

Weighing, then, the direct evidence in favour of the sunnuds, weak and suspicious as it is, against the presumptions arising from the non-production of the original sunnud, and the failure to account for it; and against the still stronger presumptions arising from the acts, representations, and conduct of the Begum in her lifetime, their Lordships have come to the conclusion that the appellants have failed to establish the title which they have set up. To decree in favour of a title to an hereditary and transmissible lakhiraj estate, on evidence so untrustworthy, would be contrary to the long-established practice of the courts in India; and such a decision would be a dangerous precedent.

The proceedings in this case undoubtedly disclose many things which in their Lordships' opinion are to be regretted. It is particularly to be regretted that the Government did not, in some way or other, investigate the title of Mr. Dyce Sombre in 1836 as a question of right, instead of dealing with it by an act of power. It is to be regretted that in 1849 they did not fairly try the question of title, instead of meeting it by a plea of the statute of limitations. But after the fullest consideration of the case, and with every desire to give to the appellants the benefit of any inference which may be legitimately drawn from the circumstances of this protracted litigation, their

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Lordships see no grounds for believing that, if the cause had been tried in 1836 as an ordinary resumption suit under the Regulations, Mr. Dyce Sombre would not equally have failed to show a good title to an Altumgha tenure in the Begum. If it were necessary for their Lordships to express as opinion of the nature of the Begum's interest in Badshapore, they would incline to the opinion that her persistent statement of there having been some grant to Juffur Yaub Khan was not without foundation; that she had in some way usurped his interest when she got undisputed command of the troops; and that the British power found her in the enjoyment of the estate, and left her so during her life. Any such opinion, however, must be, more or less, matter of speculation. For the determination of this appeal it is sufficient to say that the appellants have, in their Lordships' judgment, wholly failed to prove the fourth and sixth of the issues settled in the cause, and therefore to establish the title pleaded by them; and their Lordships have come to the conclusion that the appeal in this suit ought, on this ground, to be dismissed and the decrees of the Indian Courts affirmed; and their Lordships will advise Her Majesty accordingly.

In "the Arms suit," their Lordships are of opinion, for the reasons already given in the Badshapore suit, that the seizure of those arms and stores was not an act of State, but an act done as under a supposed legal right on the resumption of the Jaidad upon the Begum's death. They think that the evidence shows that the arms and stores were purchased by the Begum, and that there is no authority or evidence to show that those who hold by Jaidad are not entitled to things so purchased. They are entitled to all the rents on performance of a certain duty, which duty ceases on their death, and the next Jaidadhar would be bound to provide arms by virtue of his tenure.

Their Lordships think the decree in this suit should declare the appellant entitled to recover from the Government of India the value of the arms and military stores seized, with interest on such value, from the date of seizure, at the ordinary rate of 12 per centum per annum; and that unless the parties agree to name a sum as representing such value, or agree to refer to arbitrators, in this country, the question, what, at the date of the seizure, was the value of the articles seized, the case must be remitted to India, with instructions to the Court there to ascertain such value, and give a decree accordingly. Her Majesty's Order on this appeal may be suspended until the parties shall come to a conclusion as to the course to be pursued. The costs in India of each suit will follow the result; and their Lordships think that each party should bear their own costs of these appeals.

The 5th July 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, Mr. Justice Willes, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo Law of Inheritance—Gifts inter vivos and by will — Construction — Estates-tail—Donees in existence—Life-interest—Maintenance.

*On appeal from the High Court at Calcutta.**

Jotendromohun Tagore and another

versus

Ganendromohun Tagore.

The distinction adopted by the law of England in the course of inheritance between inheritable freeholds and personalty is not known in Hindoo law.

According to the Hindoo Law of Inheritance (unlike the law of England), the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the testator.

A gift *inter vivos* or by will cannot prevail against the Law of Inheritance.

A benignant construction should be used in the case of transfers by gift, the real meaning of the document being enforced if it can be reasonably ascertained from the language used.

All estates of inheritance created by gift or will, so far as they are inconsistent with the Hindoo Law of Inheritance, are void as such, and no person can succeed thereunder as heir to the estates described in terms which in English law would designate estates-tail.

A person capable of taking under a will must be such a person as can take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator.

Trusts of various kinds have been recognised and acted on in India in many cases.

Under the guise of an unnecessary trust of inheritance, a testator cannot indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust.

A trust cannot be said to fail because one of the trustees had renounced or had not acted; where a will distinctly provides for the case of a trustee not acting and gives a directing power to fill up the number of trustees when required.

Having regard to the principles above laid down, the PRIVY COUNCIL held that Jotendromohun Tagore was beneficially entitled to a life-interest under the will in

* From the judgment of Sir Barnes Peacock, C.J., and Norman, J., dated 26th May 1869.

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the real property, and also in the personalty or the fund into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities; that upon the failure or determination of such life-interest, the beneficial interest in the said real and personal property was vested in the plaintiff Ganendromohun Tagore as heir-at-law; and that the marriage gift of a *primâ facie* adequate income to the plaintiff was a sufficient provision for maintenance.

THESE were consolidated cross-appeals from a decree of the High Court of Judicature in Bengal (Appellate side,) disposing of numerous questions touching the right of succession to valuable property, partly ancestral and partly acquired, of the late Honourable Prosonocoomar Tagore, a Hindoo inhabitant of Calcutta, who died on the 30th of August 1868, leaving his only son, the plaintiff, and two widow daughters, with six grand-children, the children of daughters, him surviving.

The defendants are three of the trustees and executors under the will of Prosonocoomar, dated the 10th of October 1862, together with the persons in existence who claim a beneficial interest under the will, other than legacies and annuities (which are not disputed). The trustees and executors are Opendromohun Tagore, Jotendromohun Tagore, and Doorgapersaud Mookerjee.

Jotendromohun Tagore is named as the first tenant-for-life, and he had, and has, no son.

The defendant Sourendromohun Tagore (named in the will Shooshendromohun Tagore) is also named as tenant-for-life.

The defendant Promodecoomar Tagore (a minor) is the son of Sourendromohun Tagore, and was born in the lifetime of the testator. He is described as tenant-for-life.

The remaining defendant, Suteendurmohun Tagore (a minor) is the grandson of Lullitmohun Tagore, who was dead at the date of the will. He was born in the lifetime of the testator. His father and grandfather died before the testator. If the will be valid, he is entitled to an estate-in-tail male.

It does not appear that any other person beneficially interested is in existence. The fourth trustee has not acted, though he does not appear to have renounced. No question as to parties has been raised, except as to the alleged want of any description of the capacity in which Jotendromohun Tagore has been sued. This latter point was not argued before their Lordships, and they see no reason for doubting that the High Court rightly overruled it.

The will provided for the testator's daughters and grandchildren, but made no provision for the plaintiff, stating that he had been already provided for in the testator's lifetime. That provision was made by nuptial gift on the occasion of the plaintiff's marriage in the year 1843, when there was settled upon him absolutely, by his father, a zemindary, which then fetched 7,000 rupees per annum, and the present value of which the plaintiff does not state. Upon the death of the plaintiff's first wife, his father also paid him the value of her jewels, to which he laid claim.

The explanation of the exclusion of the plaintiff from any further provision by this will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been attempted. Nor does any such question arise as was discussed in Abraham *v.* Abraham* (9 Moore, P. C., 195), as to the law applicable to the convert's own property or as to the personal relations of him and his family. The Act XXI of 1850 appears to their Lordships to be conclusive to show that this change of religion does not affect the plaintiff's right of inheritance or suit.

As the present litigation turns upon the validity of the will, it will be convenient to state its effect, citing in terms those parts of it which call for interpretation. It was in the English language.

After reciting that the testator had acquired in severalty large estates, both real and personal, partly ancestral, but for the most part by his personal industry, and that the testator had already made such provision for his son Ganendromohun Tagore (the plaintiff) as he considered sufficient, and that Ganendromohun Tagore would "take nothing whatever under the will," it purports to give all the testator's property to four trustees, of whom Jotendromohun Tagore was one, "their heirs, executors, administrators, representatives, and assigns," upon trust.

As to the personalty (except jewels, &c., in the personal use of members of his family, and such jewels, &c., as "the person or persons for the time being beneficially interested in the real estate or the income, or surplus income thereof, shall wish to retain for his and their own use"), to pay funeral expenses, debts, and ordinary legacies within a year after his death, and to sell and to convert the rest into money and securities, and invest the proceeds in the name of the trustees, with power to change the securities.

To pay annuities afterwards given (except 1,000 rupees a month afterwards given for

* 1 W. R., P. C., 1; Suth. P. C. Cases, 501.

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worship) and legacies payable after the investment, and

"After payment of such annuities and legacies do and shall pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the person or persons who for the time being shall, under the limitations and directions hereinafter contained and expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits or surplus rents and profits thereof; and so soon as all of the said annuities and legacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust, monies, and securities, and the interest, dividends, and annual proceeds thereof, in trust absolutely for the person or persons entitled under the limitations and directions hereinafter contained and expressed, to the beneficial or absolute enjoyment of my said real property:"

And as to "realty or immoveable property," or of the nature of realty, "to apply the profits in aid of the income of the personalty in payment of debts, legacies, and annuities:"

To pay 1,000 rupees a month for the worship of idols:

And the residue "to the person or persons" for the time being entitled to the beneficial enjoyment of the real estate under the subsequent directions of the will "for the absolute use of such person or persons respectively," and the will desires that the "trustees or trustee shall hold the said real estate generally for the use and benefit of such last mentioned person or persons for the time being, so far as is consistent with the trusts and provisions" of the will; that, after payment of expenses of management, the person or persons for the time being entitled to the beneficial enjoyment of the real property, or of the income or surplus thereof, should receive 2,500 rupees a month, and that the legacies and annuities should be paid gradually out of the balance, with interest at 5 per cent. The will then directs as follows:—

"And so soon as all the legacies and annuities (save and except the said sum of 1,000 rupees, for the worship of the said idols), given by this my will, shall have fallen in or been paid and fully satisfied, then in trust forthwith, to convey the said real estate and premises unto and to the use of the person who shall under the limitations and directions herein contained be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed, of and concerning the said real estate, so far as the then conditions of circumstances will permit and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be)."

All the gifts, &c., in the will are declared to be subject to the bequest to the trustees, and to the provisions and declarations with reference thereto.

The will, then, after reciting that the testator's father had established certain idols at Molla Johur, and had given a talook to supply the means for their worship, and that such provision was insufficient, gives the 1,000 rupees before mentioned, per month, for the purposes of the worship.

Provisions follow for the members of his family, other than the plaintiff, by annuities and legacies, to vest upon the testator's death. Then follow provisions for servants, for charities, and for founding the Tagore Law Professorship.

The will then disposes of the real property as follows:—

"And whereas I am, amongst other property, possessed of and entitled to a zemindary talook, called Pergunnah Patleadah, and Kismut Patleadah, in Zillah Rungpore, subject to an annual consolidated jumma, payable to Government, of rupees 40,555-13-3, and I am also possessed of and entitled to other estates and property in Zillah Rungpore and other districts, and also to a ghaut, which I have erected and built on the river bank side of the Strand Road in Calcutta, and also to land and buildings opposite thereto, abutting on and near to the said road, and also to the Boitakhannah house, land and premises, where I usually reside, and also to various other parcels of real estate. And whereas the frequent division and sub-division of estates in Bengal is injurious alike to the families of zemindars and to the ryots, who are in consequence oppressed by numerous and needy landlords having conflicting interests, whence arise disputes and litigations. And whereas I have bestowed much time and money on the improvement of my estates and of the condition of the ryots and tenant thereof, and I am desirous that such improvements should continue to go on, and should not be interrupted by any division of the said estates or disputes concerning the same. Now, therefore, I give and devise (subject

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always to the devise to the said Romanauth Tagore, Opendromohun Tagore, Jotendromohun Tagore, and Doorgapersad Mookerjee hereinbefore contained) all the real property of what particular tenure, nature or kind soever, and also library, horses, carriages, farmyard, furniture of the Boitakhannah, jewels, gold and silver plates, &c., which I shall, at the time of my death, be possessed of or entitled to, to and for the following uses, and subject to the following provisions and declarations, that is to say:—Unto and to the use of the said Jotendromohun Tagore, for and during the term of his natural life; and from and after the determination of that estate, to the use of the eldest son of the said Jotendromohun Tagore, who shall be born during my life for the life of such eldest son; and after the determination of that estate, to the use of the first and other sons successively of the said eldest son of the said Jotendromohun Tagore, according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of the said Jotendromohun Tagore, who shall be born during my life successively, according to their respective seniorities, for the life of each such sons respectively; and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of the said Jotendromohun Tagore and the heirs male of their respective bodies issuing, so that the elder of the sons of the said Jotendromohun Tagore born in my lifetime, and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and taken before the younger of the sons of the said Jotendromohun Tagore born in my lifetime, and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, to the use of each of the sons of the said Jotendromohun Tagore who shall be born after my death successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and take before the younger of such sons and the heirs male of their and his respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, then to the use of Shooshendromohun Tagore, the second son of my brother Hurrucoomar Tagore, for the term of his natural life; and after the failure or determination of that estate,—"

Then to the sons of Sourendromohun Tagore and their sons and the heirs male of their body respectively, in like manner as for Jotendro's, and after the failure or determination of the said several estates and uses, to the first and other sons, and their sons, and the heirs male of their body of Lullitmohun Tagore successively, and respectively in like manner as in the case of the sons of Juttendro and Sourendro. Like limitations as to other persons, as to which no further question arises.

Then follows a provision that adopted sons shall be deemed sons of the body within the will, but be postponed to actual issue of the body.

The will then contains a special provision for preserving strictly the character of the estates of inheritance which it proposes to create, as follows:—

"And I declare that, in the construction of this my will, sons by adoption shall always be deemed younger than and be postponed to sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and failing descent, by adoption, and his issue or heir male by descent, and failing descent by adoption, shall be preferred to every younger son and his issue or heir male by descent or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate."

It next provides that such estates of inheritance shall not be alienable, as follows:—

"And I declare my will and intention to be to settle and dispose of my estate in manner aforesaid as fully and completely as a Hindoo born and resident in Bengal may give or control the inheritance of his estate, or a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of England whereby an entail may be barred, affected, or destroyed."

Then follows a proviso for cesser and limitation over of the estates, whether for life or inheritance, in case of any part of them being permitted by any holder "to be sold for arrears of Government revenues, or, in case of failure, to keep up in a due state of repair, and to use as his residence in Calcutta," the testator's house and furniture, &c., in which

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case the person next in succession is to take as in case of death.

Then follows a power to improve and to make leases for twenty years without fine, and with power of re-entry.

The remainder of the will consists in directions to the trustees as to management and a power of appointment of new trustees in case of death, refusal, or incapacity; and it appoints the trustees to be executors, and gives certain powers to "the acting executors or executor."

There are two codicils. The first makes further provision for the children of a daughter. It speaks of the testator's "trustees or trustee." The second revokes that portion of the will which relates to worship and charity, which it states to have been otherwise provided for by the testator.

The plaint, after stating these facts, alleges that the trustees and executors have, against the directions in the will, improperly sold or disposed of a portion of the *corpus* of the personal estate, consisting of company's paper, and that there is danger of future waste.

The plaint prays in substance that it be declared :—

1. That the plaintiff, as only son and heir-at-law, is entitled to represent the estate.

2. That the testator had no absolute power of disposition, especially of ancestral estate.

3. That the trusts as to the residue, after payment of the testamentary expenses, legacies, and annuities, are void, or at least void save so far as they give Jotendromohun Tagore a life-interest, and that plaintiff is entitled after Jotendromohun Tagore's death.

4. That the plaintiff is entitled to an account of the property, and a declaration of the rights of the parties, and incidental relief by receiver, injunction, and otherwise for securing his interest, and an adequate maintenance, if he be not declared entitled to an immediate interest, and

5. For further relief.

The answer of the trustees and executors, and that of Sourendromohun Tagore, admit the main facts, with some qualifications not at present material; and that of the trustees and executors denies that they have improperly disposed of the estate. They submit that the will is valid, and ask for proper declarations and directions.

The infant defendants respectively pray that their rights, if any, may be protected by the Court.

The following issues were settled by the High Court :—

"*First.*—Does the plaint disclose any cause of action ?

"*Second.*—Did the testator die intestate with respect to any, and what, portion of his estate ?

Third.—Was any, and what, part of the immoveable property of the testator ancestral estate, and, if so, had the testator power to dispose thereof by will ?

"*Fourth.*—Are any, and which, of the gifts or limitations contained in the will and codicils of the testator void in law ?

"*Fifth.*—What are the rights of the parties respectively under the will and codicils ?

"*Sixth.*—Whether the plaintiff is entitled to any, and what, maintenance out of the estate of the said testator ?

"*Seventh.*—Whether the executors, defendants, have misapplied any, and what, portion of the testator's estate ?"

At this stage, the cause was heard before the High Court (Ordinary Original Civil Jurisdiction), and the learned Judge, Mr. Justice Phear, dismissed the plaint.

Upon appeal before the High Court (Appellate Jurisdiction), present Chief Justice Peacock and Mr. Justice Norman, it was decreed—

(*a.*) That the decree of the Lower Court be reversed.

(*b.*) That the plaint in this suit does disclose a cause of action.

(*c.*) That Prosonocoomar Tagore, the testator in the pleadings, did die intestate as to certain portions of his property.

(*d.*) That part of the immoveable property of the said testator was ancestral estate, and that he had a right to dispose thereof by will.

(*e.*) That the plaintiff is not entitled to any maintenance.

(*f.*) That the devises and gifts to Jotendromohun Tagore for life are valid, and that (subject to debts, legacies, and annuities), he is entitled during his life to the beneficial enjoyment of the real property, and that he is entitled until the legacies and annuities shall fall in and be satisfied, to receive the sum of 2,500 rupees a month out of the net rents of the immoveable property, and also the surplus rents of the said immoveable property, and the unexpended surplus of the interests, dividends, and annual proceeds of the moveable property which shall, from time to time, remain unexpended.

(*g.*) That the said Jotendromohun Tagore is entitled for life to use and enjoy

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the library, jewels, and other personal property directed to go with the real estate.

(*h.*) That it is not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights so far as they relate to the immoveable property or to any portion of the rents thereof, or as to the surplus income of the personalty, so long as the debts, legacies, and annuities are unsatisfied.

(*i.*) That the trust as to the personal estate, after the annuities and legacies given by the will shall have fallen in and been fully satisfied, is void and invalid, and that the beneficial interest in such personal estate is vested in the plaintiff, as the heir and representative of the said testator.

(*k.*) That the executors and trustees are bound to render to the plaintiff an account.

(*l.*) And after disposing of the costs it was ordered and decreed

(*m.*) That the case be remanded to the Lower Court, with a request that it will try the sixth* issue, and return its finding thereon, with the evidence, to the Appellate Court.

Thereupon appeals were preferred to Her Majesty in Council by the plaintiff, by Jotendromohun Tagore, and by Sourendromohun Tagore, respectively, which have been consolidated, and the case was argued before this Board, when their Lordships adjourned the hearing in order to allow the defendant, Suteendurmohun Tagore, who was not represented on the argument, the opportunity of being heard. Of that opportunity he has not availed himself, and the case is ripe for judgment.

The questions presented by this case must be dealt with and decided according to the Hindoo law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in England are wholly inapplicable to the Hindoo system, in which property, whether moveable or immoveable, is in general subject to the same rule of gift or will and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty,—a distinction not known in Hindoo law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property (Tyler *v.* Walford, 5 Moore, P. C., 304). In the Hindoo law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.

Whilst, however, rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy. (Domat, 2413).

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in Soorjomonee Dossee *v.* Denobundoo Mullick* (6 Moore, I. A., 555):—"A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is, that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that

* Intended for the seventh.

* 4 W. R., P. C., 114; Suth. P. C. Cases, 291.

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it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo law (as under the present state of law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass.

If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize.

If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and and so forth, for ever to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favor of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that state of inheritance which it confers is void.

It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance are void as such, and that by Hindoo law no person can succeed thereunder as heir to the estates described in the terms which in English law would designate estates-tail.

It remains, however, to be considered whether the persons described as heirs-in-tail or heirs of inheritance not recognized by law are sufficiently designated to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power and subject to the restrictions sought to be imposed by the will upon the successive heirs-in-tail, or whether the language of the will is such as to show that the first taker was to have an estate of inheritance according to law, and that the words of special inheritance may be said to include such estate at least, and the residue be rejected as an attempt to impose fetters inconsistent with the law.

This makes it necessary to consider the Hindoo Law of Gifts during life and Wills, and the extent of the testator's power, whether in respect of the property he deals with or the person upon whom he confers it. The Law of Gifts during life is of the simplest character. As to ancestral estate it is said to be improper that it should be aliened by the holder, without the concurrence of those who are interested in the succession, but by the law as prevailing in Bengal at least,* the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Daya Bhaga, chapter i, v. 21, by the phrase "relinquishment in favor of the donee who is a sentient person."

By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence.

As to the case of adopted children (so much relied upon during the argument), it is distinguishable because of the peculiar law applicable to that relation. The Hindoo law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In

* As to Madras, see to the same effect Valinayagam Pillai *v.* Paehche, 1 Madras High Court Rep., 326; 1 Norton L. C., 334, S. C.

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contemplation of law, such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both here and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos.* The same may be said of the Roman law, as pointed out by Mr. E. C. Clark in his interesting treatise upon "Early Roman Law," 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos.* Such a disposition of property, to take effect upon the death of the donor, though revocable in his lifetime, is until revocation a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if he had given the property to them in his lifetime. There is no law expressly and in terms applicable to persons who can so take. The law of will has, however, grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord Wenleysdale in the opinion delivered by him as a Judge in the House of Lords, in the case of Mirehouse *v.* Rennell, (1 Clark and Finnelly, 546), in accordance with principles generally recognized.* "This case," said Lord Wensleydale, "is in some sense new, as many others are which continually occur, but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves according to our judgment of what is right and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science." The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

The judgment delivered by the Lord Justice Knight Bruce, in the case of Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick† (9 Moore, I. A., 135), was much relied upon to show that the English law as to executory devises ought to be applied in dealing with Hindoo succession, and Mr. Justice Phear, upon the authority of that case, held that "there is nothing in Hindoo law to prevent a testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council) if at all, immediately on the close of a life in being." The expression in the judgment of the Lord Justice thus relied upon, was as follows:—"We are to say whether there is anything against public convenience, anything generally mischievous,

* See this well stated in the introductory disposition of the Civil Code of Italy, Article 3, "Qualora una controversia non si possa decidere con una precisa disposizione di legge, si avrà riguardo alle disposizioni che regolano casi simili o materie analoghe; ove il caso rimanga tuttavia dubbio, si deciderà secondo i principii generali di diritto."

† 4 W. R., P. C., 114; Suth. P. C. Cases, 291.

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or anything against the general principles of Hindoo law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, and that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist." A consideration of the subject-matter to which these remarks were applied, will, however, at once show that they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person not in existence, but whether a person in existence and capable of taking under the will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that, if either of such sons died without having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of Bhoobun Moyee Dabia *v.* Ram Kisshore Acharj Chowdhry* (10 Moore, I. A., 279), in which the testamentary power of disposition by Hindoos in Bengal was fully recognized, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindoos in India. It is obvious, therefore, that the conclusion arrived at in the Lower Court as to the result of the judgment in the former case was erroneous.

Their Lordships, for the reasons already stated, are of opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator.

Their Lordships, adopting and acting upon the clear general principle of Hindoo law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindoo law or usage.

These general preliminaries being laid down, it will be proper next to examine in detail the various questions raised upon the discussion of the particular will, in their natural order, first disposing of those which would apply equally to a gift as to a will, and next, to those which affect the will in question.

It was argued on behalf of the plaintiff, in the first place, that the will is void by reason of its being founded upon the creation of an estate in trustees, absorbing the whole interest in the property, and out of which the interests of the beneficiaries are to be fed. It was maintained that an estate, to be held in trust, can have no existence by the Hindoo law, and that, as the foundation of the will fails, the whole superstructure must fall. This is hardly consistent with the admission in the plaint, and upon the argument, that the legacies and annuities to be paid by the trustees, and which are equally founded upon the trust, are unassailable. The plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. This argument for the plaintiff also gives the go-by to the consideration that if the trusts be void, they are not illegal, and that if they are struck out as void, the estates capable of being created by the bill, and which the trusts were introduced to secure and maintain, would thereby become impressed directly upon the estate, subject to the charges for legacies and annuities which on all hands are admitted to be valid, as, for instance, upon a gift by a will to receive and pay A an annuity, and subject thereto in trust for B; if the trust be void, it should simply be struck out, and B would have the property, subject to the annuity.

Their Lordships are unable to give any effect to this argument against the admissibility of a trust. The anomalous law which has grown up in England of a legal estate which is paramount in one set of courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindoo law. But it is obvious that property, whether moveable or immoveable, must for many purposes be vested, more or less absolutely, in

* 3 W. R., P. C., 15; Suth. P. C. Cases, 574.

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some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases.

Implied trusts were recognised and established here in the case of a benamee purchase in Goopeekist Gossain *v* Gungapersaud Gossain* (6 Moore, I. A., 53); and in cases of a provision for charity or for other beneficent objects, such as the professorship provided for by the will under consideration, where no estate is conferred upon the beneficiaries and their interest is in the proceeds of the property (to which no objection has been raised) the creation of a trust is practically necessary.

If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships, the contention that under the guise of an unnecessary trust of inheritance the testator could not indirectly create beneficiary estates of a character unauthorised by law, and which could not directly be given without the intervention of the trust, their Lordships adopt that argument upon the ground that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that after the determination of those interests the beneficial interest in the residue of the property remains in the person who, but for the will, would lawfully be entitled thereto. Subject to this qualification, their Lordships are of opinion that the objection fails.

As for the argument that the trust failed because one of the trustees had renounced, or more correctly speaking had not acted, their Lordships think this criticism unfounded in law, and wholly inapplicable to the will in question, which distinctly provides for the case of a trustee not acting, and gives a directory power to fill up the number of trustees when required.

Having disposed of the question whether there can be a trust estate, and shown that the distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one for the convenience and benefit of another, the next subject for consideration involves the objections raised on behalf of the plaintiff to every beneficiary interest or estate created by the will, except the legacies and annuities. A summary of the provisions and limitations in the will, so far as they affect the parties to this suit, and limited for the present to the real estate and personalty settled therewith, is as follows:—

2,500 rupees per month to the "*person or persons* for the time being entitled," under the will, "to the beneficial enjoyment of the said real property;"

The residue to go in aid of the income of the personal estate, which is to be first applied in payment of legacies and annuities which are to be paid "gradually and as may be found possible;"

And so soon as the legacies and annuities shall have fallen in or been satisfied, then the trustees or trustee are to convey to the person entitled to the beneficial interest, subject to the subsequent limitations "so far as the terms and condition of circumstances will permit, and so far, but so far only, as such limitations" do not infringe any law then in force against perpetuities, "if any such law there shall be;"

The limitation referred to was as follows in the present tense, and therefore to operate at the moment the will took effect, though "subject always to the devise to" the trustees.

1. To the defendant, Jotendromohun Tagore, for life;

2. To his eldest son born during the testator's lifetime for life;

3. In strict settlement upon the first and other sons of such eldest son successively in tail male;

4. Similar limitations for life and in tail male upon the other sons of Jotendromohun Tagore, born in the testator's lifetime, and their sons successively;

5. Limitations in tail male upon the sons of Jotendromohun Tagore, born after the testator's death;

6. "After the failure or determination of the uses and estates hereinbefore limited" to (the defendant) Sourendromohun Tagore for life;

7. Like limitations for the sons of Sourendromohun Tagore and their sons as for the sons of Jotendromohun Tagore. Under these limitations the defendant, Promodecoomar Tagore, who was alive at the death of the testator, is (if the will be valid) entitled for life, subject to the life estates of Jotendromohun Tagore and of his father;

8. Like limitations in favor of the sons of Lullitmohun Tagore, who was deceased at the date of the will, and their sons in tail male, as for the sons of Jotendromohun Tagore. Under these limitations (if the will

* 4. W. R., P. C., 46.

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be valid), the defendant, Suteendurmohun Tagore, as the son of a son (his father having died during the testator's lifetime) would take an estate in tail male. He is the only defendant in that situation.

The will expressly and exclusively adopts primogeniture in the male line through males, preferring the eldest son, and excluding women and their descendants, and all right of provision or maintenance of either man or woman.

Then follows a statement showing that the testator desired to dispose of his estate "as fully and completely as a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him," but "not subject to any law or custom of England whereby an entail may be barred."

This clause shows an intention that each tenant though of inheritance should be prohibited from alienation, a restriction which in England could only be imposed by Act of Parliament, as in the case of the settled Arbergavenny estates, and some others settled upon families ennobled and endowed for public services.

Then follow the residence clauses, by which the estate was to go over in case of non-residence or allowing any part of the property to be sold for Government arrears, with powers to improve and to lease for twenty years.

A glance at this summary of the provisions of the will, with a due regard to the principles already laid down, shows that upon the face of it the will contains a variety of limitations which are void in law, as, for instance, the limitations in favor of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male which is a novel mode of inheritance inconsistent with the Hindoo law.

The first life-interest in Jotendromohun Tagore next requires attention. It was objected to on two grounds. First, because it was said that Hindoo law recognizes only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life-estate, reversion, remainder, and so forth. Secondly, it was said that the life-interest was void, because of the contingency and uncertainty of the period at which it was to commence, because of the preference given to the legacies and annuities, and to their being payable first out of the interest of the personalty, and then out of the rents of the realty, except the allowance of 2,500 rupees per month, so that it is said this life estate may never come into existence, because the legacies and annuities and interest on arrears may never be completely satisfied.

As for the first objection, it amounts to this: that because there is, as was contended, only one estate technically known to Hindoo law, and that an entirety, there can be no contract by which an owner of land may bind himself to allow to another the enjoyment of the usufruct of the land, to the exclusion of the owner, for a given time, whether for years or for life (because in the law we are dealing with the distinction of chattel and freehold has no existence), and to give exclusive right of possession for the enjoyment of that usufruct. It was admitted for the plaintiff that annuities given and charged upon land are valid; but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would. In the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that is no objection to a similar interest being given by will.

As to the second objection to the life-interest, namely, the uncertainty of the period at which it was to commence, that objection also exhausts itself upon the enjoyment of the usufruct more or less. The life-interest, was to begin at once. It was subject to the devise to trustees who were to receive the rents, allow the life-holder 2,500 rupees per month out of the net proceeds, apply the remainder in aid of the interest of the personalty, to pay off the legacies and annuities, and, when they were discharged, to allow the life-holder, if he survived so long, or, if not, the succeeding donees in succession to enjoy the whole. If the trust is not to be read to make estates valid which otherwise would be void, so neither is it to be read to defeat interests which without the trust would be valid. Their Lordships read this will alike according to its words and substance, as giving a life-interest, subject to a charge for payment of legacies and annuities, whereby the rents

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over and above 2,500 rupees per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid. The law of perpetuity has no application to such a state of things. There is not a single estate or interest in question which would not be valid within the English law of perpetuity, assuming that upon the ground of public policy such law ought to extend to India, which the character of the law of gifts there seems to render unnecessary.

Whether Jotendromohun Tagore took not merely an interest for life, but by construction of law an estate of inheritance, or whether such an estate of inheritance can be implied in favor of any of his successors, must next be considered. Upon this point it is unnecessary to repeat what has been already said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, different from that prescribed by the law of the land. It is clear that an estate in tail male, such as that which the testator has attempted to create in each series of limitations, is not authorized by Hindoo law. It could not exist with the terms of non-alienation attempted to be annexed to it, even in England. These would be rejected here as repugnant to a valid estate in tail male, created by sufficient words. The general intention to create a known estate of inheritance would be given effect to. The particular intention to deprive it of its legal incidents would be disregarded as an attempt to legislate. Accordingly it has been argued in support of the will, that as it shows an intention to give an estate of inheritance of some sort, all the machinery by which that estate was to be governed and dealt with after it was created, ought to be rejected, and such an estate of inheritance as the law would uphold and sanction ought to be read out of the will, and conferred either upon Jotendromohon Tagore, whose family was intended, so long as it produced males descended of males, to represent the estate described by the testator, by treating his life-estate as converted or expanded into an estate of inheritance, according to Hindoo law, or, at least upon his son to be begotten or adopted, as the first tenant in tail male, whereby the persons designated as heirs could take, though not in the fashion of the testator, at least somehow, and to some extent. In order, however, to arrive at this conclusion, we must find a general and prevailing intention of the testator, expressed by the words of his will, which will be advanced by this process; and we are not at liberty to invent for him a will which will have the effect of creating an estate at variance not merely in details, but in substance and effect, with what he has said.

The proposed construction would contradict the will in every particular expressed therein. It would give the father a right of inheritance and a power of disposition when the will says that he shall only hold for life. (Testing this alone by English precedents, it might, in order to give effect to a general intent, be sustained by Nichols *v.* Nichols, 2 W. Bl., 1159.) The proposed construction would give the succession from him to all his sons equally, where the will says that the eldest shall be preferred and have a separate estate of inheritance, and that until that estate fails, the second and so forth shall not succeed. (Testing this alone by English precedents, it might plausibly be maintained by Pitt *v.* Jackson, 2 Brown, C. C., 51.) The proposed construction would give succession to women, whom the will excludes. It would let in rights of maintenance, which the will negatives. It would let in the power of alienation, which the will forbids. It would defeat the limitation in case of non-residence. It would disregard the provisions as to leasing and improvement, which show, in common with the rest of the will, that the intention of the testator was to give and to give only such an inheritance as would keep together the property inalienable so long as a male descended in a male line from any of the indicated sources of inheritance should be in existence, and should keep up state in the family mansion. There is no trace to be found in the will of an intention to create any other sort of estate; and the will, as clearly as language can speak without express words, declares that it was not the intention of the testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the testator had used language to describe, however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this will would be something worse than guess work as to what the testator might have said if he could be asked his meaning; for it would be to contradict in every article what he has intelligibly expressed.

These observations dispose of the case of

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Humberston *v.* Humberston (1 P. Wms., 1), so much relied upon by Sir Roundell Palmer in his able argument to sustain this claim to a general estate of inheritance by construction, and also of the other authorities which show that, in order to give effect to the general intention of the testator, estates of inheritance will be inferred against the particular expression, in order to benefit as nearly as may be in a lawful way all whom the testator intended to benefit. To infer a general estate of inheritance in this case would at the same time defeat the testator's general intention, and benefit persons other than those he intended to benefit, against established principles of construction, and (again to refer for illustration to English law) against the authority of Monypenny *v.* Dering (2 DeGex, Macnaghten, and Gordon, 145). Their Lordships are of opinion that no estate of inheritance other than the void estate in tail male can be read or deduced from the will.

There is, however, another point of view in which the estates in tail male may be regarded, namely, as intended, at all events, to confer an estate for life upon the first taker in existence when the will took effect. The intention of the testator to give at least a life estate to the first taker is clear, and if an estate in tail male stood first in the will, effect might perhaps be given to that intention. There was, however, no person in existence to take an estate in tail male at the testator's death except Suteendurmohun Tagore, and the validity of his claim to a life-interest in succession stands upon the same ground as that of Sourendromohun Tagore and his son, whose position must next be discussed.

Upon this the question arises whether Sourendromohun Tagore, Promodecoomar Tagore, and Suteendurmohun Tagore take life-interests successively after that of Jotendromohun Tagore, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates with which they were linked, and upon the failure or determination of which they were to arise. This may be considered in reference to Sourendromohun Tagore, as these other claimants in this respect stand upon a like footing. It may be urged that, as there was at the death of the testator no person to take under the first series of limitations except Jotendromohun Tagore, and no person who came into existence afterwards could in point of law so take, there was in law a "failure" of the estates at the death of the testator, which no subsequent event could affect, and that the interest for life after the death of Jotendromohun Tagore then became vested in Sourendromohun Tagore. The answer is that this argument proceeds upon the assumption that "failure or determination" means failure or determination in law, as if the testator contemplated that his will might be void in law, which, as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground upon the face of the will for supposing that he suspected. The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred.

If Jotendromohun Tagore should beget or adopt a son, and die leaving the son and Sourendromohun Tagore both surviving, either Sourendromohun Tagore (and after him his son) must take at once and enjoy, to the exclusion of the son of Jotendromohun Tagore, in spite of the will; or the heir-at-law (who though in terms excluded from benefit "under the will," cannot be excluded from his general right of inheritance, without a valid devise to some other person) must enter and enjoy during the life of Jotendro's son, and of his issue male, actual or adopted, and Sourendromohun Tagore (or his son), if he succeeded, must succeed, not as a link in the special chain of succession framed to keep together the family estate, but in turn with the heir-at-law whose intervention was not contemplated by the testator.

If Jotendromohun Tagore were to die leaving power to adopt a son who was afterwards, in fact, adopted, Sourendromohun Tagore would either enjoy absolutely to the exclusion of the son in spite of the will, or the heir-at-law would enter as before stated.

Many other cases might be supposed in which the rights of Sourendromohun and those who claim after him, instead of forming part of a series of estates in successive devisees to fulfil the testator's intention by keeping up the estate and handing it on from one to another whilst there was a male representative of the selected line of limitation and descent, would become a fitful and uncertain enjoyment in turns with the heir-at-law, according to whether there was or

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was not any person in existence who would, if by law he could, have been a prior taker under the will.

Their Lordships reject the conclusion either that the testator meant to give an uncertain interest of so strange and shifting a character, or that there was an intention to give an absolute estate to precede the prior estates, in the event not appearing to have been contemplated by the testator of the prior estates being void in law. Their Lordships understand "failure or determination" to mean "failure or determination" in fact of an estate or estates which the testator considered sufficient in law, and that these limitations over were in the scheme of this will intended to follow the creation of the prior estates of inheritance and must fall therewith.

Their Lordships are thus of opinion that a life-interest has been created in Jotendromohun Tagore, and that the estates of inheritance and subsequent estates or interests attempted to be created by the will have failed.

The decision of the rights in the real estate involves the personalty settled therewith, which calls for no further remark. There is, however, left the question how far the personalty not settled with the reality, but to be made into a distinct fund by the will after the legacies and annuities had been disposed of, ought to be dealt with;—whether the bequest of the corpus is void, or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High Court (Appellate Jurisdiction). The Chief Justice rejected the words "or persons" as insensible, because only one person could take the beneficial interest in the realty at the same time, and he treated the gift of the fund of money and securities for money as a gift of the corpus to an uncertain person who might be one of those who for failure of the estate in tail male cannot take the realty. Mr. Justice Norman declined to reject the words "or persons," and he suggested amongst others the construction that the person then in possession and his successors should take the entire income and profits without deduction, but he leant to the alternative that it was uncertain whether the testator meant to make an absolute gift or only to give the interest in succession, *reddendo singula singulis*, and upon this ground he concurred in holding the gift to be void. The decree gives Jotendromohun Tagore the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, and excludes him and his successors from any right to the subsequently accruing interest, which is hardly consistent. The intention of the testator, however, appears sufficiently clear to give effect to all the words as follows, viz., that the surplus in the hands of the trustees, and the subsequently accruing interest of the personal fund, is to go in the same line and to the same "person or persons" as were in succession to take a beneficial interest in the realty in the same manner as the rents of the realty. The words "or persons" instead of being rejected as inconsistent with a gift of the corpus, ought rather to be taken as conclusive to show that the intention was to benefit persons taking successively, rendering to each his share of the interest. The word "person" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, because there was only one conveyance to be made for the benefit of all. The words "or persons" in the plural were proper in the clause directing the trustees, not to convey, but to stand "possessed of and interested in the trust moneys and securities, and the interest, dividends, and the annual proceeds thereof in trust" absolutely for the person or persons entitled under the limitations, &c., to the beneficial or absolute enjoyment of the real property. And the use of the plural shows that one person was not to take all, but that several persons were to take, and they could only take in succession under the limitations in the will. The words "absolutely" and "absolute" are used not to indicate that the whole was to go over together, but that it was to be enjoyed free from the charges in respect of legacies and annuities. No person could be entitled to the "absolute" enjoyment of the real property under the will in the largest sense, and "absolute" is classed by the will with "beneficial," so as to have a distinct meaning as applied to each holder, whether for life or in tail male. The result, in their Lordships' opinion, is that after the legacies and annuities fall in and are satisfied, the intention was to establish a trust of a fund, consisting of money and securities,

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the interest of which should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the corpus remaining otherwise undisposed of.

In this respect the decree ought, in the opinion of their Lordships, to be varied, and a declaration made of the right of Jotendromohun Tagore, not only to the surplus interest of the personalty until legacies and annuities fall in and are satisfied, but also to the interest of the personalty after such falling in or satisfaction.

As to the plaintiff's claim to maintenance their Lordships adopt the conclusion arrived at in the High Court. Without entering into the general question as to how far the testamentary power as to ancestral property can supersede the claim to maintenance, it is enough to say that the claim in this case must be sustained, if at all, upon the footing that the marriage gift ought to be rejected. The plaintiff admits a marriage gift of his father of real property, producing at the time Rs. 7,000 per year, which *primâ facie* is an adequate maintenance. He does not state the present income. His averment of its insufficiency is not that it is in fact unreasonable or inadequate, but only that it is insufficient "considering the amount and value of the said Prosonocoomar Tagore's property."

The amount of the property, doubtless, is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position or conduct of the claimant (speaking generally and not of the particular claimant), may reduce the maintenance. If the plaint were considered well founded in this respect, a son not provided for might compel a frugal father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon, and than children living as part of his family must be content with. The only question raised, therefore, is whether the obligation, moral or legal, of the father to provide a reasonable maintenance for his son, is satisfied by a marriage gift of a *primâ facie* adequate income, and their Lordships are of opinion that such a gift is in its character obviously a provision for maintenance which in this case must be regarded as sufficient, and in respect of which the plaintiff has laid no foundation for further inquiry, either in law or fact.

The plaintiff's claim to an account must next be considered. He takes nothing under the will. As heir-at-law he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will, and he is entitled to the protection of the law to keep that inheritance intact until he comes into its enjoyment. He has averred upon information and belief that the trustees "against the directions contained in the will" sold securities for money consisting of Government paper, "out of the corpus of the estate of the said testator and have improperly applied the proceeds thereof." Issue was taken by the trustees upon this averment. In the High Court (Original Ordinary Civil Jurisdiction) Mr. Justice Phear considered this statement of the plaintiff insufficient, because "the trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personalty, and the selling of the Government paper, of which the plaintiff complains may, as far as anything goes which is stated by the plaintiff, have been effected for that purpose." The High Court (Appellate Jurisdiction), however, directed an account, thinking that an averment upon "information and belief" was sufficient as to a fact within the defendants' knowledge, and not within the plaintiff's, and that the statement as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was inconsistent with a due performance of the trust. In this latter view their Lordships concur, and hold that the plaintiff is entitled to the account decreed. Whether any further relief should follow must be decreed by the High Court upon the result of the account when taken.

Upon the question whether or not there ought to be made a declaration, beyond a mere expression of opinion, as to the rights of the parties after the life-interest of Jotendromohun Tagore, their Lordships are of opinion that such a declaration ought to be made. This case is distinguishable from Lady Langdale *v.* Briggs (8 DeGex Macnaghten and Gordon, 391), where it was laid down that, generally speaking, it is not according to the course of the Courts in England to declare future rights, and it falls within the exceptions there contemplated as possible, in the judgment of the Lord Justice Turner, page 428; because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they

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dispose or may dispose of the rights of those parties, ought to be incorporated in the decree.

As to costs, considering that the important questions litigated have arisen from the novelty and difficulty of the will, their Lordships are of opinion that the costs as between attorney and client of all parties in the Lower Court upon appeal to the High Court (Appellate Jurisdiction) and of the appeals to Her Majesty in Council ought to be paid out of the estate, taking first the corpus of the personal or moveable estate, and that future costs ought to be reserved until the taking of the account, and be then disposed of by the High Court.

Their Lordships will therefore humbly recommend to Her Majesty that the decree of the High Court (Appellate Jurisdiction) be in part affirmed and in part varied, and that additional declarations of the rights of the parties should be made as follows, that is to say, that the said decree be affirmed so far as it orders that the decree of the Lower Court in its ordinary civil jurisdiction be reversed, and that the plaint in this suit does show a cause of action, and that the testator died intestate as to certain portions of his property, and that part of the testator's immoveable property was ancestral estate, and that he had a right to dispose thereof by will, and that the plaintiff is not entitled to any maintenance from the estate of the testator, and that the plaintiff is entitled to an account as directed by the decree of the High Court (Appellate Jurisdiction), and that as to the residue of the said decree that the same be varied, and the following order and decree substituted for the same, that is to say, that the defendant Jotendromohun Tagore is beneficially entitled to a life-interest under the said will in the real or immoveable property, and also in the personal or moveable property vested in the trustees therein mentioned, and directed to be conveyed or converted into a fund respectively, subject to the payments therein directed to be made, and to the provisions of the will not hereby declared to be void, and also until the legacies and annuities fall in and are satisfied to receive Rs. 2,500 per month out of the net rents of the real or immoveable property, and also the surplus rents of the same and the unexpended surplus of the interest, dividends, and annual profits of the personal or moveable property which from time to time remain unexpended after the payments by the will directed to be made thereout, and also that subject to the trusts for payment of the legacies and annuities, the said Jotendromohun Tagore is beneficially entitled for his life to use and enjoy the library, carriages, horses, farmyard, furniture, jewels, gold and silver plates, and other articles belonging to the said testator, except the jewels, household furniture, and other articles which, at the time of the testator's death, was or were in the personal use of any member of the testator's family, which by the will are not, or were not to be collected, or got in, or sold by the said trustees and executors, and that the limitations in tail male and subsequent limitations in the said will respectively have failed and are void, and that, upon the failure or determination of the life-interest of the said Jotendromohun Tagore, the plaintiff, subject to the provisions in the said will not hereby declared to be void, is entitled, as heir-at-law of the said testator, to the real and personal property in respect of the receipt and enjoyment of which the said life-interest is declared, and that upon the expiration of the said life-interest and subject to any trust not hereby declared void, the beneficial interest in the said real and personal property is vested in the plaintiff as such heir-at-law; and that the case be remitted to the Lower Court, with a direction that it shall try the seventh issue,* and return its finding thereon, with the evidence to the High Court (Appellate Jurisdiction), and that the costs of the parties respectively in the Lower Court, of the appeal to the High Court (Appellate Jurisdiction) and the costs of the several appeals to Her Majesty in Council, be taxed as between attorney and client, and paid out of the estate, taking first the corpus of the personal or moveable property, and that the future costs, if any, be reserved and disposed of by the High Court (Appellate Jurisdiction) upon the taking of the account by that Court directed.

* In the decree, as printed, erroneously called the sixth issue.

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The 5th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Hindoo Law—Joint Family—Inheritance—Disqualification — Exclusive Possession — Onus Probandi.

Case No. 387 of 1872.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 10th October 1871, *affirming a decision of the Additional Subordinate Judge of that district, dated the 7th July* 1870.

Chunder Monee Debia (Defendant) *Appellant,*

versus

Kristo Chunder Mojoomdar (Plaintiff) *Respondent.*

Baboo Nullit Chunder Sen for Appellant.

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Respondent.

K K died, leaving a widow (A), three sons (R, K, and P), and a daughter (W). R and K died unmarried, and P, who survived them, left a widow (C M). W's son K C sued C M for 5 annas 15 gundas of the joint family estate. One of the pleas raised for the defence was that the sons R and K were disqualified from inheriting, and 1 anna 15 gundas was claimed as the exclusive property of defendant's husband under an alleged gift.

HELD that the presumption of Hindoo law was against the alleged disqualification, and R and K having an admitted right to succeed, it was for the defendant to prove by positive evidence that they did not succeed by reason of the said disqualification.

HELD that as the whole of the disputed share was found in the possession of the joint family even after the death of P, it was for defendant to prove the alleged gift.

Bayley, J.—I THINK this special appeal must be dismissed with costs. The admitted facts are these :—One Kistokinkur had three sons, Rajkissen, Kistonath, and Prannath, and a daughter Wooma Soonduree, whose son is the plaintiff in this case. Kistokinkur left a widow named Anund Moyee. Rajkissen and Kistonath died unmarried, and Prannath survived them both. The widow of Prannath, Chunder Monee, is the defendant in this case.

The plaintiff sued for 5 annas 15 gundas of the property in suit as the daughter's son of Kistokinkur.

Certain pleas were raised as to one of the two sons of Kistokinkur being insane, and the other deaf and dumb, but these pleas are not pressed before us, and it is clear there is no evidence to support them.

It was also said that Chunder Monee was incapable of inheriting having been afflicted with leprosy, but this objection also needs no further remark than this that it has been found as a fact that she had performed expiation for the disease. This objection also is not seriously pressed.

The first Court gave the plaintiff a decree for two-third share of the property.

The Lower Appellate Court has affirmed that judgment.

On the question of possession and limitation, both the Courts held that there was clear and trustworthy evidence that the property was in the joint possession of the family, and that limitation did not therefore apply. They have also held that the special plea set up by the defendant as to Prannath's share being increased by 1 anna 15 gundas by purchase was not made out.

In special appeal, it is urged that the *onus* of proof as to the disqualification of Rajkissen and Kistonath was wrongly put upon the defendant.

On this point, it may be as well to observe that the *onus* of proof was *not* entirely put upon the defendant. The Lower Appellate Court has gone through the whole evidence on the record, witness by witness on both sides, regarded their position with reference to the parties to the suit and their respectability, and come to the conclusion that "the "witnesses for the plaintiff are certainly "more respectable and reliable."

The second plea is of disqualification. It was raised by the defendant and is altogether a special plea, and in a Hindoo family, which has been found to be joint and undivided, the presumption would be against the disqualification until it is rebutted by evidence. Here the evidence signally fails to rebut that presumption.

It is then pleaded that it was for the plaintiff to prove the extent of Kistokinkur's share in the disputed talooks. The plaintiff relies on the judgment in a contribution suit brought by himself and the present defendant as plaintiffs, and in which it was held that the ancestral share of the plaintiffs was 5 annas 15 gundas. The kubooleut also says that the lands were the *poitric* (paternal) lands of Prankissen.

There is then the evidence of the defendant's poorohit, Ramnath Chuckerbutty, who was called by the plaintiff, but who still stood in the relation of poorohit to the defendant. He said that the share of Kistokinkur was 5 annas 15 gundas. Upon these facts the Lower Appellate Court was quite justified in

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coming to a conclusion in favor of the plaintiff.

I would also add that the presumption of Hindoo law starts the plaintiff's case. It is said that Prannath's share of 4 annas was raised to 5 annas 15 gundas by transfers under certain *hebbas*, but there is no evidence produced in favor of the *hebbas*, so that not only has the plaintiff proved his case by the evidence he produced, but the defendant has given no evidence to rebut the case started by the plaintiff.

On the whole I would dismiss this special appeal with costs.

Mitter, J.—I am of the same opinion. The first ground urged in special appeal is manifestly untenable. It is admitted that Rajkissen and Kistonath had a right to succeed Kistokinkur, and it was therefore for the defendant to prove by positive evidence that they did not succeed to their father's estate by reason of the disqualification alleged by her in her written statement.

The second ground also must fail. The plaint in the contribution suit shows that the whole of the 5 annas 15 gundas in dispute was in the possession of the joint family even after the death of Prannath. Under these circumstances, it was clearly for the defendant to show by satisfactory evidence that the 1 anna 15 gundas, out of the 5 annas 15 gundas claimed by her upon the ground of the alleged gift to her husband, did really belong to her husband as his own exclusive property, and not as part and parcel of the joint estate. This she has failed to do according to the judgments of both the Lower Courts, and those Courts were therefore fully justified in awarding to the plaintiff a decree for two-thirds of the entire 5 annas 15 gundas involved in this suit.

The 7th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Rent Suit by Co-sharer—Objection—Special Appeal.

Application for the admission of a Special Appeal from a decision passed by the Judge of Tirhoot, dated the 9th April 1872, *reversing a decision of the Moonsiff of Darbhangah, dated the 13th December* 1871.

Nanoo Roy (Defendant) *Appellant,*

versus

Joomuck Lall Doss (Plaintiff) *Respondent.*

Baboo Lukhee Churn Bose for Appellant.

No one for Respondent.

In a suit for rent, the objection that the plaintiff could not sue without the co-sharers joining him, which did not go to the merits of the case, was not allowed to be taken for the first time in special appeal.

Couch, C. J.—WITH regard to the first objection, no such question appears to have been raised in the defence in the first Court. If the defendant had objected that the plaintiff was only entitled to a share and could not sue without the co-sharers joining, it is possible that the plaintiff might have shown a state of things which entitled him to sue without joining the co-sharers. The case has gone through both Courts, and now that objection is taken. It cannot be allowed to be taken now, because from its not having been taken at the proper time this Court has not before it the materials upon which it can determine whether it is a valid objection. We cannot in special appeal say that there has been any error in this. If it had been taken in the first Court it might have been met, or the Court might have allowed the other parties to be added or the suit to be withdrawn with liberty to bring a fresh suit. The defendant is now seeking to set up a different kind of defence from what he did before; and, moreover, according to the finding of the Appellate Court, which is the Court whose judgment upon the facts we are to take as the prevailing decision, it would seem that he is liable to pay a share of the rent to the plaintiff, and the objection that the plaintiff ought to have joined others with him is not one which goes to the merits of the case. It is not shown that the plaintiff ought not to have his rent. The application must be rejected.

The 14th August 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Special Appeal—Incidental Issues—Ghatwalee Tenures—Mokururee Leases.

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Case No. 1341 of 1871.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 11th August 1871, affirming a decision of the Deputy Collector of that district, dated the 31st May 1871.

W. R. Davies (Plaintiff) *Appellant,*

versus

Debee Mahtoon and others (Defendants) *Respondents.*

The Advocate-General and *Baboos Romesh Chunder Mitter* and *Kalee Kishen Sen* for Appellant.

Baboos Bhowanee Churn Dutt and *Luckhee Churn Bose* for Respondents.

In a suit for arrears of rent at enhanced rates, the fact that the Lower Appellate Court did not *record* any opinion upon a kubooleut which was only incidentally in issue, and which the first Court had found to be a fabricated instrument, was held to be not a valid ground of special appeal; there having been no reason to suppose that the Lower Appellate Court had improperly excluded the document from its consideration, or that the parties had not argued on it.

Any presumption that there may be against the right of a ghatwal to grant mokururee leases cannot hold good against such leases, when granted in good faith, for the clearance of jungle.

Mitter, J.—THE plaintiff in this case is the ijaradar of a zemindaree in the district of Bhaugulpore, belonging to Rajah Leelanund Singh. The defendant holds certain lands within that zemindaree, and the present suit was brought against him for arrears of rent at enhanced rates on account of those lands.

It is admitted on both sides that the lands in question originally formed part of an *ancient ghatwalee tenure* which the plaintiff says was resumed by his lessor, the Rajah, under a decree of the High Court, bearing date the 22nd July 1865, passed in a suit instituted by the latter against the then ghatwal. The plaintiff further alleges that, on his taking possession of the mehal under the ijarah lease granted to him by the Rajah, the defendant executed a kubooleut in his favor, whereby he, the defendant, bound himself to pay a jumma of 96 rupees and odd annas for a period of one year, and that, on the expiration of the term fixed in that kabooleut, the plaintiff served the defendant with a notice of enhancement under the provisions of Section 13 Act X of 1859 under which Act this suit was brought.

The answer of the defendant is that the lands in question have been held by him and his ancestors for a long series of years at a fixed rental of 36 rupees per annum, under a mowrosee mokururee pottah, dated 28th Jeyt 1211 F. S., granted to his father by one of the former ghatwals for the clearance of jungle; that the kubooleut relied upon by the plaintiff is not a genuine instrument, and that the plaintiff is not entitled to enhance the rent of the holding.

When this case came before us on the last occasion, we sent it back to the Court of first instance for the determination of certain issues specifically laid down in our order of remand of that date.

Both the Lower Courts have now decided that the plaintiff is not entitled to enhance the rent of the defendant's tenure. Hence this special appeal, in which the following points have been raised before us, *viz.* :—

1*stly.*—That the Lower Appellate Court has committed an error in law in the investigation of the case, in that it has not expressed any opinion on the question relating to the genuineness or otherwise of the kubooleut relied upon by the special appellant, although that question was distinctly raised before it by the memorandum of regular appeal.

2*ndly.*—That the Lower Appellate Court is wrong in law in holding that the mokururee pottah propounded by the defendant is a genuine document, there being no legal evidence on the record to warrant that finding; and

3*rdly.*—That the Lower Appellate Court has committed an error in law in holding, upon the mere fact of the plaintiff's lessor having received rent from the defendant for three years at the rate mentioned in the mokururee pottah, that the said instrument has been ratified by the said lessor.

The determination of the first point does not admit of much difficulty. The mere fact that the Lower Appellate Court has not *recorded* any opinion upon the kubooleut is not, in our opinion, a valid ground of special appeal, there being no reason to suppose that the said Court has improperly excluded that document from its consideration, or that the parties did not argue on it. The kubooleut is not the direct foundation of the plaintiff's claim, and its genuineness was therefore only incidentally in issue, that is to say, so far as it bore upon the main question involved in the case, namely, the genuineness and validity of the mokururee pottah produced by the defendant. The first Court found in distinct terms that the kubooleut was a fabricated instrument, and it went to the length of recording in its judgment that the only witness who was produced to

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support it, after the remand, was tutored in its very presence by the plaintiff's agent. It is true that the Judge of the Appellate Court has not made any express reference to this point in his judgment. But taking that judgment as a whole, and bearing in mind the emphatic language in which it confirms the judgment of the first Court, we see no reason whatever to think that the special appellant has been in any way prejudiced by the omission he complains of. The Judge says :—"I see no reason whatever for questioning the validity of the mokururee pottah which I find as a fact is a genuine document." These words leave no doubt in our mind that the question relating to the genuineness of the kubooleut which was involved in the main issue as to the validity or otherwise of the mokururee title set up by the defendant has not been overlooked by the Judge.

The second ground seems to be equally untenable. There was in our opinion ample evidence to warrant the Lower Appellate Court in finding that the mokururee pottah is a genuine document. It purports to bear date so far back as the 11th of Falgoon 1211, and it would therefore be unreasonable to expect it to be proved by the direct testimony of any living witnesses. There is nothing suspicious either in the nature of the transaction or in the actual condition of the document itself. It has been produced from the proper custody, that is to say, from the custody of the person who claims title under it, namely, the defendant; and if further evidence is necessary to prove such an ancient deed, we have got the testimony on oath of the defendant himself, a man of 65 years of age, who swears that it was granted to his father for jungleboore purposes before the dawn of his recollection, and that he himself has been in possession of the lands covered by it at the fixed rate mentioned therein for the last thirty years.

The third objection is one of considerable difficulty; but after giving to it our best and most careful consideration, the conclusion we have arrived at is that it also must fail. The plaintiff puts his right to enhance solely and exclusively upon the theoretical argument, namely, that a ghatwalee tenure being by its very nature a service tenure, a ghatwal must be presumed to have no right to grant any mokururee leases, at least such as can bind the zemindar or his legal representatives after the resumption of the parent tenure itself. But without expressing any final opinion upon this proposition, considered in the general form stated above, we do not think that the presumption holds good against mokururee leases granted in good faith for the clearance of jungle, like the one under our consideration. The ghatwalee sunnud has not been produced, nor has it been suggested that there was any express stipulation between the original grantor and grantee to the effect that the latter should not grant any mokururee leases even for the clearance of jungle. The defendant and his predecessors have been in possession of the lands in question at least since the year 1803, and during this long interval of time neither the plaintiff's lessor nor his predecessors in title ever raised any objection to the validity of the mokururee grant, or to the power of the ghatwal to make it. The Deputy Collector, who tried the case in the first instance, says in his judgment that from time immemorial the ghatwals in that part of the country have largely exercised the power of granting such leases for the clearance of jungle, and that the necessity for granting them arose from the combined influence of the extremely jungly character of the district, a considerable part of which is still covered with primeval forest, and of the unwillingness of persons to undertake the clearance of jungle lands at the risk of their capital, and even of their lives without the prospect of enjoying those lands from generation to generation at fixed rates being secured to them as a compensation for the sacrifices they have to make. It is true that there is no direct evidence on the record of this case to support the above facts, but those facts being matters of public notoriety, the Deputy Collector was fully warranted in adopting the view he did on the authority of his own local experience and knowledge. The creation of these jungleboore leases, therefore, particularly in the ghatwalee parts of the district of Bhaugulpore, arose from a paramount necessity; and as such leases were doubly beneficial to the zemindar, not only because of the clearance of the particular lands covered by them, but also because of the consequent security which such clearance afforded to him in the enjoyment of the other lands appertaining to his zemindaree, the conduct of the predecessors of the plaintiff in not taking any steps either to prohibit or to protest against the granting of such mokururee leases, when taken along with the other facts and circumstances previously referred to, is good and sufficient evidence from which it can be reasonably inferred that, down to the institution of this suit, it was understood

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between all the parties interested in the lands in question that it was within the competency of the ghatwal to grant the lease now before us for the clearance of jungle.

This distinction in favor of leases granted *bonâ fide* for the clearance of jungle is fully supported by the policy adopted on the subject by the Indian Legislature down to the passing of Act XI of 1859. Up to that date, even an auction-purchaser at a sale for arrears of revenue, whose title is one of the highest recognized by our law, could not interfere with the rights of persons holding leases for the clearance of jungle, as may be seen from the various sale laws passed before the promulgation of that Act. Under this state of facts, we do not think that this is a case in which the plaintiff can ask us to set aside the long standing mokururee title of the defendant merely upon the ground that the person who created that title was a ghatwal. It may be that the Judge was wrong in finding that the plaintiff's lessor had ratified the defendant's mokururee title *merely* upon the ground that he had received rent for three years at the rates mentioned in the pottah. But we do not think it necessary in this case to express any final opinion on that point. It is enough for the purposes of this judgment to say that the nature of the lease,—the uninterrupted possession for no less than 69 years held under it,—the condition of the district in which the lands covered by it are situated,—the obscurity still hanging about the precise nature of the ghatwalee tenures of that district, regarding which no legislative enactment has yet been passed,—and lastly, the total absence of any objection or protest on the part of the plaintiff's lessor and his predecessors against the creation of such tenures which appear to be pretty numerous in that part of the country, are in our opinion sufficient to raise a strong presumption in favor of the validity of the mokururee title set up by the defendant; and as that presumption has not been rebutted by anything on the part of the special appellant, beyond the theoretical argument above referred to, we think the Lower Courts were right in dismissing his suit. The mere fact that the Judge's decision is based upon a narrower ground than that which is really warranted by the circumstances of the case, is not in our opinion a valid ground of special appeal when we find that the conclusion arrived at by the Judge is substantially correct.

We do not think it necessary to express any opinion upon the other ground mentioned by the Judge, namely, that the tenure in question is protected by Section 4 Act X of 1859. That ground was abandoned by the defendant in the Court of first instance, nor was it pressed upon us during the hearing of this appeal.

For the above reasons, we dismiss this appeal with costs.

The 26th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Markby, *Judge*.

Construction (of Conveyance)—Right of Way—Obstruction—Injunction.

Appeal from the judgment of the Hon'ble A. G. Macpherson, exercising the ordinary original civil jurisdiction of the High Court.

Mudden Mohun Sen (Defendant) *Appellant*,

versus

Chunder Coomar Mookerjee and others (Plaintiffs) *Respondents*.

Mr. Kennedy and *Mr. Lowe* for the Appellant.

The Advocate-General and *Mr. Branson* for the Respondents.

Where, upon the construction of a conveyance, the plaintiffs were considered to have acquired, not a right in the soil of a passage, but only a right of way over it, HELD that they were only entitled to complain of any acts of the defendant which obstructed them in the enjoyment of that right of way, and to an injunction against future obstructions, and that the use of doors, opened out by the defendant from his house into the passage to clean privies, was a serious obstruction to the use of the plaintiffs' right of way.

THE facts of the case will appear from the following judgment of the Lower Court:—

Macpherson, J.—Without saying that I consider the plaintiff's case to be a very meritorious one, I think that he is entitled to my judgment. The question is whether the plaintiff has a right to prevent the defendant from using certain doors which he has lately made opening on to a lane, the right of property in which—or at any rate the right of exclusive user of which—is claimed by the plaintiff and certain other persons who own property lying off Bulloram Day Street, behind the front row of houses which actually abut on the street. The plaintiff's property (on which his dwelling-house

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stands) was originally part of a larger parcel of land which belonged to one Gooroo Churn Sen, and which ran up to and abutted upon the defendant's premises. Gooroo Churn Sen divided his land into lots and sold it to different purchasers: and he reserved a portion of land, six feet wide, along the western side of the defendant's premises, to be used as a lane by which the plaintiff and the other purchasers of the inner lots should have the means of access to and from Bulloram Day Street. The defendant seems, like the plaintiff, to have a right of way over this lane, he being the purchaser of one of the lots which belonged to Gooroo Churn Sen, and which is marked in the map before me as C; but the defendant's premises which are the subject of this suit do not abut upon this lot C, and are held under a totally distinct title (not through Gooroo Churn Sen at all).

It is to be remarked that the defendant in the conveyance (of the land C) which he got from Gooroo Churn Sen has, so far as I can see, no express right of way or otherwise over this lane reserved to him: for the only lane which is mentioned in the deed is the smaller lane in the immediate vicinity of the lot C and leading into this larger lane, the subject of the present suit. The plaintiff, on the other hand, has this lane expressly reserved to him and the other purchasers. The plaintiff got two deeds of conveyance from Gooroo Churn Sen. The first (of March 17th, 1863) is an English deed, and after describing the lane says:—"Which two passages the said "Gooroo Churn Sen hath granted and al-"lowed and doth hereby grant and allow "as the passage for the said Chunder Coo-"mar Mookerjee, his heirs, representatives, "and assigns, and all others, the purchasers of "the northern portion of the said pieces of "land." The second (of the 27th of July 1863) is a Bengalee bill of sale of a very small parcel of land: and referring to this lane, it continues to the following effect:—"No one shall be able to throw sweepings "and filth on the said road or make it "unclean. If any one does at any time act "thus, you will deal with him according to "law."

Until last year the lane had no doors opening upon it from the defendant's premises, but recently the defendant has made three new doors, which open on to the lane. Two of them are used for the purpose of cleaning two privies which the defendant has on his premises: and the third is a door used by the defendant and his servants as a means of access to the lane. The plaintiff complains of these doors as a nuisance and as an infringement of his rights. He says, and I have no doubt truly, that the having the privies cleaned in this manner is a great annoyance to himself and the other occupants of the *inner* lots who have the right to use the lane: and he declares that the lane at the time when the privies are being cleaned becomes almost impassable. It seems to me that the plaintiff has sufficient title in the soil of the lane to entitle him to insist on the lane being kept in the same state as hitherto: and that he has a right to prevent the defendant from making new doors on to the lane, and to restrain him from using these doors which have been made. The lane is not a public lane, and I do not think that even if he has the same right to use the lane that the plaintiff has, the defendant has thereby acquired any right which enables him to clean his privies by means of these new doors, or to open new doors by which he and his servants may have access to the lane.

I do not consider that the plaintiff is entitled to an injunction restraining the defendant from throwing filth, or from permitting water to flow into the lane. No sufficient case of throwing filth has been made out, and the acts spoken to are but of small importance. Water apparently did flow from the privy on to the lane: but that has now altogether ceased. I think however, the plaintiff has a right to complain of the cleansing of the privies as a substantial nuisance.

An injunction will issue restraining the defendant's servants from using any of the three doors or openings complained of. I do not think that the plaintiff has proved any substantial pecuniary damage, and therefore I shall give him Rs. 25 by way of nominal damages, with the costs of this suit on scale No. 2.

Against this order the defendant appealed for the following reasons:—

First.—For that the learned Judge held that the plaintiffs had property in the soil of the lane in the plaint mentioned, whereas he ought not so to have held.

Second.—For that the learned Judge held that the defendant had not any property in, or right to, the soil of the said lane, whereas he ought not so to have held.

Third.—For that the learned Judge held that the defendant had no right to make openings in the wall of his house abutting on the said lane, whereas he ought not so to have held.

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Fourth.—For that the learned Judge held that the plaintiffs had a right to restrain the use by the defendant of certain openings from his house leading into the said lane, whereas he ought not so to have held.

Fifth.—For that the learned Judge, at the suit of the plaintiffs, granted an injunction to restrain the use by the defendant of the openings in the plaint mentioned in the premises of the defendant into the said lane, whereas he ought not to have granted such injunction in this suit.

Sixth.—For that the learned Judge held at the suit of the plaintiffs that the defendant had no right to have the privies in the plaint mentioned emptied by carrying out the contents thereof through the said lane, whereas he ought not so to have held in this suit.

Seventh.—For that the learned Judge made a decree in favor of the plaintiffs, whereas he ought to have dismissed the suit with costs.

Eighth.—For that the learned Judge held that the defendant had not any right of way in, along, or over the said lane from his house, whereas he ought not so to have held.

Mr. Kennedy.—The question is whether the plaintiffs have such a right or interest in the soil, or such an easement over the lane as to give them a right to say that the defendant shall not use it, or whether the plaintiffs have any right in the soil at all. When your Lordships see the judgment, it will appear quite plain that, except the passing along the lane in a reasonable way, amongst others by persons who were in the defendant's house, there has been in truth no obstruction of which the plaintiffs complain. It is clear that the intention of the parties at the time of sale was that the vendor should set apart this particular lot as a passage for all the purchasers. That being so, what possible reason could the plaintiffs have to come in and object to another person using that right of way in a manner which did not affect them? In Hill *v.* Tupper (2 Hurl. & Colt., 121), where an incorporated Canal Company by deed granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure boats for hire on their canal, it was held that the grant did not create such an estate or interest in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right by putting and using pleasure boats for hire on the canal. There is nothing in the instrument in the present case to suggest a sole and exclusive use in the plaintiff or in the plaintiff and the other persons who were the purchasers of the northern portion of the lane. The object of the instrument was to set apart a passage by which the purchasers might have had access to their purchases; but it would of course have been safer and better and wiser to have that set forth in their titles. [*Couch, C.J.*—Macpherson, J., seems to think that there had been that which would have amounted to an interference with the enjoyment of that right.] Macpherson, J., has expressly stated that the plaintiff has not proved any pecuniary damage, but gives only nominal damages, thereby declaring that there had been no actual interference. [*The Advocate-General.*—What were the damages given for but for the interference?] [*Markby, J.*—In that case of Hill *v.* Tupper, was it found that the grantee had a right to the easement?] Yes. There is in fact nothing to show that one person shall say to another, you have no right to go over certain land with which I have no connection. Pollock, C. B., said, that the law would not allow such a right; and Martin, B., added, that "in order "to support this action, the plaintiff must "establish that such an estate or interest "vested in him that the act of the defendant "*amounted to an eviction.*" That, I think, is the real test. Unless your Lordships come to the conclusion that the language of the deed was such as to vest the actual soil in the plaintiff, so that he could maintain an action of trespass for the infringement of the incorporeal right, the act of the defendant amounted to an eviction. In Hill *v.* Tupper there were negative attempts to prevent the user by other persons than the grantee of the easement. But in this case the instrument is nothing more than an ordinary grant of a right of way. It is a question whether it does not amount to a dedication of the way to the public. The action is not one by the owner of the soil, but by a third person, the grantee of the right of way. I am unable to understand the principle upon which such an action could be supported. I never heard of any action by the owner of an easement against another person for using the same easement where it did not operate as an obstruction to him. I think the Court below has ruled that there has not been such an obstruction, and I do not see how the mere circumstance of the house abutting upon the land could be such an obstruction. The decision of the learned Judge ordering us not to use the doors in question is a decision that cannot be supported. Our going into

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our own premises cannot amount to an obstruction to the plaintiff's due enjoyment of his easement. Mr. Kennedy here referred to the evidence to show, among other things, what construction the plaintiff's vendor put on the deed. [*Couch, C.J.*—He is not the person to construe the deed.] He was a person who could very well tell what he was doing. [*Couch, C.J.*—According to your argument, all the public might use it so long as they did not annoy the plaintiff.] There is no power to stop them in any body but Gooroo Churn Sen. It is quite certain that he might, at any time after the grant to the plaintiff, have made a complete dedication of the lane to the public. He entered into no contract with the plaintiff whereby he was prevented from doing that; and Bateman *v.* Bluck (18 Q. B., 870) shows that a public highway may in law exist over a place which is not a thoroughfare.

Mr. Lowe (on the same side).—The case really stood thus. Your Lordships will find upon the evidence that I have a right to go upon that lane just as much as the plaintiff has, and the fact of my being there is of itself no obstruction. I have a right to go on that lane to my house on the northern portion. Can the plaintiff prevent me from using my right of way in a particular direction? It is in evidence that there were formerly five ancient windows looking down on the lane, and three of them have been made into doors. Having made those doors, we contend we have a right to go into the lane through one of those doors. Has the plaintiff a right to block up those doors under this deed? I submit not. All that he can do is to go upon the lane himself as much as he pleases, but he cannot do anything to prevent the use of that way as a pathway. Beyond that he has no right of action against me or any other person. He cannot treat me as a trespasser. So long as I do not commit a trespass, I have a right to be on the lane. But what he complains of is my going into the lane through my own doors. Had he showed that my use of the lane interfered with his right of way, the case might have been different.

The Advocate-General.—Whether the question is one in which the plaintiff has a right or interest in the soil, or whether he has a right of easement, it is clear that the Judge has given us damages for some obstruction, inconvenience, or annoyance, *viz.*, the emptying of the privies and the carrying out of the filth early in the morning. That part of the judgment, therefore, should at least be allowed to stand. As to the construction of the deeds, the whole question is whether the vendor allowed a passage or a right of way. [*Couch C.J.*—When a man says I allow you a passage, does he not mean to say I allow you a right of way?] That may be so ordinarily. In this case the deed granted only two passages, one for egress and the other for ingress. [*Couch, C.J.*—Having granted the lane, does it not grant the right of way over it? You are putting too strict a construction upon it.] If it was intended to grant a right of way, it would have granted the passage, and then said "together with the right of way over it." That appears to have been the view taken by the parties. I admit that I cannot exclude the defendant from the use of the lane altogether, but only from the use of it in the way that he wants to do. When Gooroo Churn Sen parted with the ownership of the lane, his intention was to vest it in the purchasers of the northern portion. The case in 2 Hurl. and Colt, 121, does not apply at all. That case was decided on the ground that it was intended to create a novel easement; and the way in which Mr. Garth put that case seems to me to have been the correct way. If we have only a right of way, we are entitled at least to the first part of the injunction; but if we have a right or interest in the soil, then I contend that we are entitled to the injunction in both its forms.

Mr. Kennedy (in reply).—As to the question of nuisance, the Judge has clearly come to a conclusion adverse to the plaintiffs' contention. As to the other part of the case, plaintiffs had to show an injury and give evidence of obstruction of their right before they could be entitled to an injunction. But they have done nothing of the kind. In Race *v.* Ward (4 El. & Bl., 702), it is laid down that you may prescribe for water; and there is a foot note at p. 713 regarding an unlimited right of fishery. Applying the same principle to this case, I contend that the use of a foot-path is not divested by others using it.

The Court took time to consider; and its judgment was delivered as follows on the 26th July by—

Couch, C.J.—In this case, which was a suit for damages and an injunction, the plaintiffs set out in the plaint a deed dated the 17th of March 1863 between one Gooroo Churn Sen of the one part and the plaintiffs of the other part, by which the plaintiffs claimed that they had become entitled as owners to the land of a passage which is

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described in the deed, and they also set out a subsequent bill of sale dated the 27th of July 1863, which they appear to have considered supported the construction which they sought to put upon the first deed. They then alleged that the defendant had wrongfully opened out three doorways from his house into the passage and that he wrongfully used those doors, and they also complained of the defendant's placing quantities of sweepings and filth upon the passage, and asked for an injunction as well as damages—an injunction against the defendant's repeating or continuing the placing of filth or sweepings on the passage, or from interfering with the plaintiff's use of the passage, and also that the defendant might be ordered to close up the doors opening from his house into the passage.

The question between the parties really depended upon the construction of the deed of the 17th of March 1863—whether by that deed the plaintiffs acquired a right of way over it. If they have a right to the soil, they can prevent the defendant from making any use whatever of the passage. It might be that the defendant could open doors in his wall running along the side of the passage, provided he did not encroach upon the passage; still the doors would be of no use to him, because he would not be allowed to pass through them into the passage.

On the other hand, if the deed granted only a right of way, the plaintiffs could only complain of the defendant's doing acts which obstructed them in the enjoyment of it, and the injunction which the plaintiffs have claimed to restrain him from having egress or ingress through the doors, and to close them up, could not be granted.

The terms of the deed are these. It purports to "sell, alien, release, and confirm unto the said Chunder Coomar Mookerjee, Gunga Dhur Mookerjee, Gopaul Chunder Mookerjee, and Ramcally Mookerjee, their heirs, representatives, and assigns, all that piece or parcel of land or ground, containing by estimation seven cottahs, be the same a little more or less, situate, lying, and being at Bulloram Day's Street, Chassadhopa-parah, Jorasanko, in the town of Calcutta aforesaid, and butted and bounded in the manner following, that is to say, on the north by the Government drain, on the east by the land of the property of Narain Puttur, on the west by the land belonging to the said Gooroo Churn Sen, and on the south by the land of the said Gooroo Churn Sen, out of which he has allowed a passage six feet broad, running almost straight from west to east, and terminating in another passage leading to Bulloram Day's Street, and which two passages the said Gooroo Churn Sen hath granted and allowed, and doth hereby grant and allow, as the passage for the said Chunder Coomar Mookerjee, Gunga Dhur Mookerjee, Gopaul Chunder Mookerjee, and Ramcally Mookerjee, their heirs, representatives, and assigns, and all other the purchasers of the northern portion of the said piece of land No. 68 (71)." Then come the usual words "together with all buildings, erections, walls, yards, benefit or advantage of ancient and other lights, ways, paths, passages, waters, watercourses, lands covered with water-pipes, drains, rights and privileges of common of every kind, together also with the right of the two passages for ingress and egress hereinbefore mentioned."

We think that the ordinary meaning of such words as these in a conveyance of this description is that the parties intended to give only a right of way, and not to pass the property in the soil. Even if there were not persons besides the plaintiffs who appear to be intended to have the use of the passage as purchasers of the portions of the property, we think that the words would only have given a right of way. It makes it stronger against the plaintiffs' claims to a right in the soil that other persons were evidently intended to have the use of the passage. Nor do the words which follow, "together also with the right of the two passages for ingress and egress hereinbefore mentioned," make any difference. They would only give a right of way, and that is sufficient for the plaintiffs' enjoyment of their property.

Then it was argued that the subsequent deed, the bill of sale, might assist the plaintiffs' case, and show that it was intended that the plaintiffs should have a right to the soil. We think it does not do that. Provision is made for some alteration in the passage in order to allow the purchasers to erect their buildings, and the words relied on are:—"No one shall be able to throw sweepings or filth on the said road or make it unclean; if any one does at any time act thus, you will deal with him according to the laws in force." That could be prevented as well by having a right of way as by having a right to the soil. The plaintiffs would be able, according to the laws in force, to prevent persons from depositing sweepings and filth in the passage. We think, therefore, that the right which the plaintiffs acquired was only a right of way; that they were

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entitled to complain of any acts of the defendant which obstructed them in the enjoyment of that right of way, and were entitled to an injunction against future obstructions. A considerable portion of the plaintiffs' case as to the obstruction has failed, but it did seem that the use of the doors to clean privies was a serious obstruction to the use of the right of way. The plaintiffs have a right to use the passage at all times, and it certainly did appear that there were times when the presence of the men who were engaged in cleaning the privies practically prevented the use of the passage. We think, therefore, that in order to prevent, as far as possible, future disputes between the parties as to the cleaning of the privies, that portion of the decree of the learned Judge should stand.

The decree grants an injunction "to restrain the defendant, his servants, and agents, from using all or any of the three doorways or openings made by the defendant through the western wall of the defendant's dwelling-house, No. 114, Bulloram Day's Street, as a means of clearing and emptying the privies situated in the said house, No. 114, in Bulloram Day's Street as aforesaid, or either of them."

We think that the injunction should go to that extent, and there should be added the words "or in any other manner so as to cause any obstruction to the free use by the plaintiffs of the said passage." The other part of the decree is "or as a means of egress and ingress from and to the said house, No. 114, in Bulloram Day's Street aforesaid, to and from the passage running north from Bulloram Day's Street, along and past the western wall of the said house, No. 114, in Bulloram Day's Street." That part cannot remain. The plaintiffs have not shown a title which could support that, and it must be omitted. The decree will be modified in that respect.

The plaintiffs failed before the learned Judge as to a very material portion of their suit, and they have also failed in this appeal. The appellant has shown good grounds for appealing, and has succeeded in having the decree modified. He will, therefore, have his costs of the appeal on scale No. 2.

The 27th July 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Partnership—Participation in Profits—Principal and Agent.

*On Appeal from the High Court, at Calcutta.**

Mollow, March, and Co.,

versus

The Court of Wards on behalf of the Estate of Rajah Pertab Chunder Singh.

Although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where from such perception alone partnership may, as a presumption, not of law, but of fact, be inferred yet whether that relation does or does not exist must depend on the real intention and contract of the parties.

To constitute a partnership, the parties must have agreed to carry on business and to share profits in some way in common.

The relation of principal and agent ought not to be implied, any more than that of partnership, from the fact of a commission on profits and powers of control being given, when such relation is opposed to the real agreement and intention of the parties.

THE action which gives occasion to this appeal was brought by the plaintiffs (the appellants), merchants of London, against the late Rajah Pertab Chunder Singh, to recover a balance of nearly three lacs of rupees claimed to be due to them from the firm of W. N. Watson and Co. of Calcutta.

The Rajah having died during the pendency of the suit, the defence was continued by the respondents, the Court of Wards, on behalf of his minor heirs.

The plaint alleged that the firm of W. N. Watson and Co. consisted of William Noel Watson, Thomas Ogilvie Watson, and the Rajah, and sought to make the Rajah liable as a partner in it.

It may be assumed, although the exact amount is a question in dispute in the appeal, that a large balance became due from the firm to the plaintiffs during the time when it is contended that the Rajah was in partnership with the two Watsons.

The questions in the appeal depend, in the main, on the construction and effect of a written agreement entered into between the Watsons and the Rajah; but it will be

* From the judgment of L. S. Jackson and Markby, JJ., in Regular Appeals, Nos. 260 and 262 of 1868, dated 18th June 1869.—12 W. R., Civil, 56.

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necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two Watsons commenced business in partnership as merchants at Calcutta in 1862 under the firm of W. N. Watson and Co. Their transactions consisted principally of making consignments of goods to merchants in England, and receiving consignments from them.

In January 1863 they entered into an agreement with the plaintiffs, regulating the terms on which consignments were to be made between them, and under which W. N. Watson and Co. were authorized, within certain limits, to draw on the plaintiffs in London against consignments.

The Watsons had little or no capital. The Rajah supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting bills, for which the Watsons obtained discount, and which the Rajah met at maturity. In the middle of 1863 the total amount of these advances was considerable, and the Rajah desired to have security for his debt and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the Watsons.

Accordingly, an agreement was entered into on the 27th August 1863 between the Rajah of the one part, and "Messrs. W. N. Watson and Co." of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the Rajah to them, the Watsons agreed to carry on their business subject to the control of the Rajah in several important particulars which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title-deeds of certain tea-plantations, and they also agreed that "as further security" all their other property, landed or otherwise, including their stock in trade, should be answerable for the debt due to him.

The 10th and 13th clauses of the agreement were as follows:—

"10*th*.—In consideration of the said advances made, and the liability incurred as aforesaid by the Rajah, and in consideration of any future advances which may be made by him, the firm agrees that he shall receive from them a commission of 20 per cent. on all net profits made by the firm from time to time, commencing from the 1st May 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the liability so incurred by him as aforesaid shall be wholly extinguished."

"13*th*.—The firm shall, in addition to the said commission, pay to the Rajah interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the firm, and shall also pay to the banks all discount and interest now or hereafter payable on the said acceptances."

This agreement is not signed by the Rajah, but he was undoubtedly an assenting party to it.

Subsequently to the agreement, the Rajah made further advances, and the amount due to him ultimately exceeded three lacs of rupees.

In 1864 and 1865 the firm of W. N. Watson and Co. fell into difficulties. An arrangement was then made, under which the Rajah, upon the Watsons executing to him a formal mortgage of the tea-plantations to secure the amount of his advances, released to them, by a deed bearing date the 3rd March 1865, all right to commission and interest under the agreement of August 1863, and all other claims against them.

In point of fact, the Rajah up to this time had never received possession of any of the property or moneys of the firm nor any of the proceeds of the business, and did not in fact receive any commission. A sum of 27,000 rupees on this account was, indeed, on the 30th September 1863, placed to his credit in the books of the firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently "written back" by the Watsons.

Some evidence was given as to the extent of the interference of the Rajah in the control of the business. It seems the Rajah knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the case; for it was conceded that the Rajah availed himself only in a slight degree of the powers of control conferred upon him by the agreement; in fact, that he did not more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the Rajah do not in any way add to or enlarge his liability.

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Before proceeding to the main questions which have been argued in the appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the Rajah on the ground that he was an ostensible partner, and therefore liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the Watsons to the plaintiffs to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the Rajah.

The liability, therefore, of the Rajah for the debts contracted by W. N. Watson and Co. must depend on his real relation to that firm under the agreement.

It was contended, for the appellants, that he was so liable.

1. Because he became by the agreement, at least as regards third persons, a partner with the Watsons; and

2. Because, if not "a true partner" (the phrase used by Mr. Lindley in his argument), the Watsons were the agents of the Rajah in carrying on the business; and the debt to the plaintiffs was contracted within the scope of their agency.

The case has been argued in the Courts of India and at their Lordships' bar, on the basis that the law of England relating to partnerships should govern the decision of it. Their Lordships agree that, in the absence of any law or well-established custom existing in India on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that country to a right decision. But whilst this is so, it should be observed that, in applying them, the usages of trade and habits of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind.

The agreement, on the face of it, is an arrangement between the Rajah, as creditor, and the firm consisting of the two Watsons, as debtors, by which the Rajah obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the Watsons by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the Rajah as a creditor of the firm.

It was contended at the bar that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances.

It appears to their Lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it:—whereas, the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. See this pointedly stated by Mr. Justice Blackburn in Bullen *v.* Sharpe (L. R., 1 C. B., 109.) The rule had been laid down with distinctness by Eyre, C.J., in Waugh *v.* Carver (2 H. Bl., 285) and the reason of the rule the Chief Justice thus states:—"Upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of Grace *v.* Smith, and I think it stands upon fair grounds of reason."

The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the words of Lord Eldon) "to a given quantum of the profits."

This distinction was stated to be "clearly settled," and was acted upon by Lord Eldon in *ex parte* Hamper (17 Ves., 412), and in other cases. It was also affirmed and acted on in Pett *v.* Eyton (3 C. B., 32), where Tindal, C.J., in giving the judgment of the Court, adopts the rule as laid down by Lord Eldon, and says:—"Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales."

The present case appears to fall within this distinction. The Rajah was not entitled to a share of the profits "as such;" he had no

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specific property or interest in them *quâ* profits, for, subject to the powers given to the Rajah by way of security, the Watsons might have appropriated or assigned the whole profits without any breach of the agreement. The Rajah was entitled only to commission, or a payment equal in proportion to one-fifth of their amount.

This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in Cox *v.* Hickman (8 H. L., 268) and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that Waugh *v.* Carver, and others of the former cases, were rightly decided on their own facts; but the judgment in Cox *v.* Hickman had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law, but of fact, be inferred, yet that whether that relation does or does not exist must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man, who is neither a real nor ostensible partner, can be held liable to a creditor of the firm. The reason given in Grace *v.* Smith that, by taking part of the profits, he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner.

Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel.

Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

Numerous definitions by text-writers of what constitutes a partnership are collected at the end of the Introduction to Mr. Lindley's excellent Treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say that, to constitute a partnership, the parties must have agreed to carry on business and to share profits in some way in common.

It was strongly urged that the large powers of control, and the provisions for empowering the Rajah to take possession of the consignments and their proceeds, in addition to the commission on net profits, amounted to an agreement of this kind, and that the Rajah was constituted, in fact, the managing partner.

The contract undoubtedly confers on the Rajah large powers of control. Whilst his advances remained unpaid, the Watsons bound themselves not to make shipments, or order consignments, or sell goods without his consent. No money was to be drawn from the firm without his sanction, and he was to be consulted with regard to the office business of the firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds applied without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt.

On the other hand, the Rajah had no initiative power: he could not direct what shipments should be made, or consignments ordered, or what should be the course of trade. He could not require the Watsons to continue to trade, or even to remain in partnership; his powers, however large,

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were powers of control only. No doubt, he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt.

Their Lordships are of opinion that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the agreement was that of creditor and debtors. The Watsons evidently wished to induce the Rajah to continue his advances, and, for that purpose, were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really founded on the assumption, not of community of benefit, but of opposition of interests.

It may well be that, where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to show that any other was contemplated; but that is not the present case, where another and different contract is shown to have been intended, *viz*, one of loan and security.

Some reliance was placed on the Statute 28 and 29 Vict., c. 86, which enacts that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a partner, or render him responsible as such. It was argued that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence. What may be the effect of the positive enactment contained in the 5th Clause of the Act, so far as regards England, it is not necessary for their Lordships to consider. The Indian Act, XV of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the appellants that if "a true partnership" had not been created under the agreement, the Watsons were constituted by it the agents of the Rajah to carry on the business, and that the debt of the plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency which flows from that relation cannot arise, and the relation of principal and agents must on some other ground be shown to exist. It is clear that this relation was not expressly created, and was not intended to be created by the agreement, and that, if it exists, it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the Rajah. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of partners was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the Watsons and the Rajah, so as to create a partnership; and they think there is no sufficient ground for holding that it was carried on for the Rajah, as principal, in any other character. He was not, in any sense, the owner of the business, and had no power to deal with it as owner. None of the ordinary attributes of principal belonged to him. The Watsons were to carry on the business; he could neither direct them to make contracts, nor to deal with particular customers, nor to trade in the manner which he might desire: his powers were confined to those of control and security, and, subject to those powers, the Watsons remained owners of the business and of the common property of the firm. The agreement in terms, and, as their Lordships think, in substance, is founded on the relation of creditor and debtors, and establishes no other.

Their Lordships' opinion in this case is founded on their belief that the contract is really and in substance what it professes to be, *viz.*, one of loan and security between debtors and their creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

For the above reasons their Lordships think that the Judges of the High Court, in holding that the Rajah was not liable for the debts of the firm of W. N. Watson and Co., took a correct view of the case; and they

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will, therefore, humbly advise Her Majesty to affirm their judgment, and to dismiss this appeal with costs.

The 2nd August 1872.

Present:

The Right Hon'ble Sir James W. Colvile, Lord Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Jurisdiction—Municipal Courts—Ex-king of Delhi—Mortgage.

On Appeal from the High Court in the Punjaub.

Rajah Salig Ram and others,

versus

The Secretary of State for India.

Plaintiffs, appellants, sued defendant, respondent (the Secretary of State), to recover a sum alleged to be due for principal and interest on certain bonds called mortgage bonds, executed by the late king of Delhi. The claim was made on the ground that the defendant, owing to the late mutiny, confiscated all the landed estate of the said king; but that by a circular of the Judicial Commissioner, under the order of the Supreme Government, all mortgages effected by the king on those estates which the defendant had confiscated were to be paid.

HELD, that Municipal Courts have no jurisdiction to enforce engagements between Sovereigns founded upon treaties. The Government, when they deposed the king, and confiscated his property as between them and him, did not affect to do so under any legal right, and their acts can be judged of only by the law of nations.

The estates which had been given to the king had been assigned for the support of his royal dignity and the due maintenance of himself and family in their high position. It was a tenure (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself.

The Circular Order does not amount to a law, and does not fall within the meaning of the 24 and 25 Vict., c. 67.

THE appellants in this case are the heirs and representatives of Rajah Salig Ram, and Rajah Davee Sing, the plaintiffs in the suit. The respondent, the Secretary of State for India in Council, is the defendant. The suit was commenced on the 28th of November 1864, in the Court of the Deputy Commissioner of Delhi, to recover the sum of 68,853 rupees odd, alleged to be due for principal and interest on certain bonds, which in the plaint are called mortgage bonds, executed by the late king of Delhi.

It was correctly stated by Mr. Justice Boulnois, in delivering his judgment in the Chief Court of the Punjaub, that the bonds all acknowledged debts, but that all did not mention the property by which the debts were secured.

The plaint, after stating that the claim is on four mortgage bonds, of which the dates and amounts are specified, proceeds to describe the grounds of the defendant's liability in the following words:—

"The defendant, owing to the late mutiny, confiscated all the landed estate of the late king, *but* by a Circular No. 112 of the Judicial Commissioner of these provinces, under the orders of the Supreme Government, all mortgages effected by the late king on those estates which the defendant has confiscated are to be paid. The plaintiffs having failed in their application to be reimbursed, as will be seen by the proceedings regarding their claim, and referred to law to obtain their remedy, are necessitated to file this suit, and pray that a summons may issue against the defendant, and he be declared to pay the amount claimed with interest at the rate specified in the bonds up to realization of decree with costs."

The plaint, as pointed out by Mr. Forsyth, the learned Counsel for the defendant, is not a suit for ejectment or foreclosure, nor does it pray that the defendant may be declared a trustee for the plaintiffs of the revenues collected from the hypothecated villages. It does not even allege that the defendant, at the time of the commencement of the suit, was in possession of the property. The claim appears in its terms to be founded entirely on a right alleged to have been created by the Circular No. 112 of the Judicial Commissioner. It is to be remarked that the plaintiffs do not claim merely the value of the property mortgaged, for, in the VIIth Article of their written statement, they say "the defendant is liable to the full amount of claim, though it may exceed the value of the property mortgaged, or return the same to them."

It was in consequence contended by the respondent's Counsel, with great force, that the claimant must be held to the claims actually made by him; and that unless he could succeed in showing that the Circular had given him the right alleged, his claim must necessarily be dismissed. Having regard, however, to the written statement of the defendant, to the issues raised, and the mode in which those issues were disposed of in the Courts in India, their Lordships have in this case thought it right to consider the whole matter as it was presented to those Courts and at their Lordships' bar.

It must be taken upon the evidence that the late king was, at the time of the confiscation, indebted to the plaintiffs upon the

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bonds set forth in the plaint, and that either by the terms of the bonds or by his letters to Sir Thomas Theophilus Metcalfe, the Resident at the Court of Delhi, the king had, so far as he lawfully could, assigned and appropriated to the discharge of the bond debts certain amounts which the Resident was requested to pay yearly out of the revenues of certain of the royal Targool villages. It is admitted, in the 1st and 2nd Articles of the defendant's written statement, that the property so alleged to have been mortgaged to the plaintiffs was, together with all rights and interests in and in respect of it, seized and appropriated on behalf of the British Crown.

Several defences were set up in the written statement of the defendant, but for the purpose of this appeal it is not necessary to consider any of them, except the Ist, IInd, Vth, and VIth. The IIIrd, which relied upon Section 20 Act IX of 1859, and the IVth, which set up that the defendant was by Act XXXIV of 1860 indemnified from all liability of every kind in respect of seizure and appropriation of the property alleged to have been mortgaged, were abandoned by the learned Counsel for the defendant upon the argument of this appeal.

The first ground of defence was that the property alleged to have been mortgaged to the plaintiffs was, together with all rights and interest in and in respect of it, seized and appropriated by the defendant on behalf of the British Crown, on political grounds, as an act of State, and that consequently no claim against the defendant, as having thus taken possession of the said property, was cognizable in the Court in which the suit was instituted, or in any other Municipal Court.

The IInd was similar to the Ist, with the addition that the seizure was "during the continuance and in the prosecution of war."

The Vth and VIth were as follows:—

"V. That the Circular No. 112, on which the plaintiffs grounded their right to demand from defendant the debts they sued for, was simply a private order addressed by one officer of Government in his executive capacity to others, directing them, as a matter of mere grace and favor, to relax in certain cases, where they would have operated hardly, the laws under which Government was free from legal liability in respect of debts secured on the Delhi Crown property, and certain other property, which had come into its possession as a consequence of the rebellion and war of 1857, and that the issuing of such an order could be of no effect whatever to bind the Government as defendant in a Municipal Court.

"VI. That the said Circular did not authorize the exercise of this grace and favor in respect of the debts claimed by the plaintiffs, as was clear from the wording of the said Circular, and as was further clear from the Circular V of 1861."

Several issues were raised. Of these the only important ones to be considered are the Ist, IVth, Vth, and VIth.

They are as follow:—

"I. Was the seizure of these properties by Government such an act of State or act of war as is not cognizable by a Municipal Court?

"IV. Has the Circular in question the force of a legislative enactment?

"V. Do the Circulars issued by the Judicial Commissioner of the Punjaub, in his executive capacity, bind the Courts of the Punjaub or not?

"VI. Does Circular 112 apply to the debts claimed by the plaintiff?"

The case was tried by Mr. Coldstream, the Deputy Commissioner of Delhi, who, in a very elaborate and well-considered judgment, found those issues for the defendant, and gave judgment in his favor. A regular appeal was preferred from that judgment to the Commissioner of Delhi, who upheld the decision of the Assistant Commissioner.

A special appeal was then presented to the Chief Court of the Punjaub. That appeal was dismissed upon the ground that the suit was not cognizable in a Municipal Court. The appeal to Her Majesty in Council is expressed to be against the judgment of the Chief Court of the Punjaub and the several judgments of the Commissioner and Deputy Commissioner of Delhi. There is no dispute, however, as to the facts, and the questions now to be considered are whether the seizure or confiscation of the property of the late king was an act in respect of which the Municipal Courts have jurisdiction; whether the Circular Order of the Judicial Commissioner, No. 112, vested a right of action in the plaintiffs which can be enforced against the Government by a Court of Law; and whether the plaintiffs had a right or interest in the property which was not affected by the confiscation of the king's domains. The last was the proposition mainly relied on by the appellant's Counsel before their Lordships.

The Commissioner of Delhi remarked in his judgment "that in the use of the words

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'confiscation' and 'seizure' and 'appropriation,' the Court did not perceive any material distinction or difference, and one of the grounds of appeal to the Chief Court was that the ruling of the Commissioner as to the meanings of those words was erroneous. The appellants say, in the second ground of their appeal, 'the king of Delhi's property was confiscated,' and the appellants do not dispute the right of Government to confiscate it; but the king had only a right to that which remained after satisfying the appellant's claim, and to this alone is the defendant entitled by virtue of confiscation. The appellant's property was not confiscated."

Mr. Kay, in his argument, treated the word 'confiscated' as if it were used in the sense of forfeited for a crime, and he cited cases to show the distinction between 'forfeiture' and 'escheat.'

The former, he urged, did not affect *bonâ fide* incumbrances created by the offender before forfeiture. He admitted that the confiscation was an act of State, but he denied that it affected the rights which the plaintiffs had derived from the king by virtue of the mortgages.

His argument as regards the effect of a forfeiture upon a regular conviction for a crime would have been correct if he could have shown that the confiscation of the king's property was an act in the assertion of a right conferred by the law of forfeiture.

But such was not the case. Neither was the law of forfeiture in force in the case of natives of India convicted of crimes beyond the limits of the Supreme Court, whatever might have been the case within those limits (as to which it is not necessary to express an opinion), nor did the Government affect or purport to act under any such law.

The word 'confiscation,' as used by the Commissioner of Delhi, in his proceeding of the 3rd of October 1857, does not import that the appropriation to the public use was for a crime. He says, the confiscation of all the Crown villages, &c., *having been deemed proper*, &c., it is ordered, &c., that perwannahs be issued to the Tehseeldahs, &c., to confiscate all the villages, &c. In other words, the revenues were to be brought into the public treasury. The word 'confiscation' does not *per se* necessarily import that the appropriation is to be made as a penalty for a crime; and even when used in that sense, it does not necessarily imply that the forfeiture has accrued upon conviction, but may also be properly used as applicable to appropriations by Government as an act of State of the property of a public enemy, or of a subdued or deposed ruler.

The Deputy Commissioner found as a fact that which is well known as a matter of history, that the king was not tried by a regular Court and that his trial by a Court under a special commission did not take place for some months after the attachment had taken place.

Mr. Justice Boulnois in his judgment (p. 80), says :—"After the mutiny in 1857, on the 18th of September in that year, the king of Delhi was captured by the British Government, and made a prisoner of war, having been for some time the nominal head of the insurgents in Delhi. On the 3rd October in that year, the Commissioner of Delhi, on behalf of the Government, attached and took possession of the ex-king's lands. This appropriation accompanied the extinction of the political existence of the representative of the Delhi line of kings. It did not affect to justify itself on any ground of Municipal law; and it seems to have been (considering the person who had owned the property seized) an act of power on the part of the British Government exercised in a matter of State. There is, however, additional evidence to show that the authority of Government in that character, which renders it superior to positive law, was brought to bear in this act, for the seizure of the King's lands was an appropriation of an enemy's property, *flagrante bello*."

It is not necessary to express an opinion as to what is the effect of the seizure of property of a subject by a Government in the exercise of the powers of war in putting down an insurrection, especially in those cases in which the subject has not joined in the insurrection: nor is it necessary to deal with the cases which have been cited from the American reports in regard to acts which took place during the late war in that country. The case of the plaintiffs, who claim under grants from the king, is very different from that of a subject deriving title under an ordinary tenure.

It is necessary to consider under what circumstances the late king of Delhi acquired a title to the property charged with the payment of the bond debts, if, indeed, he can be held to have had any legal title whatever to the same, beyond the mere will of the British Government. As to this point, it appears that, after the Emperor Shah Aulum, the grandfather of the late king, had been rescued from the power of Dowlut Rao Scindia and placed under the protection of

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the British Government, it became a matter of political expediency to determine the nature aud extent of the provision to be assigned for the support of His Majesty and of the royal household.

The subject was fully discussed in the notes of instructions transmitted by Mr. Edmonstone, the Secretary to Government, to Colonel Ochterlony, the Resident at Delhi, in a letter dated the 17th November 1804 (4 Wellesley Despatches, 237), of which notes a copy was also dispatched to His Excellency the Commander-in-Chief. Subsequently, on the 23rd May 1805, the final determination of the Governor-General in Council upon the subject was communicated to the Resident at Delhi, by letter from the Secretary to Government of that date (see same vol., p. 542).

That arrangement was as much an act of State as if it has been carried into effect by formal treaty signed by the British Government.

Municipal Courts have no jurisdiction to enforce engagements between sovereigns founded upon treaties. (East India Company *v.* Syud Ally, 7 Moore's Indian Appeals. c. 555; the Nabob of the Carnatic, 2 Ves., Junr. Repts., p. 56.). The Government, when they deposed and confiscated the property of the late king, as between them and the king, did not affect to do so under any legal right. Their acts can be judged of only by the law of nations: nor is it open to any other person to question the rightfulness of the deposition, or of the consequent confiscation of the king's property.

If, shortly after the arrangement had been made, the British Government had found it necessary, as a matter of political expediency, to alter, without the consent of Shah Aulum, the arrangements introduced into the assigned territory, it is impossible to conceive that a Court of Law would have had jurisdiction to enforce the arrangement in a suit brought by His Majesty, either by granting a specific performance or by awarding damages for the breach of it.

The king of Delhi having joined in hostilities against the British Government, having renounced their protection, and having endeavoured to regain his former absolute rights of sovereignty, the British power over those territories which had been assigned for his support was for a time suspended. Delhi fell before the British arms, the territories were recaptured, the power of the British Government was restored, and the king of Delhi was taken as a prisoner of war. The revenues and territories which in 1804 were by an act of State assigned for the maintenance of Shah Aulum and his household, were in 1857 also by an act of State resumed and confiscated.

The seizure and confiscation were acts of absolute power, and were not acts done under color of any legal right, of which a Municipal Court could take cognizance.

The *status* of Shah Aulum was that of a king. He was treated and recognized by the British Government as a king, and not merely as a jagirdar holding under an ordinary grant from the British Government. He was the grandson of Shah Aulum, and neither he nor any of his ancestors had ever been deposed by his own subjects or by the British Government or by any other power. Shah Aulum was described by Lord Wellesley in his Despatches sometimes as the "unfortunate representative of the house of Timour," sometimes as "the Moghul," and again as "the Emperor." It is unnecessary here to refer more particularly to the extracts from the Despatches which have been pointed out in the exhaustive arguments in the Lower Courts. If further arguments were necessary, with reference to the *status* of the late king and of his grandfather Shah Aulum, the despatch of Lord Wellesley to the Secret Committee of the Court of Directors of the East Indian Company of the 13th July 1804 (4 Wellesley Despatches, page 132) might be referred to.

The *status* of the king of Delhi and that of the Begum Sumroo were very different. The latter was held not to be a Sovereign Princess, but a mere jaidadar under Scindia; and this fact distinguishes the present case from that of Forester and others *v.* The Secretary of State for India,* in which the judgment of the Judicial Committee was pronounced on the 13th of May last. In that case it was also held that the act of Government was not the seizure by arbitrary power of territories, which up to that time had belonged to another sovereign State; but that it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. It was said:—"The possession was taken under color of a legal title, that title being the undoubted right of the sovereign power to resume and retain or assess to the public revenue all lands within its territories upon the determination of the tenure under which they may have

* *Ante*, p. 349.

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been exceptionally held free. If by means of the continuance of the tenure or for other cause a right be claimed in derogation of this title of the Government, that claim, like any arising between the Government and its subjects, would *primâ facie* be cognizable by the Municipal Courts of India."

The seizure of the royal Targool villages for the reasons above given does not fall within the ruling of Forester and others *v.* The Secretary of State for India, but is governed by the principles laid down in the Secretary of State in Council *v.* Kamachee Boye Sahiba* (7 Moore's Indian Appeals, 476, &c.) ; The East India Company *v.* Syud Ally (*id.*, 555,) and in other cases in which the same principle is affirmed. But it is contended that these considerations do not necessarily determine the right of the mortgagees, who are British subjects, to what they claim. It is argued that the British authorities had given Shah Aulum estates in British territory to be dealt with at his free-will and pleasure, so that the charges *bonâ fide* created by him while in possession, *de facto* and *de jure*, as owner, survived his deposition. But their Lordships are clearly of opinion that no such ownership or power of disposition was conferred upon Shah Aulum or his successors. The territories were assigned to him for the support of his royal dignity and the due maintenance of himself and family in their high position. If he had died or abdicated, his successor would have taken the property in the same way, free from all charges. It was a tenure (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself.

Their Lordships are further clearly of opinion that the Circular Order No. 112 does not amount to a law. It was not enacted as a law, nor did it purport to be a law; and it does not fall within the meaning of the 24 and 25 Vict., c. 67.

The Circular was merely a Circular from the Judicial Commissioner, forwarding, for the information and guidance of the Commissioners of the several divisions of the Punjaub, a copy of correspondence between the Government of the Punjaub and the Government of India on the question of the liability of Government for the debts of rebels whose estates had been confiscated for rebellion.

* 4 W. R., P. C., 42; Suth. P. C. Cases, 373.

It is clear from the whole tenor of the correspondence which originated out of certain questions referred by the Judicial Commissioner of the Punjaub for the decision of the Lieutenant-Governor of the Province, that the Government did not intend to lay down any rule of law for the breach of which redress might be obtained in a Court of Law, or to use the words of Lord Kingsdown, in 7 Moore's Indian Appeals, 538, "to submit the conduct of its officers, in the execution of a political measure, to the judgment of a legal tribunal." They intended only to declare the course which a sense of justice and equity would induce them, in their discretion and as an act of favor, to adopt. The correspondence in Circular No. 112 did not apply to the Appellants' case. That was treated of in the Circular of the 12th January 1861, *in continuation* of Circular No. 112. In that Circular of the 12th January 1861, the correspondence on the subject of the appellants' claim was forwarded, and amongst other letters one from the Officiating Secretary to the Government of India, to the Secretary of the Government of the Punjaub, dated 28th December 1860. In that letter, paragraph 6, it is written :—

"6. The general rule is that rent-free estates, secured by grants from Government, are not liable for the debts of deceased grantees. The exception is in the case of such estates which have been confiscated, and this exception is based on the consideration that 'the interests of justice require the protection of creditors from the effects of a political catastrophe which they could not have foreseen.' But creditors who, like Salig Ram and Davee Singh, joined the rebellion voluntarily, accepted such security for their claims as the rebel cause might offer. They not only foresaw, but assisted to produce the catastrophe, and therefore the interests of justice do not require that they should be protected from its effects. *They may have all that they are entitled to by the letter of the law; but the Governor-General would deny them that which can be claimed only as a favor, for it is in the essence of a concession by favor that it should be withheld where favor is not due.*

"7. The Governor-General is of opinion that neither Salig Ram and Davee Singh's claim, nor that of any other creditor of the ex-king, who has been convicted of rebellion, to the liquidation of their debts from the

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revenues of the Crown lands should be admitted."

Even if the prior Circular, on which the appellants rely, could, on any fair principles of legal construction, be held to be a legislative recognition of the rights of the creditors of the deposed sovereign to be paid out of the revenues of the deposing Government (the only way in which it could avail the plaintiffs), the last Circular is an act of like character, of equal validity, and equally binding on the Courts of Law.

Their Lordships think it desirable to make a few observations on the case of Narain Doss *v.* The estate of the late King of Delhi,* in which this Board came to a conclusion in favor of a claimant under the Circulars in question. The title of the cause itself, in which the estate was named as a party, shows how it came to be a matter of judicial cognizance. The plaintiff there was admitted to claim against the estate. But he was put to prove that he was such a creditor as he alleged himself to be,—that he was one of the creditors intended to be protected by the Circulars. That issue having been raised, and having been, by the act of the Government itself, put in a train of judicial investigation by the legal tribunals, had to be determined in the same manner and on the same principles as any other issue legally raised in any ordinary litigation, and the determination was that the plaintiff had established his claims under the Circular, as alleged, and that the objections to it had failed. That case has no application to the present, in which the appellants were peremptorily excluded from the benefit of the Circular.

Their Lordships are of opinion that the judgments from which this appeal was preferred were correct, and they will humbly report to Her Majesty that, in their opinion, those judgments ought to be affirmed, and this appeal dismissed with costs.

The 15th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble A. Ainslie, *Judge.*

Case No. 217 of 1872.

Suit upon Bond—Plea of satisfaction—Error—New Suit.

* 10 W. R., P. C., 55.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 14th September 1871, *affirming a decision of the Subordinate Judge of that district, dated the 22nd May* 1871.

Mohun Senee (Plaintiff) *Appellant,*

versus

Bahadoor Singh and others (Defendants) Respondents.

The Advocate-General for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

The answer to a suit upon a bond was that the amount should be satisfied out of the purchase-money of property sold by defendant to plaintiff, and plaintiff claimed to avoid the sale as being bad. HELD, that the Lower Courts, instead of deciding against plaintiff and leaving him to bring a new suit to try the question whether the sale was a good one or whether plaintiff could avoid it, were bound to try that question in this suit.

Couch, C.J.—WE think that both the Courts have avoided trying what appears to have been the real question between the parties.

The plaintiff sued on a bond, which, it is not disputed, was executed by the defendant; and the answer to the suit was that the bond had been satisfied by an arrangement that the amount of the bond should be taken out of the purchase-money of property sold by the defendant to the plaintiff, and the balance was to be paid to the defendant. The plaintiff's answer to that is, "it is true that there was a sale of the property as you allege, but there was a representation as to the quantity of land sold, which was false, and on that ground, I am entitled and I claim, to avoid the sale, and then there will be no purchase-money out of which my bond can be satisfied."

The real question to be tried was, whether the sale was a good one and was to be carried out, in which case the bond would be satisfied in the way contended for, or whether the circumstances were such that the plaintiff was entitled to avoid the sale, and then there would be no way of satisfying the bond. Both Courts seem to have considered that they ought not to try that question;—they seem to have thought that there was a sale in effect, although it might not be binding and might be avoided; that the bond must be treated as satisfied, and this question must be tried in some other suit, and the plaintiff would have to bring a suit to set aside the sale. The question was to

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be determined, and might well be determined in this suit. The case must be remanded to the first Court to try that question which seems to us, so far as we can see at present, to be the real question in the case between the parties. The decrees must be reversed and the suit remanded for re-trial, both parties being at liberty to give such evidence as they may be advised.

The 15th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Probate of Will—Nephew—Brother—Widow.

Case No. 196 of 1872.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 4th of April 1872.

Chunder Shikur Mullick (Petitioner) *Appellant,*

versus

Sham Chand Mullick (Opposite Party) *Respondent.*

Baboo Mohendronath Seal for Appellant.

No one for Respondent.

In this case the High Court directed probate of a will executed by a Hindoo in favor of a nephew (the son of an elder brother) to be granted to the nephew, instead of to a brother;—the property being of small value, and consisting of several small holdings, and the widow of the deceased being a girl of very immature age, whereas the nephew had been brought up by him and was the object of his special affection.

Kemp, J.—THIS is an application for probate of the will of one Tarachand Mullick. This will was executed on the 26th of Assin 1277, and Tarachand died in Kartick of the same year. The appellant before us who applied for probate is Chunder Shikur Mullick, the nephew of the deceased; he was opposed by Sham Chand, the brother of the deceased, who claims to be the guardian of the widow of the deceased. The Judge has rejected the application of the petitioner for probate, on the ground mainly that it is very improbable that Tarachand should leave his small property to the son of his elder brother, rather than to his widow or the brother with whom he lived in commensality. Nobody has appeared for the respondent in this Court. The ground of appeal taken is that the Lower Court was wrong in holding that the will was not proved, inasmuch as the evidence on the record very clearly shows that it was executed in the petitioner's favor by his uncle, the late Tarachand Mullick. We have read the will and heard the evidence. There is, we think, nothing whatever improbable in this will; on the contrary, it is just the kind of will which we should expect a man in Tarachand's position to make. The party in whose favor the will is made, Chunder Shikur Mullick, was the nephew of the testator. For a long time it was a moot point whether, a nephew existing, the adoption of any other person would be valid under the Hindoo law. This nephew was brought up by Tarachand Mullick, and was the object of his special affection; Tarachand was married to a girl of a very immature age, and this girl was left to the protection and care of the nephew; the property is not a large one, being of the value of some Rs. 400, and consisting of several small holdings. We therefore see nothing whatever improbable in the arrangements made by the deceased. There is evidence to the execution of this will, and it is also clear that some of the brothers of the deceased had separated from, and were not on good terms with, the testator. On the whole, therefore, we think that the Judge was wrong in not granting a probate of the will of Tarachand Mullick to the petitioner.

We therefore decree this appeal with costs, reverse the decision of the Judge, and direct him to grant probate of the will to the petitioner, Chunder Shikur Mullick.

The 16th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1859 *s.* 230—*Bonâ fide Possession—Title—Remand.*

Case No. 1166 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 24th February 1871, *reversing a decision of the Moonsiff of Kytee, dated the* 19*th March* 1870.

Woomesh Chunder Roy (Defendant) *Appellant,*

versus

Beharee Lall Pallit (Plaintiff) *Respondent.*

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Mr. R. E. Twidale and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboo Kallee Prosunno Dutt for Respondent.

Where a case is remanded to be determined with reference to s. 230 Act VIII of 1859, and the remand order apparently only applies to the question of *bonâ fide* possession, proof of *bonâ fide* possession will enable the party making the allegation to claim to have his title investigated.

Glover, J.—THE question we have to decide in this special appeal is whether the Subordinate Judge has rightly carried out the order of remand passed by this Court in March 1869. By that order, which is to be found in Vol. XI, Weekly Reporter, page 197, the Subordinate Judge was directed to try whether, under the provisions of Section 230 of the Code of Civil Procedure, the property in suit was *bonâ fide* in the possession of Beharee Lall on his own account or on account of some person other than the defendant. The Subordinate Judge has considered himself bound by the terms of that order to go no further than the question of *bonâ fide* possession, and has refused distinctly to go into the question of title. The words of the order which we have just now read, no doubt *primâ facie* appear to apply simply to the question of possession, but there can be no doubt that the meaning of the Division Bench was that the case should be determined with reference to the whole of Section 230; and it has been held by a Full Bench of this Court, in the case of Radha Pearee Dabee Chowdhrain *v.* Nobin Chunder Chowdhry, reported in Vol. XIII, Weekly Reporter, F. B., 80, that the question of *bonâ fide* possession is only one part of the Section, but that proof of *bonâ fide* possession will enable the party making the allegation to claim to have his right investigated. The Chief Justice on this part of the case says, that "the Court is "to proceed to investigate the matter in dispute. Now, what is the matter in dispute? "I think that the matter in dispute is the "right of the decree-holder to dispossess the "applicant of the property under the decree, "and the subsequent words which state the "grounds upon which the applicant may come "to the Court do not restrict the meaning of "these words, but are intended to show the "cases in which the applicant is entitled to "come to the Court. Unless he can show that "he was *bonâ fide* in possession on his own "account, or on account of some other person, "he has no right to apply to the Court; but "if he can do that, and if the Court is satisfied that there was probable cause for his "application, the Court may receive it, and "proceed to investigate the matter." Therefore, the object with which this suit was remanded was that, after seeing whether the objector could prove that he was *bonâ fide* in possession, the Court should determine, between the decree-holder and the party in possession, which of them had a better right to hold the property in dispute. It appears to us that on this part of the case the ruling of the Full Bench entirely disposes of the question.

Then comes the next point as to whether we ought not to remand the case to the Subordinate Judge in order to try the question of title, he having, as before stated, distinctly refused to go into that question on the ground that the remand order forbad him to do so. It appears to us that it would be useless to follow such a course in the present case, inasmuch as the plaintiff claims to derive his title through one Denonath Pallit, who is said to have purchased a certain interest in this property in 1859. Now it so happens that, in a suit which was brought by the present appellant against this Denonath, which suit was decreed in appellant's favor, and which decision was affirmed in appeal by the Judge, Denonath Pallit never appealed; and the result of the order of the Judge, now become final, was that Denonath had no interest whatever in this property. Now the sale to the plaintiff by Denonath dates after the time when he was thus declared to have no interest in the property, and therefore he had nothing to sell. We remark, moreover, that in the plaintiff's own kobala there is a recital to the effect that the vendor Denonath had no title, and that the purchaser would have to fight out his title in Court.

We reverse the order of the Subordinate Judge and restore that of the Moonsiff with costs.

The 17th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 15 *Charter Act—Act XX of* 1863, *ss.* 4 *&* 5.

Khajah Ashruf Hossein, *Petitioner,*

versus

Mussamat Hazara Begum, *Opposite Party.*

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Baboos Mohinee Mohun Roy and *Obinash Chunder Banerjee* for Petitioners.

Mr. C. Gregory and *Baboo Ashootosh Dhur* for Opposite Party.

Where an application by a petitioner under Act XX of 1863 s. 5 to be appointed manager of a religious endowment was rejected by the Judge after hearing both sides, on the ground that there had been no transfer of the property by the Local Government under s. 4:

The Court refused to interfere under s. 15 of the Charter Act, holding that the Judge had not declined to accept jurisdiction in the case, and that he was right in refusing to exercise the jurisdiction vested in him by s. 5.

Kemp, J.—THIS is an application under the provisions of Section 15 of the Charter Act. It was contended that the Judge of East Burdwan had improperly rejected an application made by the petitioner under Section 5 of Act XX of 1863. The application was made by one Ashruf Hossein, the son of Surwar Hossein, deceased, to be appointed manaegr of the endowment connected with the tomb of Khajah Anwar Sahib in the town of Burdwan. Opposition was made by Hazara Begum, the daughter of Ali Hossein, the younger brother of Surwar Hossein. The Judge appears to have entertained the application, and to have heard the pleaders on both sides. He was of opinion substantially that, inasmuch as there was no transfer of the endowed property under the provisions of Section 4 Act XX of 1863, the provisions of Section 5 of the same Act did not apply. He therefore, rejected the application with costs.

We think that, under Section 15 of the Charter, this Court can only interfere where the Judge in the Court below either has acted without jurisdiction, or has declined to accept the jurisdiction vested in him by the law. In this case we do not think that the Judge has declined to accept jurisdiction. He has, as already stated, entertained the application. He has heard the pleaders on both sides, and he has come to the conclusion that the Act does not apply to the property in dispute, and therefore that he cannot appoint the petitioner under Section 5. Under Section 5 the appointment is in the discretion of the Court, and after considering all the circumstances the Judge thought proper not to exercise that discretion.

Further, on referring to the Act, we find that Act XX of 1863 applies to mosques, temples, and other properties endowed for religious purposes or usage. Section 3 of the aforesaid Act enacts that, in the case of every mosque, temple, or other religious establishment, such as the one under consideration, to which the provisions of either of the Regulations specified in Section 1 of the Act, namely, Regulation XIX of 1810, Bengal Code, and another Regulation of the Madras Code apply, the Local Government shall, as soon as possible after the passing of the Act, make special provision as provided for in Section 4; such provision being that, in the case of every mosque, temple, or other religious establishment which, at the time of the passing of the Act, shall be under the management of any trustee, manager, or superintendent, the Local Government shall, as soon as possible after the passing of this Act, transfer to such trustee, manager, or superintendent (provided that the nomination of such trustee, manager, or superindent shall not vest in, nor be exercised by, nor be subject to the confirmation of, the Government or any public officer) all endowed property belonging to such establishment.

In this case, it is not shown by the petitioner that any such transfer was made by the Local Government, and therefore under Section 5 the Judge was perfectly right in refusing to exercise the jurisdiction vested in him by that Section, inasmuch as the property had not been transferred under Section 4 by the Local Government.

The rule must, therefore, be discharged with costs.

The 19th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Knight, Chief Justice,* and the Hon'ble W. Markby, *Judge.*

Jurisdiction (of Court of Recorder, Rangoon) —Suit against Defendant not dwelling within jurisdiction.

Reference to the High Court by the Recorder of Rangoon, dated the 31st July 1872.

Anonymous.

The Court of the Recorder of Rangoon has no jurisdiction in a suit brought against a defendant dwelling in Surat, though the cause of action arose in Rangoon.

Case.—THE question is whether the Court of the Recorder of Rangoon has jurisdiction in cases in which the cause of action has arisen within the local limits of the jurisdiction of the Court, but the defendant does not, at the time of the commencement of the suit, dwell within those limits? A suit in which the cause of action arose in Rangoon

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has been brought in the Court of the Recorder of Rangoon against a defendant dwelling in Surat. Before admitting the plaint, the Recorder, of his own motion, submits the question above stated for the decision of the High Court.

By Section 41 of the Burmah Court's Act, 1872, the Court of the Recorder has jurisdiction "if, in the case of immoveable "property, the subject-matter of the suit is "situate, or if, in all other cases, the defend-"ant, at the time of the commencement of "the suit, dwells or carries on business or "personally works for gain within" the local limits of the jurisdiction of the Court as defined in the Act; but jurisdiction is not expressly given in cases in which, at the time of the commencement of the suit, the defendant is not dwelling or carrying on business or personally working for gain within the local limits of the jurisdiction, though the cause of action may have arisen within such limits. There is considerable difference in the language of the Charters and Acts giving jurisdiction to Courts in India; and I need only refer to the Charter of the High Court at Calcutta, Clause 12; the (Presidency Towns) Small Cause Courts Act (IX of 1850), Section 28; the Mofussil Small Cause Courts Act (XI of 1865), Section 8; the former Recorder's Courts Act (XXI of 1863), Section 10; and the Code of Civil Procedure, Section 5, to show that different jurisdiction has been given to different Courts; and that jurisdiction in cases in which the cause of action arises within the local limits of a Court is sometimes expressly given, and sometimes is not given. These differences are to some extent noticed in the note to Section 5 of Broughton's edition of the Code of Civil Procedure. The point receives more prominence by the enactment in Section 4 of Act XXIII of 1861. On presentation of the plaint above mentioned, it was urged that the Recorder's Court has jurisdiction by virtue of Section 5 of the Code of Civil Procedure; but in what way the jurisdiction expressly given by the Burmah Courts Act, Section 41, is extended by Section 5 of the Code of Civil Procedure, could not be very well explained in the face of the words "subject to such pecuniary or other limitations as are or shall be prescribed by any law for the time being in force," with which the last mentioned Section commences; but perhaps the argument intended was that that Section, read in connection with Section 44 of the Burmah Courts Acts, whereby the Recorder is authorized to exercise the powers of a District Judge, extends the jurisdiction expressly given by Section 41. It may be observed, however, that Section 41 gives in one instance (that of the defendant carrying on business within the local limits) a wider jurisdiction than is given by Section 5 of the Code of Civil Procedure. I am of opinion that no jurisdiction arises by implication from the words of Section 44, and that jurisdiction, when the defendant is not within, or carrying on business within, the local limits prescribed by the Act, is, either by accident or design, *casus omissus*. It appears by the report of the proceedings in the Legislative Council of India that the Burmah Courts Bill received the greatest attention when before the Select Committee to which it was referred; and Section 41 of the Act is entirely different from the corresponding Section in the original Bill. Apart from the express words of that Section, I do not see how any jurisdiction can exist; but, as the point is one which, if my opinion be correct, can only be rectified (if rectification be desirable) by legislative enactment, I deem it expedient to submit the question for the decision of the High Court.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—The Court is of opinion that the suit referred to is not within the jurisdiction of the Recorder.

The 19th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Procedure—Suit for rent—Rule of Proportion.

Case No. 165 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 3rd October 1871, affirming a decision of the Moonsiff of Shazadpore, dated the 17th July 1871.

Kuroona Moyee Debia (Plaintiff) *Appellant,*

versus

Kripanath Doss (Defendant) *Respondent.*

Baboo Tarinee Kant Bhuttacharjee for Appellant.

Baboo Issur Chunder Doss for Respondent.

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In a suit for rent the Lower Appellate Court was directed to proceed upon the evidence adduced in the case and find what was the contract between plaintiff and defendant, what the area and jumma, and to what arrears, if any, plaintiff was entitled, instead of proceeding upon a kind of rule of proportion having reference to a former decision.

Bayley, J.—It is quite clear that the judgment of the Lower Appellate Court in this case is erroneous in law and defective in investigation so as to affect the decision on the merits.

The suit was one for arrears of rent due from the defendant.

The Lower Appellate Court has affirmed the judgment of the first Court which gives the plaintiff a modified decree for 3 rupees 1 anna 12½ gundahs. The Lower Appellate Court does not in any way sift the evidence in the case, or find what the tenure was, or what was its area and jumma, or what was the contract between the plaintiff as landlord and the defendant as tenant, but merely proceeds upon a kind of rule of proportion that because a certain former decision decreed to the plaintiff a certain sum out of 16 annas, therefore the plaintiff in this suit is entitled to a proportionate sum out of 5 annas 6 gundahs 2 cowries 2 krants.

It is obvious that such a decision is clearly wrong. The Lower Appellate Court should proceed upon the evidence adduced in this case, and find what the contract was between the plaintiff and the defendant, what was the area and what the jumma, and to what arrears, if any, the plaintiff is entitled in this suit.

The case is accordingly remanded to the Lower Appellate Court with reference to the above remarks.

The 19th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Endowment—Evidence.

Case No. 413 of 1872.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 21st December 1871, affirming a decision of the Subordinate Judge of that district, dated the 19th August 1869.

Ram Pershad Doss Adhikaree and others (Plaintiffs) *Appellants,*

versus

Sreehuree Doss Adhikaree and others (Defendants) *Respondents.*

Baboos Ashootosh Dhur and *Kumla Kant Sen* for Appellants.

Baboo Bhyrub Chunder Banerjee for Respondents.

The mere fact that a portion of the profits of land in the possession of a party had been for some time used for the worship of an idol is no proof of an endowment, and cannot impose on such party the liabilities attaching to the office of a *shebait.*

Mitter, J.—We see no reason to interfere in this case. The Lower Appellate Court has found as a fact that the plaintiff, special appellant, has failed to prove what portion of the property involved in the present litigation is *debuttur*, and what portion is not *debuttur.*

It has been said that the defendant, special respondent, had admitted in a previous suit that 131 beegahs of land were *debuttur;* but in that very case those lands were decreed to the respondent, not on the ground that they constituted the property of the family idol, but on the ground that they belonged to Kisto Doss, the founder of the idol, and that the respondent was entitled to succeed to Kisto Doss as his heir. It appears clear from the judgments of both the Lower Courts that there was in point of fact no endowment at all. It may be that a portion of the profits of the lands in the possession of the defendant had been for some time used for the worship of the idol; but that circumstance cannot impose on the respondent the liabilities attaching to the office of a *shebait.*

In this view, it appears to us quite clear that the judgment of the Lower Appellate Court must be affirmed, and this special appeal dismissed with costs.

We wish further to remark that the Lower Appellate Court has distinctly found as an additional fact that the charge of misappropriation brought by the plaintiff, special appellant, against the respondent, is altogether unfounded.

The special appeal is, therefore, dismissed with costs.

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The 19th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Non-appearance of Defendant—Ex-parte Judgment—Act VIII of 1859 *ss.* 113, 119.

Case No. 369 of 1872.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 29th July 1871, *affirming a decision of the Subordinate Judge of that district, dated the* 13*th March* 1871.

Syud Mahomed Hossein (Defendant) *Appellant,*

versus

Shaik Muntozul Huq (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellant.

Moonshee Mahomed Yusoof for Respondent.

One of several defendants in a suit did not enter appearance until nearly a month after the date fixed for the first hearing, when he applied, by a vakeel, for leave to be heard in answer, under the last part of s. 111, Code of Civil Procedure. In the absence of good and sufficient cause for previous non-appearance, his application was rejected and an *ex-parte* judgment given against him. After this he applied, at the instance of the Appellate Caurt, for a re-hearing on the ground that the summons had not been duly served upon him. This application was rejected and the order of rejection was upheld in appeal. In special appeal he contended that the case did not fall within Section 119, and that he was entitled to have the regular appeal previously preferred determined upon the record as it stands, notwithstanding his prayer had been rejected under Section 113.

HELD, that the service of the summons, which had been found as a fact by both the Lower Courts, must be taken for granted in the special appeal and the order under s. 113 must be assumed to be correct.

HELD, that the mere fact of the special appellant having appeared by a vakeel in the way mentioned above, could not be taken as an appearance within the meaning of s. 119, and was not sufficient to prevent the Court from passing a judgment *ex-parte* against him.

Mitter, J.—THE special appellant in this case was one of several defendants in a suit instituted in the Court of the Subordinate Judge of Bhaugulpore by the special respondent.

The special appellant did not enter appearance in the suit until after nearly a month from the date fixed for the first hearing. He then appeared in the Court by a vakeel, and applied for leave to be heard in answer to the suit, under the provisions of the last part of Section 111 of the Code of Civil Procedure. The Subordinate Judge, however, not being satisfied that the special appellant had succeeded in showing any good and sufficient cause for his previous non-appearance, rejected his application, and gave judgment *ex-parte* against the special appellant.

Against this decision the special appellant appealed to the Judge; but the Judge rejected the appeal upon the ground that the case was one which fell within the provisions of Section 119 of the Code of Civil Procedure, and that the special appellant's only remedy was to go to the Court of original jurisdiction under that Section and ask for a re-hearing of the case.

The special appellant, accordingly, preferred an application to the Subordinate Judge, asking that officer to grant a re-hearing upon the ground that the summons had not been served upon him, and that the return made by the serving-peon was false and fraudulent.

The Subordinate Judge, however, found upon the evidence that the case put forward by the special appellant, in order to account for his negligence in appearing in the suit, was altogether unfounded, and that the special appellant was therefore not entitled to a re-hearing.

Against this order, the special appellant appealed to the Judge, and the Judge having rejected the appeal for the precise reasons mentioned by the Subordinate Judge, the present special appeal has been preferred to us upon the ground that the case is one which does not fall within the purview of Section 119, and that the special appellant is entitled to have the regular appeal previously preferred by him to the Judge determined upon the record as it stands, notwithstanding that his prayer to appear and to be heard in answer to the suit had been rejected by the Subordinate Judge under Section 111 of the Code.

We are of opinion that this contention is of no force whatever. That the special appellant was duly served with summons to appear in the suit cannot now be disputed. That fact has been concurrently found by both the Lower Courts, and we must therefore take it for granted for the purposes of this special appeal.

It has been argued that, in point of fact, the special appellant did appear in the original suit by the vakeel who was appointed by him to support his application for leave to be heard in answer to the suit. But this contention seems to us to be manifestly erroneous. The mere fact of the special appellant having appeared before the Subordinate Judge in the way mentioned above cannot be taken as an *appearance* within the meaning of Section 119, when his application for leave to be heard in answer to the suit was rejected,

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and the case decided against him *ex parte* under the provisions of the Code. It cannot be contended that, under the facts found by the Lower Courts in this case, the Subordinate Judge was not fully justified in rejecting the special appellant's application for leave to be heard in answer to the suit. Section 111 makes a distinct provision for that purpose, and we must therefore assume that the order passed by the Subordinate Judge rejecting that application was a proper and correct order. If then that order was a proper and correct one, it would follow as a necessary consequence that the special appellant was *not heard* in answer to the suit, and that the judgment pronounced against him by the Subordinate Judge was, therefore, strictly speaking, a judgment passed *ex parte* against a defendant who had not appeared to answer the plaintiff's claim.

Of course, a party may be heard in answer to a suit either by being permitted to put in a written statement, or by being permitted to defend himself in person or by pleader without putting in any written statement at all. But it cannot be reasonably contended that the mere fact of a defendant appearing before the Court in order to ask for leave to be heard in answer to a suit, is sufficient to prevent the Court from passing judgment *ex parte* against that defendant, if the application for leave to be so heard is not made upon proper and reasonable grounds. No authority has been cited to us by the pleader for the special appellant in support of his contention, and taking the facts as found by the Lower Courts we feel little hesitation in saying that this special appeal ought to be rejected.

It is accordingly dismissed with costs.

The 19th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Mahomedan Law—Pre-emption—Incidental Rule.

Case No. 375 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 22nd November 1871, *reversing a decision of the Moonsiff of Monghyr, dated the 9th March* 1871.

Torul Komhar (Plaintiff) *Appellant,*

versus

Mussamut Achhee and another (two of the Defendants) *Respondents.*

Moonshee Mahomed Yusoof for Appellant.

Mr. R. E. Twidale for Respondents.

When a pre-emptor, on being asked to purchase a property, deliberately refuses to exercise his right of pre-emption, and a new purchaser, having satisfied himself after careful inquiry that there is no other impediment, purchases the property, the former cannot be allowed to take away the property from the latter on the incidental rule of Mahomedan law that the pre-emptor's title to purchase is not extinguished until the property has actually passed.

Bayley, J.—We are of opinion that this special appeal must be dismissed with costs.

There is a clear finding of fact by the Lower Appellate Court that the plaintiff had the option of purchasing the property as pre-emptor; and that having that option, he deliberately refused to avail himself of it. It is equally clear that, after he so refused to purchase, the defendant No. 1, after due enquiry as to the vendor's title, and being satisfied that there was no impediment to his title, purchased that property.

It is urged in special appeal that, under the Mahomedan law of pre-emption, although a person having that right may have refused to purchase, yet his title to purchase is not extinguished until the property is actually passed into another person's hand, and a case reported in Volume XI, Weekly Reporter, is cited in support of this contention. That case, however, has not its facts the same as this. There it was doubted whether there was a clear refusal on the part of the pre-emptor, and although it was incidentally laid down that the pre-emptor's title is not extinguished until the property is actually passed into another's hands, yet the principle of equity raised before us in this case was in no way considered or touched upon by the learned Judges in that case. That case in Volume XI, therefore, is neither a precedent in support of the special appellant's contention, nor a conflict with the case reported in page 311 of the Gap Number of the Weekly Reporter. There is, therefore, no necessity for our referring this case to a Full Bench as asked by the special appellant's pleader. On the other hand, the principle of equity is clear that when a pre-emptor, on being asked to purchase a property, deliberately refuses to exercise his right of pre-emption, and after his refusal a new purchaser, after careful enquiry, and having satisfied himself that there is no other impediment to his making the purchase, purchases that property, the pre-emptor should not be allowed to turn round and take away the property from the

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purchaser's hand on the incidental rule of Mahomedan law that his title to purchase is not extinguished until the property is actually passed.

In this view I would dismiss this special appeal with costs.

Mitter, J.—I am entirely of the same opinion. No authority has been cited to us from the Mahomedan law to show that a pre-emptor can enforce his right of pre-emption, even after having positively refused to purchase the property in which he claims that right, but which after his refusal has been purchased by a third party. But whatever may be the rule of Mahomedan law on this point, it appears to me quite clear that we should not allow the plaintiff in this case to commit a fraud upon the defendant by asking the latter to give up to him a property which he has purchased on the strength of the plaintiff's own refusal to exercise his right of pre-emption. The case falls within the ordinary principle of estoppels, and I think that the plaintiff in this case is precluded by his own conduct, which has been acted upon by the defendant, from impugning the title of purchase acquired by the latter.

The 19th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Act X of 1859 s. 54—Right of Suit.

Case No. 455 of 1872.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 10th October 1871, modifying a decision of the Moonsiff of that district, dated the 30th June 1871.

Shetab Chand Laha (Plaintiff) *Appellant,*

versus

Majum Ali Chowdhry (Defendant) *Respondent.*

Baboo Issur Chunder Doss for Appellant.

No one for Respondent.

Where a suit for rent was dismissed for default by a Deputy Collector, who held substantially that neither of the parties had appeared before him either in person or by an agent duly qualified, HELD that, under Act X of 1859 s. 54, the plaintiff was entitled to bring a fresh suit, unless barred by the law of limitation.

Bayley, J.—No one appears for the respondent in this case.

The plaintiff sued for arrears of rent for the years 1274, 1275, and 1276.

The first Court gave the plaintiff a full decree for his claim for all the three years.

On appeal the Lower Appellate Court held that, as regards the years 1274 and 1275, the plaintiff's claim was barred by the provisions of Section 2, inasmuch as a previous suit brought by him was dismissed by the Deputy Collector for default, but that he was entitled to a decree for the year 1276.

The decree of the Deputy Collector was that neither of the parties was before him, and he therefore dismissed the suit. Under this state of the facts, it seems to us that the case comes under the provisions of Section 54 Act X of 1859, under which Act the case was tried. That Section says:—"If, "on the day fixed by the summons or proclamation for the appearance of the defendant, or on any subsequent day to which "the hearing of the case may be adjourned, "prior to the recording of an issue for trial "as hereinafter provided, neither of the "parties appear in person or by an agent, "the case shall be struck off with liberty to "the plaintiff to bring a fresh suit, unless "precluded by the rules for the limitation of "actions."

We may here observe that substantially the Deputy Collector held that neither of the parties to the suit had appeared before him either in person or by an agent *duly qualified* to answer the questions of the Court. It follows, therefore, that under the provisions of Section 54 the plaintiff is entitled to bring a fresh suit, unless barred by the law of limitation.

The judgment of the Lower Appellate Court, therefore, in so far as it dismisses the plaintiff's suit for the years 1274 and 1275 is reversed, and the plaintiff will be entitled to a full decree of his claim.

The 20th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Jurisdiction—Act VIII of 1859 s. 246—Attached Property.

In the matter of
Khellat Chunder Ghose, *Petitioner,*

versus

Gour Churn Mojoomdar, *Opposite Party.*

Baboo Rash Beharee Ghose for Petitioner.

Mr. M. L. Sandel for Opposite Party.

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Where a Subordinate Judge, under Act VIII of 1859 s. 246 declared that a decree-holder was entitled to enforce his mortgage lien against certain attached property, although that property was in the possession of the claimant on his own account, and not on behalf of the judgment-debtor, inasmuch as the claimant professed to derive his title under *ladavee* executed in his favor by the judgment-debtor:

HELD that the Subordinate Judge had proceeded beyond the authority given him by the Section, and that the decree-holder's title to enforce his mortgage lien against the property could only be determined in a regular suit.

Mitter, J.—WE think this rule ought to be made absolute.

The only question which the Subordinate Judge had power to try under the provisions of Section 246 Act VIII of 1859 was whether the property attached was in the possession of the judgment-debtor, or of any other person as trustee for him. So far as that question is concerned, the Subordinate Judge has substantially answered it in favor of the claimant; but he goes on to say that, inasmuch as the claimant professes to derive his title under a *ladavee* executed in his favor by the judgment-debtor, the decree-holder is entitled to enforce his mortgage lien against the attached property, although that property is in the possession of the claimant on his own account, and not on account or on behalf of the judgment-debtor.

This reasoning of the Subordinate Judge is clearly erroneous, and it follows therefore that he had no power to reject the claim put forward by the claimant, after having already found the only issue which he had to determine for the purpose of adjudicating upon that claim in the petitioner's favor.

It has been said that this Court has no power, under the provisions of Section 15 of the Charter Act, to interfere with the judgment of the Subordinate Judge, because the Subordinate Judge had jurisdiction to try whether the attached property ought to be released or not. But the jurisdiction given to the Subordinate Judge by the provisions of Section 246 is of a very limited character; and as it is impossible to deny in this case that the Subordinate Judge has proceeded beyond the authority given to him by that Section, we feel little hesitation in saying that we have full power to reverse the decision of the Subordinate Judge, and to direct the immediate release of the property in question. The decree-holder may be entitled to enforce his mortgage lien against the property, but that is a question which can be determined only in a regular suit.

The rule is made absolute with costs.

The 24th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Act VIII (B. C.) of 1869 *s.* 27—*Act I of* 1868 *s.* 2 *cl.* 2—*Calendar Year.*

Case No. 488 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 8*th December* 1871, *reversing a decision of the Moonsiff of that district, dated the* 15*th August* 1871.

Khusro Mundar and another (Plaintiffs) *Appellants,*

versus

Prem Lall and others (Defendants) *Respondents.*

Baboo Boodh Sen Singh for Appellants.

Moonshee Mahomed Yusoof for Respondents.

In the absence of any provision in the Bengal Council Act VIII of 1869, as to the calendar according to which the "year" mentioned in s. 27 is to be calculated, the interpretation given in cl. 2 s. 2 Act I of 1868 must be followed, and the year calculated according to the British calendar.

Bayley, J.—WE think this case must be remanded to the Lower Appellate Court for trial on the merits.

It is found by the Lower Appellate Court as a fact that the cause of action arose from the 1st Assar, when it is the custom of the people of that part of the country to begin cultivation. Section 27 Act VIII of 1869 (B C.) merely says that the suit is to be instituted within one year of the cause of action. It does not provide according to what calendar that year is to be calculated. On the contrary, Clause 2 Section 2 Act I of 1868 provides that "years" and "months" are to be calculated according to the British calendar, unless the contrary be expressed. Now, although that is an Act expressly referring to Acts passed by the Governor-General in Council, we think that, in the absence of any provision in the Bengal Council Act, the interpretation given in Act I of 1868 must be followed, and following that interpretation the present suit is in time.

The judgment of the Lower Appellate Court is accordingly reversed, and the case remanded for trial on the merits.

The costs of this appeal and of the Lower Appellate Court will abide the ultimate result.

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The 24th August 1872.

Present:

The Hon'ble H V. Bayley and Dwarkanath Mitter, *Judges.*

Mortgage—Assignee—Right of Suit.

Case No. 268 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 29th September 1871, affirming a decision of the Moonsiff of Mudhoopoora, dated the 31st May 1871.

Baboo Dutt Jha (one of the Defendants) *Appellant,*

versus

Pearee Kaunt (Plaintiff) and another (Defendant) *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboos Hem Chunder Banerjee and *Taruck Nath Paleet* for Respondents.

A party with whose money a mortgage has been satisfied may bring a suit for the enforcement of his lien as assignee of such mortgage; but not for obtaining possession of the mortgaged property in the capacity of an absolute owner.

Mitter, J.—In this case we are of opinion that the decision of the Subordinate Judge ought to be reversed.

It is clear that the decree, in execution of which the property in dispute was sold to the plaintiff's vendor, was a mere money decree, and the plaintiff must therefore be treated merely as the purchaser of the right, title and interest of the judgment-debtor, or in other words, of the equity of redemption, which was all that remained to the latter after the first mortgage. It appears, however, that at the time of the auction-purchase of the plaintiff's vendor the right title and interest of the debtor had already passed to the special appellant, partly under a purchase and partly under a mortgage, and it follows therefore that the present suit cannot be maintained in the shape in which it has been brought. It may be that the vendor of the plaintiff, and therefore the plaintiff himself, is entitled to be equitably considered as the assignee of the first mortgagee, inasmuch as it was with their money that that mortgage was satisfied. But in that case, the plaintiff ought to have brought a suit for the enforcement of his lien as such assignee, and not for obtaining possession of the mortgaged property in the capacity of an absolute owner, as he has done in the present instance. The present suit, therefore, must be dismissed with all costs, without, however, any prejudice to the plaintiff's right, either to enforce the lien created by the first mortgage or to redeem that portion of the disputed property which is held by the defendant under the mortgage executed in his favor. Suit dismissed accordingly.

The 24th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Alienation by Guardian—Suit by Minor—Limitation—Notice—Preliminaries.

Case No. 120 of 1872.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 16th August 1871, reversing a decision of the Moonsiff of Kechoogunge, dated the 28th February 1871.

Rajnarain Deb Chowdhry (Plaintiff) *Appellant,*

versus

Kashee Chunder Chowdhry and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Ashootosh Dhur* for Appellant.

Baboo Bykuntnath Doss for Respondents.

Mere silence for a period short of that prescribed by the law of limitation cannot by itself constitute a valid ground for rejecting a person's claim to set aside an alienation improperly made by his guardian, during his minority, without valid necessity.

A person who has arrived at majority is not required by law to give any notice, express or implied, to the person who holds his property under such an alienation, or to perform any preliminary acts before he can bring a suit to set it aside.

Mitter, J.—The main questions which the Lower Courts had to determine in this case were, *firstly*, whether there was any legal necessity to justify the guardian of the plaintiff's vendor in mortgaging the disputed property to the defendant; and, *secondly*, whether the plaintiff's vendor Chunder Nath, after arriving at majority, had, previous to the sale to the plaintiff, ratified the said transaction of mortgage.

With reference to the *first* question, the Lower Appellate Court has found as a fact

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upon evidence that the case of necessity set up by the defendant, special respondent, in his written statement, was not proved to its satisfaction. This finding has been impugned by the special respondent under the provisions of Section 348. But as it is a finding of fact based upon a full consideration of the evidence on the record, and as we do not find any error in law either in the procedure or in the investigation of the case, we cannot interfere with it in special appeal.

Upon the *second* question, the Lower Appellate Court has come to the conclusion that the plaintiff's vendor having failed to take any steps to *repudiate* the defendant's title under the mortgage within *five* years after the date of his arrival at majority, it must be presumed that he has ratified that title.

We are of opinion that, under the admitted circumstances of this case, this conclusion is erroneous in law. We do not mean to say that long silence on the part of a person arrived at majority to impugn the validity of a transaction between his lawful guardian during his minority and a third party, cannot be treated as evidence of ratification, merely because that silence falls short of the period prescribed by the statute of limitation. Nor do we mean to say that a Court of Justice whose duty it is to determine a question of fact cannot, in any case, infer a ratification from the fact of such silence. But after a careful consideration of all the arguments and authorities brought to our notice, the conclusion we have arrived at is that mere silence for a period short of that prescribed by the law of limitation, cannot by itself constitute a valid ground for rejecting a person's claim to set aside an alienation improperly made by his guardian without any valid necessity. Such a course would be tantamount to the establishment of a new rule of limitation not sanctioned by the statute, and it is therefore clear that mere delay in repudiating an alienation, like that above described, can be treated only as evidence of ratification, if such ratification is pleaded, and in no other light.

Let us now proceed to see how the Lower Appellate Court has dealt with the delay imputed in this case to the plaintiff's vendor, that delay being considered merely as a matter of evidence bearing upon the question of ratification. The learned Judge admits in his decision that, as soon as the plaintiff's vendor arrived at majority, he sold his rights in a moiety of the lands mortgaged to the defendant, to the plaintiff, and in the *kobalah* executed for that purpose, he, the plaintiff's vendor, expressly repudiated the title of the defendant and characterized the possession held under that title as wrongful. But the learned Judge goes on to say that the defendant was not a party to this *kobalah;* and as neither the plaintiff nor his vendor gave to the defendant any notice of their intention to repudiate the mortgage transaction in question within five years and upwards from the date of its execution, it must be held that that transaction has been sufficiently ratified by the plaintiff's vendor, and therefore as a matter of law by the plaintiff himself, who cannot claim to stand in a higher position than his vendor.

But this reasoning appears to us to be erroneous. In the first place, it seems to be clear that there is no law which requires a person who has arrived at majority to give any notice, express or implied, to the person who holds his property under an invalid alienation made by his guardian during his minority, nor do we find any law providing that a suit of this description cannot be maintained without the performance of some preliminary acts on the part of the minor, or of those who claim under him.

In the next place, it is clear from the foregoing remarks that the question which the Judge had to try was whether the title relied upon by the defendant had been *ratified* by the plaintiff's vendor, there being no allegation in this case that it had been ratified by the plaintiff himself; and it may be conceded that, in dealing with this question, the Judge had every right to draw any legitimate inference he thought proper from the conduct of the parties,—such as the delay on the part of the plaintiff or of his vendor in taking proceedings against the defendant. But in this case it is admitted that there is no *direct* evidence of any positive act of ratification. There may be cases in which mere silence for an undue length of time may be taken as proof of such an act. But in this case it is clear, upon the learned Judge's own showing, that there was something more than silence, namely, the express repudiation of the defendant's title in the *kobalah* executed in favor of the plaintiff by his vendor immediately after the latter's arrival at majority. That *kobalah* is at any rate evidence of the declared intention of the plaintiff's vendor to institute proceedings against the defendant, at least, of an intention existing on the date of its execution, and there is therefore direct evidence not of ratification but of positive disaffirmance or repudiation. It is not even alleged that there has been

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any ratification by the plaintiff since that date, the acts of his vendor done subsequently to the date of his purchase being of course rejected as not binding against him, the plaintiff.

In the above view, we reverse the decision of the Judge, and restore that of the first Court with all costs to be paid by the defendant, mortgagee.

The 24th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Mokururee Tenures—Alienation by Hindoo Widow—Rights of Reversioners—Rights of Zemindars.

Case No. 484 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 6th December 1871, reversing a decision of the Subordinate Judge of that district, dated the 22nd September 1870.

Ram Dhun Shaha and another (Plaintiffs) *Appellants,*

versus

Rajah Raj Kristo Singh Bahadoor (Defendant) *Respondent.*

Baboo Kishen Dyal Roy for the Appellants.

Baboo Shoshee Bhoosun Sen for the Respondent.

Alienations made by Hindoo widows of shares of an estate held as a hereditary mokururee tenure, can only be contested by reversionary heirs and other persons having some interest in the estate; it is not open to the zemindar or superior landlord to object to such alienations. If the reversionary heirs make no arrangement for the due payment of the mokururee rent, the only right which the zemindar has is to sue them for arrears and then to cause the sale of the tenure, if necessary, in execution of decree, but not to take *khas* possession of it by force.

Mitter, J.—It is quite clear that the judgment of the Lower Appellate Court in this case cannot be supported. The plaintiff has proved, to the satisfaction of both the Lower Courts his own possession and that of his father under a *mowrosee bemeadee ijarah pottah from generation to generation* granted to his father in the year 1245, by three persons, *viz.*, Kalee Mohun, Koomaree, and Shib Soonduree. That these parties, *viz.*, Kalee Mohun, Koomaree, and Shib Soonduree were entitled to an hereditary mokururee tenure under the zemindar defendants, now special respondents before us, is not disputed. It has been said that the pottah granted to the plaintiff's father by Kalee Mohun, Koomaree, and Shib Soonduree did not by its terms create a hereditary mokururee tenure in favor of the grantee, but it is quite clear from the whole context of that pottah and the use of the words "*from generation to generation*," that it did create a hereditary mokururee tenure in favor of the plaintiff's father. The Judge says that the lease is valid only to the extent of the one-third share which belonged to Kalee Mohun, and that the two female lessors, Koomaree and Shib Soonduree, being in possession of their husband's estate as Hindoo widows, the creation by them of the hereditary mokururee tenure in favor of the plaintiff's father was invalid, there being no evidence of any legal necessity to justify the alienation. It seems to us, however, quite clear that this is an objection which is not open to the zemindar defendants to raise. Their right as superior landlord is not disputed, and when we find that the plaintiff and his father have been in possession of the disputed property ever since the year 1245 until he was wrongfully ejected by the zemindar defendants under color of certain Act X proceedings referred to in the plaint, there can be no doubt whatever that an objection of this description, which can be raised only by the reversionary heirs to the estates left by the husbands of the female lessors, and other persons having some interest in those estates such as the Government when it claims as ultimate heir, cannot be taken by the zemindar defendants who are utter strangers to those estates.

With reference to Shib Soonduree, it is admitted that she died more than 26 years prior to the institution of this suit, and if the reversionary heirs to Shib Soonduree's husband have not during the whole of this period taken any step to set aside the alienations made by Shib Soonduree in favor of the plaintiff's father, it does not lie in the mouth of the zemindar defendants, who are in wrongful possession of the property, to take exception to the plaintiff's title on the ground that Shib Soonduree was a Hindoo widow, and had therefore no right to make the alienation in the absence of any valid necessity. It is urged, on behalf of the zemindar defendants, that on Shib Soonduree's death the reversionary heirs having

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made no arrangement for payment of the mokururee rent, they, the zemindar defendants, took *khas* possession of Shib Soonduree's share by way of resumption. But this position is clearly untenable. The tenure inherited by Shib Soonduree from her husband was a mokururee tenure, and if the reversionary heirs of her husband had made no arrangement for the due payment of the rent, the only right which the zemindar defendants had was to sue those parties for arrears of rent and then to cause the sale of the tenure, if necessary, in execution of decree, but not to take *khas* possession of it by force.

With regard to the other widow Koomaree, the record does not show the date of her death, but it is not disputed that Kalee Bhyrub, the son of Kalee Mohun, who is the reversionary heir to the estate of Koomaree's husband and from whom the zemindar defendants themselves have purchased a share, instead of trying to dispute the validity of the mokururee lease granted by Koomaree in favor of the plaintiff's father, acknowledged it by receiving rent from the plaintiff under that lease. It is clear, therefore, that under the circumstances of this case it is not open to the zemindar defendants to raise any objection to the title of the plaintiff under the mokururee lease of 1245, the validity of that instrument not having been questioned up to this time by the reversionary heirs to the estates either of Koomaree or Shib Soonduree's husband. According to the findings of both the Lower Courts, the zemindar defendants have taken wrongful possession of the property by ejecting the plaintiff, and it does not lie in their mouth to raise an objection which could only come forward from those who are legally entitled to contest the validity of alienations made by Koomaree or Shib Soonduree.

In this view of the case, we reverse the decision of the Lower Appellate Court, and restore that of the first Court with all costs against the zemindar defendants.

The 24th August 1872.

Present:

The Hon'ble W. Markby, *Judge.*

Criminal Appeals—Privy Council.

In the matter of
Gooroo Doss Roy, *Petitioner.*

Mr. R. T. Allan and *Baboos Grija Sankur Mojoomdar* and *Asheotosh Dhur* for Petitioner.

No right of appeal to the Privy Council exists in any matter of criminal jurisdiction.

Markby, J.—I THINK I have no power to grant this application. The 39th Section of the Letters Patent expressly excludes any matter of criminal jurisdiction from those in respect of which a right of appeal is given. The order from which it is sought to prefer an appeal in this case was an order under Section 404 of the Criminal Procedure Code, and that order was made by this Court in its criminal jurisdiction. No doubt, the order of the Lower Court which was then under consideration of this Court was an order which in some way does relate to civil rights. But it is only upon the assumption that it is the order of a Criminal Court that it can come up before this Court under Section 404 at all; and, therefore, when this Court assumed to deal with the order under Section 318 in the manner pointed out by Section 404, they assumed that they were dealing with a matter of criminal jurisdiction. If I were to admit this appeal, I shall be putting a different interpretation upon this Section of the Code from that which has been already put upon it by two Judges of this Court in this very case: that I do not think I shall be justified in doing. They have already held that it is a matter of criminal jurisdiction, because it is only as a matter of criminal jurisdiction that it can be dealt with under Section 404 by this Court. And this Court has no power, as I held the other day in the case of Ameer Khan,* to admit an appeal in such a case to the Privy Council.

The application is refused.

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* The 22nd June 1872.

Present:

The Hon'ble W. Markby, *Judge.*

In the matter of
Ameer Khan, *Petitioner.*

Mr. Carruthers for the Petitioner.

Markby, J.—THIS application is for a certificate that the case is a fit and proper one to appeal to Her Most Gracious Majesty in Council, and for an order that the applicant shall have leave to appeal from the finding and sentence of the Officiating Sessions Judge of Patna, and from the determination and judgment of this Court on the appeal against the finding and sentence of the said Officiating Sessions Judge.

The Counsel who appears for the applicant has produced no authority for granting such an application as this, and admits that he can find none, but states that, in order to meet all possible objections that may be made hereafter, this application is preferred. But as I know of no power or authority whatsoever under which this Court can grant such a certificate or order as is asked for, and as no case has been shown to me in which such an application has been granted, I consider that I have no discretion in the matter and am bound to reject the application.

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The 24th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Co-sharers — Injunction — Damages — Right of Action.

Case No. 346 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 5th October 1871, *modifying a decision of the Moonsiff of Balia, dated the* 18*th July* 1871.

L. J. Crowdy (Defendant) *Appellant,*

versus

Inder Roy and others (Plaintiffs) *Respondents.*

The Advocate-General and *Mr. R. E. Twidale* for Appellant.

Baboo Debendro Narain Bose for Respondents.

The Court refused to issue an injunction commanding a co-sharer in a certain village not to cultivate the *ijmalee* land thereof without the consent of his co-sharers, or until the separation of his share by a *butwarrah*, because of alleged interference with the rights of the said co-sharers; holding that the remedy lay in an action for damages.

Mitter, J.—We are of opinion that the decision of the Subordinate Judge ought to be reversed.

The plaintiffs and the defendant in this case are co-sharers in a certain mouzah, and the prayer in the plaint is that an injunction should be issued to the defendant commanding him not to cultivate the *ijmalee* lands of the village with indigo without the consent of the plaintiffs, or until the separation of his share by a *butwarrah.* It seems to us that such an injunction ought not to be issued in a case of this description. It may be that the defendant has in some respects interfered with the rights of the plaintiffs as tenants in common, and it may also be that the defendant has thereby rendered himself liable to an action for damages at the instance of the plaintiffs. But we cannot on that account issue an injunction commanding the defendant, who is an admitted share holder in the property, not to cultivate any part of the lands of the village with indigo, and that for the indefinite period of time mentioned in the plaint. If the case set up by the plaintiffs is true, they may sue the defendant for such remedy in damages or otherwise as they may be entitled to; but we do not think that this is a case in which we can grant the injunction prayed for by them. The granting of such injunction is a matter entirely in the discretion of the Court, and we do not think that the plaintiffs have made out any case for the exercise of such discretion.

We dismiss the plaintiffs' suit; but under the circumstances disclosed by the judgments of the Lower Courts, we think that the plaintiffs ought to pay the costs of this appeal only. Each party will bear his own costs in the Lower Courts.

The 27th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Contribution—Suit against Partner—Adjustment of Accounts.

Case No. 265 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 6th August 1871.

Pearee Mohun Roy and another (Plaintiffs) *Appellants,*

versus

Chunder Nath Roy (Defendant) *Respondent.*

Mr. J. T. Woodroffe and *Baboos Doorga Mohun Doss, Hem Chunder Banerjee,* and *Lall Mohun Doss* for Appellants.

Baboo Issur Chunder Dân for Respondent.

In a civil action by one or more members of a defunct firm against another member for contribution to recover money paid in liquidation of a debt due by the firm, if there has been no adjustment of accounts it is necessary to make all the partners parties to the suit.

Glover, J.—This was a suit to recover Rs. 9,250, principal and interest of a joint partnership debt alleged to have been paid by plaintiffs on account of the defendant.

The circumstances which it is necessary to detail somewhat at length are as follows.

The plaintiffs, the defendant Chunder Nath, Bissambur Roy (since dead, leaving a son Soorut Soondur, a *pro formâ* defendant in this suit) and Gour Soondur had a shop for miscellaneous articles (*moniharee*) at Dacca. In this firm which, for convenience of after reference, we may call Firm A, the plaintiffs and Bissambur are said to have had

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a 6 annas 8 gundahs share, Chunder Nath a 6 annas 8 gundahs, and Gour Soondur a 3 annas 4 gundahs share.

This firm had monetary dealings with the house of Buloram and Uddul Poddars, the partners in which were Pearee Mohun and Huree Mohun, 4 annas and 2 annas sharers, the plaintiffs in this suit, Bissambur 2 annas, Radha Mohun 2 annas, Radha Kant 4 annas, and Kisto Mohun 2 annas. This firm may be called Firm B.

There was a third firm, which may be called Firm C, in which Pearee Mohun, Huree Mohun, and Bissambur were partners in shares respectively of 8 annas, 4 annas, and 4 annas.

The plaintiffs were partners, that is, in the three Firms A, B, and C.

Firm A fell into difficulties and has been closed. Whilst in existence, however, it owed a very considerable sum of money, alleged to be Rs. 37,320-6-10, to Firm B, and Firm B pressed for a settlement. Chunder Nath paid a portion of the debt by making over to Firm B a decree which he had obtained against a third party, and the balance which is said to have been Rs. 30,864-1-10 was made good by crediting Firm A with moneys to that amount held by Firm B on account of Firm C, the plaintiff's partners in Firm C arranging for the transfer.

The plaintiffs now seek to recover Chunder Nath's share of this debt, alleging themselves to have received satisfaction from the other parties liable; and after giving credit for the amount of the decree paid by Chunder Nath, demand from him as contribution on his 6 annas 8 gundahs share Rs. 7,490, which with interest makes up the amount sued for.

The defendant Chunder Nath took a variety of objections. He denied that his share was so much as the plaintiffs alleged, and urged that the whole claim was barred by limitation. His substantial defence, however, was that no suit would lie, inasmuch as there had been no adjustment of accounts between himself and his partners in Firm A, and that until that was done it would be impossible to determine the extent of his liability.

The Subordinate Judge held that the suit was not barred, but that it ought to be dismissed on the ground that no adjustment of the partner's liabilities had been made, and that there was no proof of any balance of debt having been struck as between the Firms A and B.

The plaintiffs appeal, and Mr. Woodroffe on their behalf contends that the finding of Subordinate Judge on the question of adjustment is against the weight of evidence, and that in any case the plaintiffs' suit ought not to have been dismissed before the accounts of the firm had been taken: of the Firm A's indebtedness to Firm B, there was no doubt, and the precise amount of such debt, together with the precise amount of each partner's liability ought, if the Subordinate Judge thought it necessary, to have been ascertained by a careful investigation into the accounts of the firm: the defendant undoubtedly benefitted by the payment made by the plaintiffs, and cannot avoid his share of the responsibility.

It appears to me that the judgment of the Court is substantially right, although it is not very correctly expressed. I have read the evidence on both sides, and do not think that the Subordinate Judge was wrong in disbelieving the allegation that there had been a balance of account struck as between the Firms A and B. The evidence does not in my opinion establish any such fact. On the contrary, I believe the defendant's witnesses who say that, whilst the accounts were being made up, the plaintiffs' people carried off the books. One thing is at all events clear that these books have been produced by the plaintiffs, although they would most naturally have been in the defendant's custody if he was, as is alleged, the principal sharer in and manager of Firm A.

There having been, then, no adjustment of accounts, the whole question as to how much the Firm A owed Firm B is an open one, and may be disputed, not only by the defendant Chunder Nath, but by any one of the partners of the firm.

I do not see, moreover, how plaintiffs can call upon Chunder Nath to make good what they conceive to be his share of the debt to B, without first ascertaining the state of the A partnership account. It might very well be that the major portion, or even the whole of the debt, was caused by some other one of the partners,—by the plaintiffs themselves for instance—having overdrawn his account, and that Chunder Nath was not responsible. Plaintiffs may be equitably entitled to recover their money from the members of Firm A, but they are themselves partners in that firm and must show that Chunder Nath, and not the other partners, was liable for the amount claimed. This might have been shown, no doubt, by an investigation into the firm accounts, and under ordinary circumstances such investigation might be made now were it not for a difficulty pointed out by the respondent's pleader.

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And that difficulty is that, as all the partners in Firm A have not been made defendants, no account of their respective liabilities can be taken. The plaintiffs themselves admit in their plaint that Gour Soondur was a partner in the firm to the extent of 3 annas 4 gundahs, and the result of an enquiry into the firm accounts might be that he, Gour Soondur, was the party liable, and not Chunder Nath. Moreover, if an account taken now showed Chunder Nath to be the debtor, Gour Soondur would not be bound by any decree passed in the suit, but might show in another suit that the accounts were all wrong, and that so far from the Firm A owing anything to Firm B, the truth was just the other way.

I do not consider this to be at all a technical objection, but one that the defendant has a perfect right to take and to succeed in.

Holding this opinion, it is not necessary for me to go into the other points raised, although I may say that I have the very strongest doubts as to this being a case to which Section 8 Act XIV of 1859 would apply. It has not been shown to my satisfaction that there were any "mutual dealings" between the two firms, which would take the limitation period out of the purview of Clause 9 Section 1 of the Act.

Kemp, J.—I concur in dismissing the plaintiffs' appeal. The evidence adduced by the plaintiffs to prove adjustment of the accounts of the Firm A with the Firm B is very unsatisfactory. None of the witnesses depose to any proper adjustment. They state that the books of the two firms were compared. It is admitted that the two principal gomashtahs of the Firm B are Mudden Mohun and Bungshee Budden who have been examined. The former says there was a comparison of accounts, but no writing or memorandum. The latter apparently was not present when the alleged comparison was made. This witness also states that he is unable to say to what firm the witnesses Huree Mohun, Mudden Mohun Bysack, and Chunder Nath belong, or what sort of gomashtahs they are. Oomesh Chunder Roy, witness No. 6, who is the son of one of the partners of Firm B, cannot say whether any adjustment took place. Luckhee Kanto Shaha says the accounts of Firm A were not adjusted. Bunko Beharee says he heard from the plaintiffs that there was a "*bytuk*" meeting, and a comparison of accounts. Huree Mohun first says he was gomashtah of Firm B; then says no, of Firm A. He speaks of a comparison of the books by Bungshee Budden and Mudden, but the former witness denies this. On this evidence I can have no hesitation in finding that the accounts of Firm A with Firm B have not been adjusted.

The evidence as to the sum said to be due by the Firm A to Firm B is also very vague and inconclusive.

Witness No. 1, Ram Kanaye, says the debt was about Rs. 33 or 34,000, and that he heard of the transfer of accounts between the Firms of B and C.

Witness No. 2, Dinonath, says the debt was about Rs. 30 or 35,000.

Mudden Mohun, No. 3, says Rs. 30,800.

Bunko Beharee, No. 4, says Rs. 31 or 32,000, exclusive of Rs. 6,000 paid by the defendant by transfer of a decree.

Luckhee Kanto, witness No. 5, gives hearsay evidence.

Radha Kanto Roy, a co-partner in Firm B, says the debt was Rs. 33 or 34,000. Oomesh Chunder Roy, who is a son of a co-partner in Firm B, says Rs. 30 to 31,000. Bungshee Budden says Rs. 30,800. Huree Mohun says Rs. 30,000 or 32,000.

Until all the partners in the Firm A are made parties to the suit, and the accounts of that firm with the Firm B are adjusted in their presence, the liability of the defendant, respondent, cannot be ascertained.

Plaintiffs come into Court and allege that they have paid Rs. 30, 864 on account of the liabilities of Firm A to Firm B, and that they are liable for only a portion of that sum in proportion to their share in Firm A. Such a claim may be met by saying that no such debt was due by the Firm A to Firm B, or by showing that the plaintiffs have overdrawn their account, and that money is due to the defendant, which can be set off as against the sum claimed by the plaintiffs. It is impossible to isolate this item of Rs. 30,864, so as to admit of its being dealt with separately. The defendant is not in possession of the books of the Firm A. They have been produced by the plaintiffs. The books extend over a long period from 1263 to 1271, nine years. It was not possible for the defendant to meet such a plea, *viz.*, that this item of Rs. 30,864 could be treated as a separate item and one not mixed up with other entries necessitating an adjustment of the whole account in the presence of all the parties interested.

I am also very doubtful whether Section 8 Act XIV of 1859 applies to this suit. I can find no evidence which proves that the Firm A and the Firm B were merchants and trad-

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ers who have had "mutual dealings" with each other.

As far as the books have been examined in this Court, it appears that, with the exception of Rs. 4-8, the whole of the alleged debt fell due prior to 14th Assin 1269, so that when the alleged transfer was made in liquidation of that alleged debt, or on the 14th Assin 1272, the debt, if any, with the exception of Rs. 4-8, was apparently barred.

Appeal dismissed with costs.

The 28th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1859 *s.* 213—*Notice of Attachment—Identification.*

Cases Nos. 21, 22, and 23 of 1872.

Miscellaneous Appeals from an order passed by the Judge of Hooghly, dated the 5th October 1871, *affirming an order of the Subordinate Judge of that district, dated the 12th June* 1871.

Maharajah Dheraj Mahtab Chund Bahadoor (Decree-holder) *Appellant,*

versus

Burodanath Mundul (Judgment-debtor) *Respondent.*

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* for Appellant.

Baboo Umbica Churn Bose for Respondent.

Following a former decision, the intention of Act VIII of 1859 s. 213 was held to be that the description of the property in the notice of attachment should be such as may be sufficient to identify it; and where a property was described as a *lakheraj* tank with four banks, the boundaries of which were given, the identification was held to be fully made out.

Glover, J.—In cases Nos. 21 and 22, the decree-holder applied to attach certain property,—in case No. 21 an alleged *lakheraj* tank with banks, and in No. 22 a piece of *lakheraj* land,—as the property of his judgment-debtor. Both the Courts below refused to entertain his application on the ground that the list of the property did not contain any description of the property to be attached sufficient to identify it, nor any specification of the share or interest therein of the judgement-debtor, as required by Section 213 of the Code of Civil Procedure. In appeal it is contended that the specification contained in the list is sufficient. The translation of the list, as given to us in the paper-book, is, we find, on referring to the original list, not correct. In the original list, the tank in No. 21 is fully described as a *lakheraj* tank with four banks, the boundaries of which are given. In No. 22 the *lakheraj* land is similarly described, and in the petition presented on appeal to the Judge against that part of the first Court's order which threw out his application on the ground that there was no sufficient specification of shares, the decree-holder alleges that he made no specification of shares because the whole of the property belonged to the judgment-debtor, and there was therefore no necessity for any specification of shares.

We think that the specification given by the decree-holder in each case is a sufficiently reasonable description whereby the property can be identified, and therefore the judgment of the Court below is wrong. In a similar case decided by this Court, that of Laek Ram *v.* Mohesh Doss, reported in Volume XII, Weekly Reporter, page 488, it is laid down that the intention of Section 213 of Act VIII of 1859 is that the description of the property in the notice of attachment should be such as may be sufficient to identify it, and in this case the identification is fully made out.

In No. 23 the case is somewhat different. Without going into the question whether the property was or was not properly specified, as required by the Section, we find that the original debtor is dead. The son who succeeded him is likewise dead, and the party against whom the judgement-creditor now requires execution to be taken out denies all interest in the property of the deceased debtor, and says he has nothing to do with it. It is clear to us that, before the decree-holder can take out execution against this particular property, he must show that it is the same property that was formerly in the hands of his judgment-debtor, and has now gone by reversion or other cause into the hands of the party he wishes to make a defendant. This must be done in the Court below, and not in this Court, and it has not been done. We have been asked to remand the case in order that the decree-holder should have an opportunity of proving in the Court below that the property which he attached is in the possession of the opposite party, and was formerly the property of his judgment-debtor. The decree-holder ought to have done this himself; and when he found that his judgment-debtor had died, and that the property

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was in the hands of a third party, he should have taken proper steps to have the case struck off, and by proceeding anew against the party in possession, to have proved that the property which he sought to attach was formerly the property of his judgment-debtor.

The result will, therefore, be that the appeals Nos. 21 and 22 will be allowed with costs, and appeal No. 23 dismissed, the appellant paying the costs of the respondent, who has been unnecessarily brought into Court.

The 28th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII B. C. of 1869 *s.* 52—*Act X of* 1859 *s.* 78— *Ejectment— Discretion in Appellate Court.*

Case No. 201 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 5th April 1872, *reversing an order of the Moonsiff of Salkhea, dated the 23rd September* 1871.

Rao Banee Ram (Decree-holder) *Appellant,*

versus

Prannath Shaha Koyal and another (Judgment-debtors) *Respondents.*

Baboo Mohendro Lall Mitter for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondents.

Having obtained a decree for arrears of rent for 2 years and part of a third year, the decree-holder subsequently sued the judgment-debtor for the balance on account of the last mentioned year, adding a prayer for his ejectment and adducing the former decree as evidence. The first Court, after serving notice, held that the tenant was liable to ejectment inasmuch as he had not paid in the amount of the decree within 15 days. On appeal, the Judge held that as the decree was *ex-parte* and the case peculiar, he ought to exercise the discretion vested in the Appellate Court.

HELD, with reference to Act VIII (B. C.) of 1869 s. 52 and the wording of Act X of 1859 s. 76, and a previous ruling, that the Judge had discretion to extend the time, and, under the circumstances, was right in its exercise.

Kemp, J.—THE decree-holder is the special appellant. He obtained a decree against the judgment-debtor for arrears of rent for the years 1275, 1276 and part of 1277. This was on the 29th of November 1870. Subsequently, he instituted another suit for the balance of the rent of the year 1277 and obtained a decree. There was also in the latter case a prayer for the ejectment of the tenant, and the decree-holder adduced the former decree as evidence of the existence of the arrear. The first Court, the Moonsiff, after serving a notice upon the judgment-debtor to make any objection he might think proper as to why he should not be ejected, held that under the terms of the decree the tenant was liable to ejectment inasmuch as he had not paid in the amount of the decree within 15 days. On appeal, the Judge observed that seeing that the decree was an *ex-parte* one and that the case was peculiar, it was one in which the Appellate Court ought to exercise the discretion vested in it, and further the Judge was of opinion that he was supported in his view that the Appellate Court has such a discretion by a decision of Sir Barnes Peacock and Mr. Justice L. S. Jackson in the case of Nubo Kristo Mookerjee *versus* Ramessur Goopto* reported in Volume II, Wyman's Reports, page 75.

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* The 18th September 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Case No. 1460 of 1866.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 24th January 1866, *affirming a decision of the Deputy Collector of Boodh-boodh, dated 9th September* 1865.

Nubokisto Mookerjee (Plaintiff) *Appellant,*

versus

Ramessur Goopto (Defendant) *Respondent.*

Baboo Tarucknath Sein for Appellant.

Baboo Ashootosh Dhur for Respondent.

Peacock, C.J.—IT appears to me that all that comes after the words "the appeal is dismissed with costs" is not part of the decree itself. Substantially, it is an order with reference to execution.

Section 78 Act X of 1859 says:—"In all cases of suits for the ejectment of a ryot or the cancelment of a lease, the decree shall specify the amount of the arrear; and if such amount, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed,"—that is, that the defendant will be entitled to have execution stayed, without any order of the Court, if he pays the money into Court within the limited period. But it does not say that execution shall not be stayed under any circumstances, either by the Court itself or by the Appellate Court.

In this case, the Appellate Court thought it right when it admitted the appeal to stay the execution of the Lower Court. By the decree of the Appellate Court,

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This case turns upon the wording of Section 52 of the Rent Act, Act VIII of 1869, the wording of which is precisely the same as that of the old Section 78 of Act X of 1859, which enacts that in all cases of suits for the ejectment of a ryot the decree shall specify the amount of the arrear, and if such amount, together with interest and costs of suit be paid into Court within fifteen days from the date of the decree, execution shall be stayed. Now, in the case which has been referred to in Wyman's Reports, Sir Barnes Peacock distinctly says in considering Section 78 of Act X which then applied, and the words of which are precisely the same as those of Section 52 of Act VIII of 1859, that the ryot is entitled to have execution stayed without any order of the Court, if he pays the money into Court within the limited period, but it does not say that execution shall not be stayed under any cicumstances either by the Court itself or by the Appellate Court.

We think, therefore, under that ruling the Judge had discretion, and looking to the circumstances of the case we think that he was right in his exercise of that discretion.

We dismiss the appeal with costs.

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the costs of the appeal have become part of the amount to be paid into Court for the purpose of staying the execution of the decree.

It appears to me that the words which come after "the appeal is dismissed with costs" may very properly be looked upon as an order made with reference to the former order of the Court staying the execution. The words are "the period of grace allowed by section 78 to be reckoned from that date,—that is to say, in order to save the tenure, the costs of the first Court and of the Lower Appellate Court must be paid within the period of fifteen days from the date of the decree of the Lower Appellate Court."

I, therefore, think that this appeal must be dismissed with costs.

Jackson, J.—I am of the same opinion. It appears to me that the insertion in the decree of the words referred to by the Chief Justice was quite a superfluity. The privilege allowed to the defendant in cases of this nature to stay execution of the decree on payment of the amount due with costs and interest, is not a matter within the discretion of the Judge. It is allowed absolutely by the terms of the Act, Section 78. Therefore, the Judge's stating that the period of grace specified in that section is to commence from such a date, instead of such a date, is a matter beyond his authority. It follows the construction of the Act itself. I am not prepared to say that the Judge might not, in the exercise of his appellate jurisdiction, if he thought fit, order execution to be stayed for a still further period. But I should not have thought, looking to the nature of the defence and the appeal itself, that this was a case in which the Judge would have exercised such a discretion. In any view of the case, however, it does not appear to me that, in this case, we are called on to interfere with the decree of the Lower Court. I, therefore, concur in dismissing the appeal with costs.

The 30th August 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Application under Act XXVII of 1860—*Certificate—Review.*

Cases Nos. 122 and 123 of 1872.

Miscellaneous Appeals from an order passed by the Judge of the 24-*Pergunnahs, dated the* 16*th January* 1872.

Nissa Bibee and another, *Appellants,*

versus

Abdoor Ruhman, *Respondent.*

Baboos Doorga Mohun Doss and *Sreenath Banerjee* for Appellants.

Mr. J. S. Rochfort for Respondent.

An application for a certificate under Act XXVII of 1860 having been rejected on the ground that the applicant had not been able to prove his relationship to the deceased, the applicant obtained a review of the order and received a certificate with regard to a share of the estate.

HELD, that as there was no attempt to show that the applicant had been in ignorance of the existence of the new evidence which he afterwards had recorded before the Judge, or how it was that that evidence was not and could not be produced when the application was first heard, the review was improperly granted, and the decision thereon must be reversed.

Glover, J.—THESE are applications for a certificate under Act XXVII of 1860 to recover the debts due to the estate of one Golam Nubee. The petitioners, appellants, Nissa and Amina, are the daughters of Golam Nubee. Abdoor Ruhman, the objector, styles himself the first cousin of Wahedoonnissa, the step-mother of Nissa and Amina. It appears that this Wahedoonnissa on the death of Golam Nubee got a certificate and managed the affairs of the property until her death. On her death, the present applicants, her step-daughters, applied for a certificate and were opposed by Abdoor Ruhman. The Judge awarded a certificate to Nissa and Amina with regard to a 15-anna share of the property; and to Abdoor Ruhman, inasmuch as he was the nearest of kin to Wahedoonnissa, whose share was one anna, the Judge considered that he was entitled to a certificate with regard to a 1-anna share.

The question which we have to decide in this appeal is whether the Judge was right in admitting the application of Abdoor Ruhman to review of judgment.

It appears that on a former occasion his application for a certificate was rejected, and

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a certificate granted to Nissa and Amina, on the ground that he, Abdoor Ruhman, had not been able to prove his relationship to Wahedoonnissa. That decision was passed on the 18th of November 1871. In December of the same year the Judge admitted his previous order to review, and found on the evidence then adduced by Abdoor Ruhman that his allegation of relationship to Wahedoonnissa was made out, and gave a certificate in proportion as we have above stated.

It has been ruled in the case of Nudar Chand Bhooyah *versus* Rheedoy Mundul, to be found in Volume XVII. Weekly Reporter, page 458, that a Judge ought not to admit a review for the purpose of receiving fresh evidence in a suit, until he is satisfied by legal evidence that the new matter was not known to the applicant or could not be adduced by him when the decree was passed.

Now, in this case, there has been no attempt made to show that Abdoor Ruhman was in ignorance of the existence of the new evidence which he afterwards had recorded before the Judge. He does not even put in any verified petition. He has not given evidence himself, nor has he offered the evidence of any other person to show how it was that that new evidence on which the Judge relied as proving his relationship to Wahedoonnissa was not and could not have been produced when the application for a certificate was first heard. We have looked through the record and find no order whatever on this subject on the part of the Judge. He must have taken the petition of Abdoor Ruhman apparently as a thing of course, and recorded the evidence adduced by him as if Abdoor Ruhman had a perfect right to have it so recorded. Following the rule laid down in the decision above quoted, we think that this application for a review of the order passed on the 18th of November 1871 was improperly admitted, and that Abdoor Ruhman must revert to the position which he held before the decision of December 1871 was passed, and that position was that he had no right to a certificate inasmuch as he had not proved his relationship to Wahedoonnissa. That being so, he has no *locus standi* in the present case, and as Nissa and Amina are the step-daughters of Wahedoonnissa, and as the property which went to her originally belonged to their father Golam Nubee, they and they alone are entitled to a certificate under Act XXVII of 1860.

The order of the Judge is therefore modified accordingly, and this appeal decreed with costs.

The 31st August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Markby, *Judge*.

Contract—Damages—Bought and sold Notes—Parol Evidence.

Case stated for the opinion of the High Court under Section 7 Act XXVI of 1864, by the first Judge of the Court of Small Causes at Calcutta.

Howard Clarton, carrying on business under the style of H. Clarton & Co., Plaintiff,

versus

D. K. Shaw and P. N. Mitter, carrying on business under the style of D. N. Shaw and P. N. Mitter, Defendants.

Neither party was represented in the reference before the High Court.

In a suit for damages sustained for breach of contract, where the Statute of Limitations does not apply and there has been an interchange of bought and sold notes, the plaintiff is at liberty to prove by parol evidence the existence and terms of a contract on which he can maintain the action.

There may be a complete binding contract if the parties intend it, although bought and sold notes are to be exchanged or a more formal contract is to be drawn up.

If the bought and sold notes do not agree, they cannot be used as evidence of the contract; but the fact of their differing and not being returned is not conclusive evidence that at the conclusion of the negotiations the parties did not agree.

Case.—In this case the plaintiff sued the defendants for damages sustained through their breach of contract in failing to deliver certain bales of jute.

The facts of the case, so far as they are material for its decision, are the following :—

1. The defendants are Hindoos.

2. Mr. J. K. Moran, who acted as broker for the parties, delivered to the plaintiff the bought note marked B, and to the defendants the sold note marked A, which documents were received and retained by the parties respectively.

2a. Mr. Moran made no entry of the contract in his broker's book.

3. Subsequently, Mr. Moran, at the request of the plaintiff, obtained from the defendants and made over to the plaintiff the exhibit marked C.

4. The first two parcels of jute referred to in exhibit C were delivered by the defendants on board ship on the 23rd, and were paid for by the plaintiff on the 24th January last.

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5. On the 25th January the plaintiff, in his letter marked E, demanded delivery on that day of 250 more bales in terms of the exhibit C; which delivery the defendants in their letter of the same date marked F declined to give, alleging a breach of contract on the part of the plaintiff in not having at once paid for the two parcels of jute referred to in paragraph 4.

6. An attempt was made by the plaintiff to prove that the defendants had subsequently to the acceptance of the notes on both sides, accepted and ratified the contract as expressed in the bought note of the plaintiff. But this entirely failed.

The case coming on for hearing, the defendants' attorney, among other pleas, contended that as there was a variance between the bought and sold notes, there was in fact no contract between the parties, and that the claim should therefore be dismissed.

I decided the case against the plaintiff on this issue, holding that as the bought note gave the plaintiff a right to insist on delivery on board ship, while the sold note gave the defendants an option of delivering on shore, the variance between the notes was material, and there was consequently no contract.

At the trial, the plaintiff proposed to show by parol evidence what the contract between the parties really was; but as I was of opinion that the fact of the interchange of bought and sold notes showed it to be the intention of the parties that the terms of the contract should be reduced to writing, and that the notes which they had respectively accepted must be regarded as the ultimate expression by each of his several intention as to what the terms of the contract which he would assent to should be, and also as to what they had been made, and that every thing which had passed between the parties through their broker previously could only be looked upon as the early stages of the negotiation, I declined to admit parol evidence of a contract which was not contained in the notes.

A new trial was applied for on the ground that I should not have refused to receive the parol evidence tendered; and it was argued that, as it is admissible in cases falling within the provisions of the Statute of Frauds in which the bought and sold notes are found to vary to establish the contract by a reference to the entry in the broker's book, so here, in a case in which the defendants being Hindoos the Statute of Fraud does not apply, it was competent to show by the parol evidence of the broker or of others what was in fact the contract which the parties intended to make for themselves.

In support of this view, reference was made to the case of Seivewright *vs.* Archibald, 17 Q. B., 115, and more particularly to the elaborate judgment of Mr. Justice Erle in that case, as showing that the only reason for refusing to admit parol evidence to prove the contract where bought and sold notes differ is the restriction contained in the Statute of Frauds.

I have given that case my careful consideration.

It appears to me that the learned Judges in that case do not decide that the entry in the broker's book may be referred to in case of variance between the notes, but that where there is an entry in the broker's book that entry is itself the contract. It also appears to me that the majority of the Court there held, in very pointed terms, that where there is no entry in the broker's book there the bought and sold notes are themselves the contract.

Further, if Mr. Justice Erle be correct in his view that these holdings can only be considered quite sound, if we interpret the word "contract" as meaning what is, to some extent, and in a strictly practical point of view, the same thing, *viz.*, the statutory evidence of the contract necessary under English law, it appears to me that even then, and even where the Statute of Frauds does not prevail, bought and sold notes delivered accepted and retained by the parties cannot be regarded in a more degraded light than as the expression, reduced into writing with the consent of the parties, of what their wishes and intentions with regard to the intended contract were at the last stage which the negotiations reached. If this view of mine be not erroneous, it seems to me that varying bought and sold notes, accepted retained and acted on, amount to positive evidence of the negative fact that at the conclusion of the negotiations the parties did not agree, and thus evidence having been in fact (though unnecessarily as far as any statutory provision is concerned) reduced into writing by the parties themselves, or accepted by them when so reduced by their agent, no parol evidence is admissible to contradict them.

There is surely some want of clearness in the argument of the learned dissentient Judge, where he remarks that the Court must, according to the view of the majority of his colleagues, first arrive at the conclusion that there was a contract before it can by inspection of the terms of that contract arrive at the oppo-

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site determination that there had after all been no contract. All that the Law of Evidence requires is that there should have been an intention to contract and to reduce the terms of such intended contract to writing. This will be sufficient to exclude parol evidence, and then the Court, by inspection of written expression of their intentions, may conclude that the parties have failed to carry out those intentions. Taylor on Evidence, p. 401, Edn. 1868, n. 2.

My colleague, Mr. Thomson, does not agree with me in this view, but considers that, for the reasons given by Erle, J., in the case of Seivewright *vs.* Archibald above referred to, parol evidence as to what the parties really intended to be their contract should be admitted. I have therefore the honor to submit for the opinion of the High Court the following points, *viz* :—

1*st.*—Whether, on the facts of the case as set forth in paras. 1—6 of the foregoing statement, it was open to the plaintiff to prove by parol evidence the existence and terms of a contract on which he could maintain the present action ?

2*nd.*—Whether bought and sold notes materially varying are not, when received and retained by each party, as has been stated, conclusive evidence that in the last stage of their negotiations the parties did intend to make, and believe themselves to have made, a contract, but failed to do so ?

The judgment of the High Court was delivered as follows by

Couch, C.J. — It being stated that the Statute of Frauds does not apply, we are of opinion that the plaintiff was at liberty to prove by parol evidence the existence and terms of a contract on which he could maintain the action. In Seivewright *vs.* Archibald, a memorandum in writing of the contract was necessary, as it was within the Statute of Frauds ; and Mr. Justice Erle's opinion that the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree, was in accordance with that of the other Judges. Mr. Justice Patteson says :—"I consider that the memorandum need not be the contract itself, but that a contract may be made without writing, and if a memorandum in writing be afterwards made embodying that contract, and be signed by one of the parties or his agent, he being the party to be charged thereby, the Statute is satisfied ;" and the ground of his judgment is that where the bought and sold notes are the only writing, and they differ materially, the Statute is not satisfied. Lord Campbell says "I by no means say that where there are bought and sold notes, they must necessarily be the only evidence of the contract : circumstances may be imagined in which they might be used as a memorandum of a parol agreement." * * * * "What are called the bought and sold notes were sent by him (the broker) to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them." * * * "In the present case there being a material variance in the bought and sold notes, they do not constitute a binding contract ; there is no entry in the broker's book signed by him ; and if there were a parol agreement, there being no sufficient memorandum of it in writing nor any part-acceptance or part-payment, the Statute of Frauds has not been complied with, and I agree with my brother Patteson that the defendant is entitled to the verdict."

There may be a complete binding contract if the parties intend it, although bought and sold notes are to be exchanged or a more formal contract is to be drawn up. This is shown by Heyworth *vs.* Knight, 33 L. J., C. P., 298. If the bought and sold notes do not agree, they cannot be used as evidence of the contract ; but we cannot agree with the first Judge that their differing and not being returned is positive evidence that at the conclusion of the negotiation the parties did not agree, the fact being, as we think, that the negotiation was concluded and the contract made before the notes were written, and they were sent by the broker to his principals by way of information. To support the opinion of the first Judge, it would be necessary that there should exist a custom between merchants that they should not be bound until regular bought and sold notes have been exchanged.

The 31st August 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Markby, *Judge.*

Surety—Interest—Promissory Note.

Appeal from the judgment of the Honorable A. G. Macpherson, exercising the ordinary original civil jurisdiction of the High Court.

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Kally Prosonno Roy (one of the Defendants) ***Appellant,***

versus

Umbica Churn Bose (Plaintiff) ***Respondent.***

The Advocate-General **and** ***Mr. Lingham*** **for the Appellant.**

Mr. Lowe **and** ***Mr. Branson*** **for the Respondent.**

Where a creditor, without the knowledge of the surety, accepts from the principal debtor a sum on account of interest in excess of the interest then due on a promissory note, without anything further appearing as to the intention of the parties, and so gives time to the principal debtor, he thereby discharges the surety from liability on the promissory note.

THE plaintiff in this case sued to recover the sum of Rs. 3,021-10-8, for principal and interest, from Cowar Brojendernarain Deb and Kally Prosonno Roy, on a promissory note dated 19th October 1870, which ran in the following terms :—

Three months after date we jointly and severally promise to pay to Baboo Umbica Churn Bose or order the sum of Rs. two thousand and five hundred (Rs. 2,500), for value received as follows,* with interest at the rate of twenty-five per cent. per annum.

KALLY PROSONNO ROY.

BROJENDRANARAIN DEB.

Plaintiff admitted having received the sum of 250 rupees on the 29th of January 1871 on account of interest, which he credited to the account. He denied that the second defendant was surety for the first defendant.

The first defendant did not appear to the suit, but the second defendant, the appellant in this appeal, contended that he was merely surety for the first defendant, and as the plaintiff had received 250 rupees on the 29th January from the first defendant on account of interest, which sum represented interest down to the 19th March 1871, without the knowledge of the second defendant, and as that sum was in excess of the amount which was then due for interest, the plaintiff had thereby given time to the first defendant and could not have sued him on the note at any time between the 29th January and the the 19th March 1871. He contended that by so doing the plaintiff had discharged him as surety from further liability.

The judgment of Macpherson, J., in the Original Court, was as follows :—

On the evidence, I consider it clear that the defendant Kally Prosonno Roy was throughout merely surety, and that the plaintiff was aware of that fact from the first. The only question I have to decide is whether or not Kally Prosonno Roy is discharged as surety because time was given to the principal debtor on the 29th of January 1871, as Mr. Marindin contends it was. The promissory note is dated the 19th of October 1870, and was payable three months after date. The evidence is (and I have no doubt it is true) that on the 19th of January 1871, which was the due date of the note, the plaintiff called on the defendant Brojendernarain Deb and was told to come back in eight or ten days when interest would be paid. Accordingly, on the 29th of January, the plaintiff did go back and was then paid the sum of 250 rupees on account of interest. Mr. Marindin, for the defendant Kally Prosonno Roy, contends that inasmuch as 250 rupees was more than was actually due on the 29th of January, the plaintiff by accepting it practically gave time to Brojendernarain in such a manner as to discharge the surety; and he relies upon the case of Blake *vs.* White, 1 Younge and Collyer. 420.

In the present case the circumstances are very different from what they were in the case of Blake *vs.* White. In that case there was a memorandum in writing showing expressly the receipt of several months' interest in advance, and by the memorandum it was also agreed that the interest should be paid in future every six months, commencing from a certain day named. Here there is nothing of the sort; and there is absolutely no new agreement whatever between the parties beyond such as is evidenced by the simple fact that whereas Rs. 150 was the amount due for interest up to the 19th January, Rs. 250 were received by the plaintiff on the 29th of January. The plaintiff states that he never promised, and was never asked, to give time, and that the extra Rs. 100 were not paid to him then in consideration of his giving further time: and although he says he received the whole payment of Rs. 250 as on account of interest, he says further that he knew that the whole of that sum was not due, but that on the 29th January he was in want of the precise sum of Rs. 250, and when he went on that day to Brojendernarain he asked him if he could then give him Rs. 250 merely in consequence of the immediate need he had for that sum. The interest due on the 19th of January would have been Rs. 150; and, as the monthly interest is Rs. 50, by getting Rs. 250 on the 29th the plaintiff

* Particulars of the currency notes follow.

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did in fact get that which was equal to two months' interest in advance. But inasmuch as he states (and there is nothing to contradict him) that no calculation was made at the time, and nothing was said about the payment of interest in advance, I confess I cannot see how it can be said that there was any agreement which now prevents the plaintiff from proceeding against the surety. for I do not think that by accepting the Rs. 250 he deprived himself of the right of suing the principal debtor. The defendants will be entitled to credit for the amount which the plaintiff has received as interest, but the plaintiff is entitled to recover against both the defendants.

As regards the manner in which the evidence of the plaintiff on cross-examination has been taken down with regard to the payment of the Rs. 250, I state distinctly that the meaning of the witness as understood by me was that the Rs. 250 were received by him with knowledge that that sum was more than was then due for interest, but that that sum was not paid on any calculation that it was interest which was due for two months in advance or for any other time. It is true that, in answer to a suggestion of Mr. Marindin, the plaintiff did say that the sum received would be equivalent to interest up to the 19th of March; but he never said nor meant to say that there was any calculation made at the time or that the amount asked for was the result of any understanding that it was interest for any definite time.

The surety-defendant appealed from this judgment on the following grounds:—

1*st.*—That the learned Judge ought to have held that the demand and receipt by the plaintiff, on 29th January 1871, from the first defendant, by way of interest on the amount due upon the promissory note of a sum in excess of the interest then due, had the effect in law of a binding agreement to give the said defendant time for the payment of the amount secured by the said promissory note, and that the surety-appellant was thereby discharged from his liability upon the said note.

2*nd.*—That the learned Judge ought to have held upon the evidence that the sum of Rs. 250, paid by the first defendant to plaintiff on 29th January 1871, was demanded and received by the plaintiff as interest in advance upon the amount secured by the promissory note up to the 19th March 1871, and that such demand and interest had the effect in law of a binding agreement to give the said defendant time for the payment of the amount secured by the said promissory note until the 19th March, and that the appellant was thereby discharged from his liability upon the promissory note.

3*rd.*—That the learned Judge ought to have held upon the evidence that there was in fact a binding agreement between the plaintiff and the first defendant that plaintiff would give such defendant time for the payment of the amount secured by the promissory note; and that the appellant was thereby discharged from his liability upon the note.

4*th.*—That the suit ought to have been dismissed as against the surety-defendant with costs.

The Advocate-General.—This suit was brought by plaintiff against two persons, Brojendernarain Deb and Kally Prosonno Roy. The suit was in respect of a promissory note given by the defendants to the plaintiff on the 19th October 1870. The note became due between the 19th and 21st January 1871. The plaint was filed on the 1st February 1872, about a year after the note became due, and alleges that the time for payment had elapsed; that the Rs. 2,500 had not been paid, nor the balance of interest, Rs. 521-10-8; but that the plaintiff on the 29th January 1871 received from the defendants Rs. 250 on account of interest. My client, Kally Prosonno Roy, was not aware of this payment of interest in excess of the interest then due by Brojendranarain Deb, the principal debtor. I contend that the taking of such interest by way of anticipation was giving the principal debtor time, and that therefore the action against my client, the surety, is barred. The learned Judge seems, upon the evidence of the plaintiff, to have arrived at the conclusion that when the Rs. 250 was paid, there was nothing certain as to the purpose for which it was paid. I think, however, that when he received the money as interest, he must have been well aware for what purpose it was paid. Mr. Marindin in the Court below had cited Blake *vs.* White (1 Younge and Collyer, 420). The learned Judge is right that that case goes a little beyond the present case. But there is a case (Greenough *vs.* M'Clelland, 30 L. J., Q. B., 15), the facts of which are very nearly the same as those here, except that in that case the interest was taken twice,—in this only once,—and in which it was held that, if one maker of a promissory note signs as surety only for the other, and the payee has notice of this when he takes the note as security for money advanced to the principal, he cannot give security for money advanced to the principal without the consent of the surety. If he does, the surety is dis-

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charged in equity, although the payee has never agreed to treat him otherwise than as a principal party liable upon the note. In the case of the Oriental Financial Corporation *vs.* Overend Gurney and Co. (7 L. R., Chancery Appeals, 142), Lord Hatherley, L. C., held that the holder of a security who agrees with the principal to give time to the surety by so doing discharges the surety.

In the time of Lord Eldon, in the case of Boultbee *vs.* Stubbs (18 Vesey, 20), where a creditor having among other securities a bond with a surety, took a mortgage from the principal debtor and agreed to receive the residue by instalments secured by warrant, &c. without prejudice to any security he now held, an injunction was granted against suing the surety. The cases are summed up in Story's Equity Jurisprudence, p. 376, para. 326. In 2 Brown's Chancery Cases, 578, it was held that a creditor giving the principal debtor further time for payment releases the surety. Precisely the same doctrine was applied in Bonar *vs.* Macdonald (3 Clark's H. of L., 226). It may be said that it is found as a matter of fact there was no agreement to give time; but I submit that the agreement to give time would only be evidence of the facts before the Court. If he gave time, the surety was discharged. Then your Lordships must not forget that the claim is in lieu of interest. The money was received by the plaintiff for past interest and future interest. Suppose, instead of its being a matter between two gentlemen, it was matter between two Banks, and insolvency takes place, what would be the result?

Mr. Lingham (on the same side).—In the Lower Court, when the case of Blake *vs.* White was referred to, it was objected that it was not a decision which has been followed in any case. In answer to such an argument, I would only say that it is referred to in White and Tudor, 297, Byles on Bills, and Smith. Then I contend that here we have all the elements of certainty to assume an agreement.

Mr. Lowe (*contra*).—The question in this case is really one of fact. Your Lordships are asked to say that, in consequence of a sum of money paid by plaintiff, there was an agreement by the plaintiff to give three months' further time. I submit upon the evidence that your Lordships cannot come to that conclusion. At the time of payment there is no doubt that a certain sum was due for interest. About that time the plaintiff, being in want of money, applied to the Roy defendant for Rs. 250. Three months' interest was due and a part of another month. It does not appear upon the evidence that Roy paid it only on account of interest. There is nothing to show upon the evidence that there was anything understood between the parties that it was a payment which was to extend to the 19th August. [*Couch, C.J.*—The plaintiff took it as in advance.] There was no calculation made as to the precise sum then due, and it is contended that inasmuch as the money was received on account of interest and was more than the interest then done, your Lordships are to infer that there is a binding agreement. [*Couch, C.J.* — It is not necessary upon the authorities that we should infer that. The mere fact of its having been received as interest in advance would prevent the plaintiff from suing the principal.] Can your Lordships say upon the evidence that he received the money as interest in advance? [*Couch, C. J.*—He received it by way of anticipation. It is clear that the plaintiff did not intend that any portion of the Rs. 250 should go in reduction of the principal.] Could your Lordships say that he received it by way of anticipation? [*Couch, C. J.*—Then in what other way could he have received it? He did not receive it as a loan.] No; he says, generally, he received it as interest. The case of Blake *vs.* White, referred to in the Court below, is quite a different case from the present. In that case there was an actual agreement to give time, and there was also a payment of interest for a particular period, and the time was specified. Here there is no time specified at all. [*Couch, C.J.*—If the time could be ascertained, it is not necessary that it should be specified.] Here there was no agreement except what is inferred from the receipt of the money. The case in the 30 L. J., which was contended to be on all-fours with the present, seems to me to be very different.

Mr. Branson (on the same side).—The issue is a mixed issue of law and fact, whether there was an agreement between the creditor and principal debtor by which the creditor bound himself to give the debtor time. If there was any agreement by which the creditor gave the principal debtor time, that would discharge the surety. But there is no evidence of any new agreement, as the learned Judge has found. It is clear upon the evidence that the plaintiff did not ask for Rs. 250 as interest. He simply asked for Rs. 250. The Advocate-General has contended that if there was more money paid than the

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interest due, the plaintiff could not bring his suit, because in every such case the mere fact of such payment in excess was proof of payment of interest in advance and of an agreement by which the creditor has bound himself not to sue the principal. In the case of Blake *vs.* White, there was an agreement to take interest on a given specified date. In the case cited from the 30 L. J., the question was not raised. The only question was whether the surety was discharged. The case in 7 L. R., Chancery Appeals, also, was wholly different. In 3 Merivale, 278, it was held that there must be time given by a positive contract to discharge the surety. See also Ewin *vs.* Lancaster (6 Best and Smith, 571). There was no agreement in the present case, and there is no authority to show that simple payment gave time to principal debtor so as to discharge the surety.

The Advocate-General (in reply).—I rely on the case of Blake *vs.* White, and on Tucker *vs.* Laing (2 Kay and Johnson, 745). The matter is well put in 2 White and Tudor. Mr. Branson seems to have forgotten that this is a matter of law and fact. It seems to me that the learned Judge has drawn a wrong inference upon the facts.

The Court took time to consider. The judgments of the Court were delivered as follows on the 31st August 1872 :—

Couch, C.J.—This suit was brought on a promissory note of the defendants for Rs. 2,500 dated the 19th of October 1870 and payable three months after date, with interest at 24 per cent. per annum ; and the plaint stated that the plaintiff, on the 29th January 1871, received from the defendant Rs. 250 on account of interest. The defence was that the note was made by the appellant as surety for the other defendant with the knowledge of the plaintiff and that the Rs. 250, which the plaintiff alleged that he received as interest, was in excess of the interest then due, and was given to and taken by the plaintiff without the knowledge or consent of the appellant, and thereby the appellant became discharged. The plaintiff in his evidence said that he went to the first defendant, the principal, on the 19th January, and was told by him that he would pay interest a week or ten days afterwards, and on the 29th of January the first defendant paid him Rs. 250 for interest ; that he made no application for payment to the appellant ; that the Rs. 250 was more than what was due for interest then ; that it represented the interest which would be due up to the 19th of March ; that he first applied to the appellant for payment in September 1871. He also said that, on the day he was paid the Rs. 250, or two or three days before that, the first defendant told him that the appellant joined in the note for his accommodation; and Mr. Justice Macpherson has found that he was aware from the first that the appellant was merely a surety. In reply to questions by the Court, he said "I received the Rs. 250 on account of interest. I simply asked him to pay on account of interest and he gave me that amount, and I gave him credit for it."

The rule that if a creditor enters into any binding contract, the effect of which will be to give further time to the debtor, without consulting the surety, the surety will be thereupon discharged, and it is immaterial that the further time was given in consequence of the inability of the debtor to pay, or that no injury could thereby accrue to the surety, was laid down by Lord Loughborough in Rees *vs.* Berrington, 2 Ves. Jun., 540, and Lord Eldon in Samuell *vs.* Howarth, 3 Mer., 272. It has been followed in the Courts both of Equity and Common Law in many cases which are mentioned in the note to Rees *vs.* Berrington in 2 Tudor's Leading Cases in Equity, 822, and must be followed by this Court.

It was argued by Mr. Branson for the plaintiff that there was no binding contract to give time, as if this meant an express contract ; but a contract need not be expressed in writing or by words to be binding. A tacit or implied contract inferred from the acts of the parties is equally binding as an express one. The facts of the case in Blake *vs.* White, 1 Y. & C. Exch. Cas , 420, are no doubt different from the facts of the present case, but the law laid down by Lord Lyndhurst, then Lord Chief Baron, is clearly applicable. He says at page 426, "But the question is, whether time was not given to the 1st of January 1819, upon a valuable consideration ? The fact is admitted that the obligee received interest up to that time in the month of October preceding. Could he then in the *interim* have been allowed by a Court of Equity to bring his action on the bond ? I think not. It is admitted that in the case of a principal only, without a surety, if the debtor had given six months' interest in advance a Court of Equity would interfere to stop the action. If, in such a case, the time for payment of the interest could be explained consistently with the action, that would alter the state of the case; but, if it appeared simply that six months' interest had been given, what could

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the imagination suggest, but a contract *ipsissimis verbis*, that the creditor could not sue for that time? Besides, the interest being paid, would a Court of Equity endure that the creditor should put that interest into his pocket, and next day sue for the principal?

"If that be so as between the principal debtor and the obligee, the same principles will apply to the surety. The question here is, whether the party did not preclude himself from suing on the bond, by receiving by anticipation the interest due between October and January. The shortness of that period cannot affect the question. Taking even an hour's interest in the same manner, if it were the habit to reckon interest by hours, would be attended with the same consequences. Under the present circumstances, I must grant this injunction."

The judgment was not founded upon the memorandum in writing to which Mr. Justice Macpherson alludes as distinguishing this case from Blake *vs.* White, for Lord Lyndhurst in the previous page speaks of it as a mere agreement to give time without any consideration, which would not prevent the creditor from successfully prosecuting his action at law. "But the question is," he continues as above quoted.

Putting the most favorable construction upon the plaintiff's evidence and allowing that the Rs. 250 were not paid on any calculation that it was interest which was due for two months in advance or for any other time, it is a fact that interest was received by anticipation, and the time for which it was received was a matter of simple calculation. I think it is clear that, under those circumstances, a Court of Equity would have interfered to stop the plaintiff from suing the first defendant until the time which was covered by the payment in advance had expired. The plaintiff bound himself to give further time, and the appellant was therefore discharged from his liability on the note.

The decree so far as it applies to the appellant should be reversed, and the suit be dismissed as against him with costs; and the costs of the appeal should be paid by the respondent.

Markby, J.—In this case I do not think it necessary to examine the facts at length. It is admitted that the principal debtor paid to the creditor, at the creditor's request, on the 19th of January, a sufficient sum to cover the interest upon the debt up to the 19th of March; and it seems to me, with the greatest deference for the opinion of the learned Judge who decided this case in the first instance, that it is impossible to avoid inferring from that an undertaking that the creditor will not sue the principal debtor during that period. I do not discuss this part of the case further, because it has been clearly shown by the Chief Justice that the case of Blake *vs.* White distinctly lays down that we ought to infer this.

But then comes the question (and it is one which from the way in which the case was there decided was not considered in the first Court) what effect has this giving of time upon the engagement of the surety? Giving time to the principal debtor, though, as a general rule, it discharges the surety, does not always do so (see Green *vs.* Wynn, 7 L. R., Eq., 28: S. C., on appeal (4 L. R., Ch. App., 204), and the question we have to decide is whether we ought to infer in this case from the receipt of interest such a giving of time as would discharge the surety. There was no intention to discharge him, and we can only give the surety his discharge if it is necessary to do so in order to do justice between the parties.

For these reasons it appears to me necessary to examine very carefully the grounds upon which the surety is discharged when he is discharged. Now, the most recent case on the subject to which we have been referred is that of the Oriental Financial Corporation *vs.* Overend Gurney and Co.; and as this case has been argued on both sides entirely upon the principles of English law, and as that case was decided by very high authority, our decision would ordinarily be governed by it.

In that case it is laid down as the true explanation of law to be applied in such cases, that "if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety, you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal." And then it is added that it is plain that this is the right explanation of the law, because "it is competent to the creditors to reserve all their rights against the surety, in which case the surety is not discharged; and for this reason, that the contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal;" and

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at end of the judgment it is said "The defendants would have freed themselves from all difficulty whatever by reserving their rights against the plaintiffs."

Now, if this be the true *ratio legis*, I should certainly feel difficulty in saying that the surety was wholly and absolutely discharged by the acceptance of interest in advance from the principal. An undertaking by the creditor not to sue the principal debtor during the period in respect of which interest has been paid is implied, because otherwise, as Lord Lyndhurst points out in Blake *vs.* White, the injustice would follow that the creditor might put the interest into his pocket and next day sue the principal. But we are asked to infer from the acceptance of interest in advance, not only a suspension of the right to sue the principal, but an absolute discharge of the surety. Now, if (as it seems to be put in the Oriental Financial Corporation *vs.* Overend Gurney and Co.) the creditor was prevented from suing the surety, only because his so doing would be a breach of the contract with the principal, it seems to me that the only inference which in reason or justice could be made would be, not that the surety was discharged altogether, but that the right to sue him was suspended for the same period as the right to sue the principal was suspended; so that the surety might not, by being sued during that period, be turned upon the principal.

But on a reference to some of the earlier authorities, most of which are quoted and recognised in the Oriental Financial Corporation *vs.* Overend Gurney and Co., I am satisfied that the rule of law by which the surety is discharged does not rest exclusively on a consideration of the rights of the principal debtor, but upon a consideration of the rights of the surety himself. It seems to me, in the first place (I say it with the greatest deference) that the judgment in the Oriental Financial Corporation *vs.* Overend Gurney and Co. does not quite correctly state the opinion of Lord Cranworth in Owen *vs.* Homan. What Lord Cranworth said was not simply that the rights against the surety could be reserved, but that he thought "it must be competent for a creditor to contract with his principal debtor to give him time, so far as he can lawfully and effectually do so without prejudicing his right against the surety." This was said by way of protest against an opinion which appears to have been expressed by Lord Truro in the Court below that a creditor could not reserve his rights against the surety. But the observations and counter-observations of those learned Judges must be taken with reference to the sort of reservation which had actually been made in that case. The contract by which time was given in that case provided that nothing therein contained should discharge the sureties, but whilst providing that the creditor would not take any proceedings against the principal during the period specified, these important words were added, "except at the instance or request of the sureties." It was, therefore, not merely a reservation of the creditor's right against the surety, but a reservation of their mutual rights,—the right of the creditor to compel the surety to pay the debt, and the right of the surety to compel the creditor at any time to sue the principal debtor.

This at once suggests a doubt whether the principle on which the surety is discharged is correctly, or at any rate, fully stated in the Oriental Financial Corporation *vs.* Overend Gurney and Co., and I think the very authorities referred to in that judgment do introduce another and a very important element. I find that in Oakley *v.* Pasheller, Lord Lyndhurst says "The principle of law is this, that where a creditor gives time to the principal, there being a surety, without any communication with the surety and without the consent of the surety, it discharges him from liability, because it places him" (*i e., the surety*) "in a new situation and exposes him to risks and contingencies which he would not otherwise be liable to;" and the Master of the Rolls had given a similar reason, namely, that *the surety* is thereby prejudiced. And so in another case to which the Lord Chancellor refers—Samuell *vs.* Howarth—Sir William Grant says "The surety is held to be discharged, for this reason, because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract."

The principle is explained in the same way by Mr. Justice Williams in Strong *vs.* Foster, 25 L. J., C. P., 111, where he says—"The surety has a right to say to the principal creditor, 'I have reason to believe that the debtor is in insolvent circumstances; you should sue him, or allow me to do so in your name.' Then if the principal creditor said, 'I cannot sue him, because I have bound myself to give him time,' that would discharge

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the surety," and this explanation was adopted by the Court of Queen's Bench in Pooley *vs.* Harradine, 26 L. J., Q. B., 160.

These cases put the principle upon a very clear and intelligible basis, that the surety is discharged, not only because the principal debtor would be prejudiced by proceeding against the surety, but because the surety is prejudiced by the loss of his right to proceed against the principal debtor; and this fully accords with the opinion intimated in Owen *vs.* Homan, namely, that if with the assent of the principal debtor this right of the surety is reserved by the creditor, then the surety, not being prejudiced, is not discharged.

I do not of course mean to say that the principle exactly as stated in the case of the Oriental Financial Corporation *vs.* Overend Gurney and Co. has not been so stated by other authorities. It is so stated in a note to Lewis *vs.* Jones, 4 B. and C., 515, which is frequently quoted, and by Lord Eldon in English *vs.* Darley, 2 B. and P., 61, and it is to be found in various text books. Nor can there be any doubt whence this statement of the principle has been derived. It is almost a literal translation of a passage in the Digest of Justinian,—*Quod dictum est, si cum reo pactum sit ut non petatur, fidejussori quoque competere exceptionem; propter rei personam placuit ne mandati judicio conveniatur* (Digest Lib. II., Tit. XIV., 32.) And as to this it is further said—*Debitoris conventio fidejussoribus proficiet, nisi hoc actum est ut duntaxat a reo non petatur; a fidejussore petatur; tunc enim fidejussoe exceptione non utetur* (par. 22 of the same title.) But this is said of a contract wholly different from a contract of suretyship. The creditor here alluded to was under no obligation to pursue the remedies of the surety against the principal debtor, and was not, therefore, bound to pay any regard to the rights of the surety in his arrangements with the principal debtor. If, therefore, the creditor gave time to the principal debtor, the surety could originally take no advantage of it, but afterwards he was allowed to do so *propter rei personam, i. e.*, for the sake of the principal debtor, because otherwise the principal debtor (*reus*) would be prejudiced; for should the surety be sued by the creditor, he would then be able to sue the principal debtor at once, though the time given had not expired. But if the rights of the creditor to sue the surety had been reserved in the contract to give time, then as the principal debtor could not complain, so neither could the surety, and the surety was liable just as before. This is no doubt exactly the principle laid down in the Oriental Financial Corporation *vs.* Overend Gurney and Co., but it is applied to a transaction of an essentially different kind, and with a wholly different result, namely, that the remedy against the surety is not extinguished, but suspended.

Bearing in mind and applying the principle as it is explained in Samuell *vs.* Howarth, and Strong *vs.* Foster, and, I must say, as it seems to me, though, perhaps, not quite so clearly in Oakley *vs.* Pasheller also, there is, I think, little difficulty in disposing of the present case. The creditor had accepted interest in advance from the principal debtor, and he had thereby, not only put it out of his own power to sue the principal debtor for a certain period, but had also put the principal debtor in a position in which it would be a hardship that he should be sued by any one at all during that period. But though all that the principal debtor could require us to say upon this would be that the rights of the surety against him should also be suspended, the surety could not be thus satisfied. The creditor has no right to put the surety, without his consent, in a position in which he cannot exercise his rights against the principal debtor at any time he chooses to do so. Nor can we say the rights of the creditor against the surety are reserved. A simple reservation of the rights of the creditor would not be sufficient. The surety's rights must also be reserved. But that is excluded by the acceptance of interest, for no one would pay interest in advance unless he was secure against being sued either by the creditor or the surety. The surety, therefore, whose rights have been interfered with by the voluntary act of the creditor, without his consent, has a right to say that he is discharged.

It may, perhaps, appear unnecessary for me to have discussed this case at so great a length, seeing that I arrive ultimately at the same conclusion as the Chief Justice. It must, however, be acknowledged that the case before us is a striking example of the serious consequences of ignorance upon this subject; and as the law upon it is not very easy to discover, I have thought myself justified in making this endeavour to ascertain how it really stands.

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The 31st August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Markby, *Judge.*

Act V of 1866—*Promissory Note—Consideration—Amendment of Plaint — Principal and Agent.*

Appeal from the judgment of the Hon'ble A. G. Macpherson, exercising the ordinary original civil jurisdiction of the High Court.

C. W. Joseph (Plaintiff) *Appellant,*

versus

E. R. Solano (Defendant) *Respondent.*

Mr. Lowe and *Mr. Fergusson* for the Appellant.

Mr. Jackson for the Respondent.

In a suit under Act V of 1866 on a promissory note part of the consideration for which was legal and part illegal, HELD (*per Couch, C.J.,*) that plaintiff could not sue on the note, but that he might amend his plaint and recover so much of the consideration as was not illegal.

The agreeing not to enforce a contract which is void for illegality is an illegal consideration, and the contract is void.

An agent who has sold goods for his principal and received the price is bound to pay it over to his principal, although the contract of sale is illegal and void.

THE facts of this case are set forth in the judgment appealed against, which was as follows :—

Macpherson, J.—This action is brought on two promissory notes given by the defendant to the plaintiff. The connection between these parties began in July last, when the defendant entered into an agreement to take the plaintiff's horse "Bridesmaid" on what are called "racing terms." That agreement was reduced into writing, and is set out in the 2nd paragraph of plaintiff's written statement. It was further arranged that "Bridesmaid" should be trained by Joseph, and that Joseph should charge Rs. 60 a month for training her. Shortly after, five other horses belonging to the defendant were made over to the plaintiff to be trained.

Race meetings took place at Barrackpore and Sonepore at which some of the defendant's horses ran, and at which others were present. After the Sonepore meeting, and after the parties had returned to Calcutta, the defendant on the 22nd of December 1871 gave to the plaintiff a document which is called a *mortgage* of his horses, in which he says :—"As security for the payment by me to you of the following sums," and there are set out five items (one of which is "balance of bets and lotteries, Rs. 1,149") which make a total of Rs. 4,456 ; "and in consideration of your advancing on my account the sum of Rs. 2,550 as deposit in the matter of the reference from Meerut, and also such further sums (not exceeding in the whole, together with the sums above-mentioned, the sum of Rs. 10,000) as may be necessary to pay for entrances, I hereby declare that you shall as from this date hold my five race horses—'Rising Star.' 'Velona,' 'Pirate,' 'Sulimau,' and 'Sultan'—as mortgagee in possession thereof, and I hereby charge the same horses with the payment at the expiration of one week after the last race of the first Calcutta Race Meeting of all moneys (not exceeding as aforesaid) at that period due by me to you, and I authorize you, in the event of my making default in the payment of such moneys at the time aforesaid, to sell the said horses, or any of them, either by public or private sale, and subject to such conditions, and generally in such manner as to you seems proper." Upon receiving this letter of hypothecation, which was signed immediately before the beginning of the first Calcutta Race Meeting, the plaintiff paid to the Secretary of the Calcutta Races Rs. 2,000 on the defendant's account, and thereby enabled the defendant's horses to run, which they otherwise could not have done. The defendant now makes very light of this document, and says that he never admitted the correctness of Joseph's accounts, or of any one of the items mentioned in the letter of hypothecation, although he undertook to pay them at the end of the first Calcutta Race Meeting. However little the defendant may think of his own word—and he seems to me to think very little of it—I am bound to attach, and do attach, great weight to this document which he signed deliberately after it had been for about a fortnight in his possession. It is not to be forgotten that by signing it he induced the plaintiff to pay Rs. 2,000 for him to the Secretary of the Calcutta Races, and thereby enabled his horses to run at the first meeting. The correctness of the items in the accounts has been gone into before me. Strictly speaking, their correctness or incorrectness is immaterial for the purposes of this suit. But they have been in some degree discussed ; and the result is that, while each item has been sworn to by the plaintiff, the incorrectness of no one of these items has been shown in any degree by the defendant. I have no hesitation in finding as a fact that, when Solano signed the letter of hypothecation

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(although he may before have raised some objections), he agreed to accept the items mentioned in it as correct. Under the circumstances, it is impossible for me to listen to him when he comes here and says that he meant nothing by it and that he was forced into signing it.

The first Calcutta Race Meeting came on, and fresh accounts arose between the parties. Shortly before the expiry of the time fixed in the letter of hypothecation, the plaintiff produced his accounts, including his bill for the keep and training of the horses up to the end of December 1871. This account was rendered on the 15th of January, and in it were included the items specified in the letter of hypothecation, besides many others. On the general balance of that account of the 15th of January (including the items in the letter of hypothecation), there appeared to be due to Joseph the sum of Rs. 6,784. When this account was rendered, the defendant took exception to several of the charges, being principally the extra charges in respect of horses under training, and certain sums said to have been paid by the plaintiff to jockeys who rode the horses at races. The defendant disputed the correctness of the accounts; and I think it probable that, on the evening of the 15th of January, these accounts were not finally settled and that the defendant did not then say he would pay the balance claimed. On the contrary, I believe that when they parted on that evening the accounts remained unsettled. On the next day, the 16th of January, the plaintiff, early in the morning, made an infructuous attempt to get the accounts settled. Failing in that, he went to his attorneys and got a letter from them to the defendant to the effect that, as he had not paid according to the terms of the letter of hypothecation, the plaintiff would sell the horses on the following Saturday. That letter was given by the plaintiff to the defendant at Hunter & Co.'s stables. What actually passed between the plaintiff and the defendant on that occasion, is really of little importance; for whatever it was, the parties were substantially left in exactly the same position as if nothing had been said on the delivery of that letter. Next morning, an advertisement appeared in one of the daily papers, stating that the horses would be sold by Hunter & Co. on the following Saturday. In the course of that day, the 17th of January, the defendant sent for the plaintiff, and they met in a room at the Great Eastern Hotel. The result of some negotiation was that the defendant wrote a letter addressed to the plaintiff, which (as it now stands) is as follows:—

"In consideration of your withdrawing the advertisement anent the sale of my horses and withholding their sale until four days before the commencement of the second Calcutta Race Meeting, I will give you a promissory note for the balance of your claim.

"The claim to be satisfied in the beginning of the second meeting."

This letter being written, there arose a discussion as to what the balance was, the accounts not being at the moment actually in the hands of either party. The plaintiff said it was something under Rs. 7,000—about Rs. 6,900 or Rs. 6,800—and proposed that Solano should give a promissory note for Rs. 7,000, and promised that he (the plaintiff) would give him credit in the subsequent account for the difference between the Rs. 7,000 and the actual balance due on the account which he had rendered on the 15th January. There is some conflict of evidence as to the details of what passed at the Great Eastern Hotel, but I believe that the story told by the plaintiff is substantially true. I do not doubt that the giving of the promissory note for Rs. 7,000 was simultaneous with the giving of the letter of the 17th of January set out in the written statement. The defendant says that that particular letter was given on that day. The plaintiff states that the letter set out is not the actual letter given when the note was signed, but an amended letter given some days after. If the note for Rs. 7,000 went out of the Great Eastern Hotel with Joseph along with the original letter written by Solano, it was brought back by Joseph and was again taken away by him with the letter now produced,—which letter and the final giving of the promissory note for Rs. 7,000 I find were practically one transaction.

The consideration for the promissory note of Rs. 7,000, as it appears to me, was this, that Solano, in consideration of the plaintiff's withdrawing the advertisement of the sale of the horses and withholding the sale until four days before the beginning of the second Calcutta Race Meeting, agreed to admit the correctness of the balance shown in the accounts which had been delivered, and as to which there had been a dispute on the 15th of January, and to take that balance roughly at Rs. 7,000, on the understanding that the difference between Rs. 7,000 and that balance should be credited to him in his current account. The plaintiff has made a mistake, and is confused as to the time when the letter

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originally written by the defendant at the Great Eastern Hotel was altered ; but except as to that, I have no doubt what he says is substantially correct.

That was on the 17th of January. A few days after it was found that a mistake had been made in the account delivered on the 15th, which showed the balance of Rs. 6,784. The mistake was in an item of Rs. 744 for which the plaintiff gave the defendant credit, and the defendant admitted that a mistake had been made and gave the plaintiff another note for Rs. 744, the sum so over-credited. This was some days after the note for Rs. 7,000 had been given ; but we still find the defendant admitting that Rs. 7,000 were due to the plaintiff, and that it was right and proper that he should be further secured by an additional note for Rs. 744.

Having received the note for Rs. 7,000, the plaintiff carried out his part of the agreement and withdrew the advertisement and withheld the sale of the horses, and thus the defendant's horses were enabled to run at the second Calcutta Race Meeting.

On the 28th January the defendant gave the plaintiff a cheque for Rs. 4,000 in part payment of the note for Rs. 7,000, but told him not to present it for three or four days, as funds were daily expected to arrive to meet it. When the cheque was presented some four days afterwards, it was dishonored. Thereupon a variety of negotiations took place between the parties at Messrs. T. Smith & Co.'s stables, and in some of those negotiations Mr. Dover took part. So far as I can see, Mr. Dover did his best honestly to arrange for all parties ; and it is very much to be regretted that they did not lay their whole case before him and have it settled by him. It is perfectly clear to me that the whole of the facts were never placed before Mr. Dover. For example, he was never aware of the second note for Rs. 744, which was as much given to secure the original balance as was the note for Rs. 7,000. There is no doubt that both the plaintiff and the defendant considered throughout the whole of these negotiations that the plaintiff was entitled to be paid the Rs. 744 just as much as the Rs. 7,000 ; and it stands to reason that the plaintiff never could have intended to bind himself to withdraw the suit he had instituted in this Court, unless Solano provided for the payment of this note for Rs. 744 also. Mr. Dover evidently is correct when he says that there was a general talk at Messrs. Smith & Co.'s stables about the suit being withdrawn ; but I have no doubt that, between the plaintiff and the defendant, there was also discussion as to the payment of the Rs. 744. I do not consider it proved that there ever was any binding or conclusive agreement of any kind come to at Messrs. Smith & Co.'s stables ; but constant proposals were made and constant promises were given, but nothing was really done, except the payment of Rs. 3,085 by Mr. Dover. I further believe that the plaintiff is correct in saying that in the later negotiations it was also part of the arrangement that the further sum of Rs. 1,000 (as representing the final balance up to date due to him) should be provided for. The plaintiff has sworn that on the last day of their negotiations, the 14th or 15th of February, he and Solano went through their subsequent accounts together, and that each cast up the items separately and came to much the same result, *viz.*, a balance of about Rs. 1,030 in favor of the plaintiff, who, on Solano's suggestions, agreed to consider it as Rs. 1,000. I accept the plaintiff's story as to this absolutely true. It is strongly corroborated both by Mr. John and by Mr. Dover. Mr. John says that he understood at the time from the parties that there was a balance of about Rs. 1,000 in favor of the plaintiff ; and Mr. Dover says very much the same. They also say that both parties went away, and that they understood in a general way that the defendant was to pay the plaintiff that amount somehow during that day. The defendant has denied that he entered into any calculations on that day, though he admits that he knew he owed plaintiff about Rs. 1,000 on the subsequent account, and that he promised the plaintiff to pay it when he could. All I can say is that the plaintiff has sworn that he and the defendant did go into calculations on that day and arrive at a balance, and both Mr. Dover and Mr. John practically say the same thing ; and these statements are certainly supported by the probabilities of the case.

If these negotiations ever resulted in anything that could be called a final agreement, I think that the defendant never carried out the terms agreed upon. Mr. Dover, as well as the plaintiff and the defendant, speaks to a memorandum prepared about the 8th of February. Mr. Dover says that, on that occasion when certain terms were proposed by defendant to him, he said that if there were to be any further negotiations in which he was to take part, the terms must be put down in writing, and that the defendant then drew up the memorandum of which Dover subsequently made a note, of which he afterwards made

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Joseph take a copy. That note is as follows :—

"Solano to pay Rs. 915 *down* (balance of "cheque for Rs. 4,000) ; for balance, namely, "Rs. 3,000, will grant a promissory note at "6 months, with interest at 10 per cent. "Accepted by T. Smith & Co. on Joseph "giving up all documents, promissory notes, "and horses to T. Smith & Co." So that Joseph was entitled to be paid the Rs. 915 down, and neither Dover or any one else had a right to withhold that sum on the ground that the horses, documents, and papers were not given up. He was entitled to get the Rs. 915, and to keep the horses until the acceptance was given. But none of these negotiations were ever converted into a binding agreement, for the defendant never acted up to his promises.

In this suit the items of the account making up the balance for which the promissory notes were given were not properly in issue. I may say, however, with reference to the dispute as to the extra charges for training, that there is nothing to lead me to suppose that the plaintiff was not entitled to make those charges. Messrs. Hunter & Co. make them. Mr. C. Martin, a gentleman of great experience in racing matters, says the charges are all perfectly fair (except perhaps the charge for a pail), and Mr. Wilson gives the same evidence. It may be that Messrs. Smith & Co. do not make these charges; but there is clearly nothing unusual in their being made. As to the dispute about the "winnings" of "Bridesmaid," I think that propably the entrance and jockey's fees should have been first deducted from the gross winnings, and then the balance or net winnings divided between the parties. However that may be, the defendant agreed to accept the account as made up by the plaintiff; and I am bound to say that I see no evidence of fraud or other special misconduct on the part of the plaintiff. There may have been looseness of dealing on the part of the plaintiff; but it is more than equalled by the greater looseness on the part of the defendant. The whole case shows the utter unfitness of a Court of Law to deal satisfactorily with these racing transactions. On the whole, I find that these debts were admitted by the defendant to be due after full opportunity for consideration; and I cannot see that he has any excuse for saying that he was unfairly dealt with.

But there is yet another question in this case, the question, namely, whether the plaintiff is entitled to have the assistance of a Court of Justice to enable him to recover those debts. In other words, are these two promissory notes bad because given for a consideration which was in part illegal? There is no doubt that the balance of Rs. 6,784, appearing on the account rendered on the 15th of January, is the balance in respect of which the note for Rs. 7,000 was given; and in that account there are at least two items which on the face of them show an illegal consideration. The one is "balance of bets and lotteries at Sonepore, Rs. 1,149," an item which also appears in the letter of hypothecation; the other is "four tickets in Secundra Raffle, Rs. 64." There is no doubt that these items are absolutely illegal under the law relating to lotteries in India.

Mr. Lowe says that I must put out of sight altogether the question whether the original consideration was legal or not, and must treat the case as one in which the promissory notes were given merely to prevent the sale of the horses. But it is impossible for me, on the facts, to take this view of the case. When the plaintiff put forward his advertisement, he was claiming a particular balance shown on an account which included these illegal items; and, in order to obtain the payment of that balance, he advertised the horses for sale. The defendant said if you withdraw your advertisement, I will pay that balance. The promissory note was given, not merely because of the existence of the advertisement, but because of the advertisement and the existence in Solano's mind of the knowledge that he owed the plaintiff some such balance as he claimed. The advertisement was, no doubt, the immediate motive power which made him give those notes. But the real agreement between the parties was that Solano would admit the accounts to be correct and would pay the balance shown by them to be due from him, if the sale was stopped.

The illegality of the consideration extends to but a portion of the claim; but the promissory notes were given as a security for the whole balance: consequently part of the consideration is illegal, and I am bound to hold that the notes as a whole are tainted with illegality, and that no action is maintainable on them.

The case of Bubb *vs.* Yelverton (9 L. R., Eq., 471) was referred to. It goes far in favor of the plaintiff's contention no doubt, but it is distinguishable from this case in several respects. In that case a formal bond had been given, and the consideration for that bond was, not the racing debts of the

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Marquis of Hastings, but the abandonment by his creditors of proceedings instituted against him before the Jockey Club. There is also nothing in that case to show how the accounts were made up, or how the sum was arrived at which was secured by the bond. Moreover, the circumstances in Bubb *vs.* Yelverton were altogether peculiar. Sir Roundell Palmer, who supported the bond, argued thus :—" It will be contended on the other side that this bond was given to secure a racing debt, and is void : but we say, in the first place, that the consideration for the bond was the abandonment by his racing creditors of proceedings against the Marquis of Hastings before the conventional tribunal of the Jockey Club, and, in the next place, that a wagering contract is not illegal, and that a bond given to secure a wager is not illegal, but simply voluntary ; and as all the creditors of the Marquis for valuable consideration have been paid in full, we do not care to claim any higher position ;" and the Master of the Rolls in giving judgment says—" But here there was a perfectly good consideration quite ulterior to, and independent, of any racing debt. It is quite impossible to read the evidence without seeing that it was given, not to pay racing debts, but to avoid the consequences of not having paid them." It is to be noticed further that in Bubb's case racing debts only are mentioned : and it is not stated that any of the debts arose out of lotteries and were therefore illegal.

The suit is dismissed, but without costs.

The plaintiff and defendant both appealed against the above judgment. The plaintiff's objections were as follow :—

1*st.*—For that the learned Judge erred upon the evidence in holding that part of the consideration for the promissory notes for the amount of which the said action was brought was illegal.

2*nd.*—For that the learned Judge ought to have held upon the evidence that the consideration for the promissory notes was the withdrawal of the advertisement and withholding the sale of the respondent's horses by the appellant until four days before the second Calcutta Race Meeting, and that such consideration was a good and valid consideration entitling the appellant to recover from the respondent the amount of the said promissory notes, and that the learned Judge erred in not decreeing accordingly.

3*rd.*—For that the learned Judge erred in not holding and finding upon the evidence in the cause that there was a good and valid consideration for the promissory notes entitling the plaintiff to recover the amount thereof from the respondent.

4*th.*—For that the decree of the learned Judge is not supported by the evidence in the cause.

5*th.*—For that the judgment of the learned Judge, so far as the same relates to the dismissal of the appellant's suit againt the respondent, is erroneous and contrary to the evidence, and that the learned Judge erred in dismissing the appellant's suit, and ought to have made a decree against the respondent for the amount claimed.

The defendant took the following objections by way of cross-appeal :—

1*st.*—That the learned Judge erred in holding that the accounts between the plaintiff appellant and the respondent, or any part of them, were settled either at the time of the respondent's signing the letter of hypothecation in the pleadings mentioned, or at the time of the making of the promissory note for Rs. 7,000.

2*nd.*—That the learned Judge should have found on the evidence that the promissory note for Rs. 7,000 was given by way of a payment on account generally, and not as an admission in any way of the correctness of the accounts rendered by the plaintiff.

3*rd.*—That the learned Judge erred in holding that no binding agreement was come to at the office of Thomas Smith & Co., and erred also in holding that the respondent had not performed his part of the agreement.

4*th.*—That the learned Judge should have dismissed the plaintiff's suit with costs.

Mr. Lowe for the plaintiff (appellant) relied on the case of Bubb *vs.* Yelverton (9 L. R. Eq., 474). He contended that the Rs. 1,149 was not the balance of bets made by the parties themselves, or the result of any contract entered into by the plaintiff on account of any bet. It was money which an agent held. He admitted that if part of the consideration of a promissory note was illegal, the whole note was vitiated. [*Couch, C.J.*, observed, with reference to the consideration stated in the plaint, that the plaint did not disclose the consideration.] Before the Lower Court, the defendant came in and got leave to appear and set aside the decree, and the plaintiff then obtained permission to file a written statement in which the consideration was stated. The plaint and the written statement together showed the consideration, and should be taken together. [*Couch, C.J.*—I should think the practice should be that when a defendant obtains leave to come in and defend, the

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parties should be ordered to file written statements, and the plaintiff's written statements should be treated as part of his plaint.]

Mr. Lowe then referred to Act V of 1844 as regards lotteries, and to Act XXI of 1848 with respect to waging. As to the Rs. 1,149 made up of bets and lotteries, defendant himself says that he never received any part of that sum. The letter of hypothecation of 22nd December is a binding document. The consideration of it was the payment of certain moneys to the Calcutta Races for entrance fees. The onus to show that the Rs. 1,149 was for illegal consideration, lay on the defendant. If the whole of that sum was for betting, no suit could be brought. There were no bets between plaintiff and defendant. It represents the sum of money which you admitted in your hands (proceeds of betting and lotteries), and you promised to pay it to us. We have dealt on that footing, and I consider you are bound to pay it to us. It was merely a promise voluntarily made. The plaintiff never wished defendant to admit the correctness of the account, but to get him to pay the amount. As to the plaint not being properly worded, admits that is so, but under Act V of 1866 there is no provision for accounts. Defendant can set up an equitable defence, but his defence shows plaintiff is entitled to a decree for something. The decree should have been for the amount justly due. [*Couch, C.J.*—It is not an equitable defence. If it is an answer at all, it is an answer to the suit.] Defendant in his affidavit (paragraph 12) admits something is due. The agreement is a binding agreement, and under it I could have sold the horses. The consideration for the second note was the postponement of the sale of the horses, and the defendant cannot now say that the consideration was partly illegal and therefore void.

Mr. Jackson, for the respondent, contended that, if money was advanced by a person for an illegal purpose, though he had nothing to do with it, the money could not be recovered. He referred to Cannon *vs.* Bryce (3 Barnewall & Alderson, 179;) Act XXI of 1848, Act VIII of 1867. [*Couch, C.J.*—Mr. Lowe admits that if part of the consideration is illegal, the whole is illegal.]

Mr. Jackson then proceeded to comment on the evidence. He cited Fisher *vs.* Bridges (2 Ellis & Blackburn, 118); S. C. (3 Ellis & Blackburn, 642); Section 3 Act V of 1844.

As to the Rs. 774, out of that Rs. 480 was in respect of a lottery account; the second note was in substitution for the first and was therefore illegal, the first being illegal—Hay *vs.* Ayling (16 Q. B., 423); Treston *vs.* Jackson (2 Starkie, 237); Wynne *vs.* Callander (1 Russell, 293); and Geere *vs.* Mare (2 Hurlstone & Coltman, 339).

Mr. Lowe (in reply).—Mr. Jackson could not answer many of the questions put by your Lordships as to the second promissory note, whether there was any consideration for it. The point in the case was suggested by the Chief Justice during the argument. I am required to show that I had a right to sell, and that the mortgage-deed was a good and valid document as against the defendant. Mr. Jackson has ignored what was the true consideration for that mortgage-deed. The true consideration for it was not those items making up Rs. 4,456. With reference to that part of the case, Macpherson, J, said—"It is not to be forgotten that by signing it he induced the plaintiff to pay Rs. 2,000 for him to the Secretary of the Calcutta Races, and thereby enabled his horses to run at the first meeting." Is not that good consideration? And is not this case on all fours with Bubb *vs.* Yelverton (9 L. R., Eq., 471)? [*Couch, C.J.*—All that he did was merely to lend a sum of money. He was not to abstain from exercising any powers as Yelverton did.] It was an advance of money. The defendants attempt to say that a portion of those items are sums of money for which we could not sue in a Court of Law. What Macpherson, J., finds, is, that this was the case of an account stated in which two gentlemen come together and deliberately settle the account themselves, and then put in certain items into the account as due by Solano.

Then, as to whether we had a right to sell, we have a power of sale in that document, and the consideration was Rs. 2,000, and that if you do not withdraw this horse, we will exercise the power to sell. The withdrawal of that advertisement was a good consideration. The Rs. 7,000 was cash. [*Couch, C.J.*—That would make no difference.] It was given as payment of the amount which we claim to be due to us, not that it was a payment subject to settlement of accounts. That, it seems to me, was a perfectly good consideration. If I had no right to sell at all, I am quite willing to concede that it was no consideration. Supposing I claim a sum of money due from another to me, and he denies his indebtedness to me, and I say, unless you pay I will take out proceedings against you: suppose then he gives me a promissory note, and I sue upon that note, it will be no

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answer for him to say that there was no consideration for the promissory note, because the debt was not due by him at all. In Cook *vs.* Wright (30 L. J., Q. B., 321,) plaintiffs' trustees, under a local Act, called on the defendant, who was agent of certain houses, to pay certain expenses chargeable under the Act on the owner. The defendant told the plaintiffs that he was not owner, but that B was, and that B, and not he, was liable. The plaintiffs *bonâ fide* believing the defendant to be personally liable, threatened to take proceedings against him to enforce payment. In order to avoid the expense and trouble of legal proceedings, he agreed to a compromise, and the question was, as Blackburn, J. put it, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted. It was held that there was good consideration for the note, and that the plaintiffs were entitled to recover. I have referred your Lordships to this case to show that it does not follow that when a person makes a claim *bonâ fide*, and the other party gives a promissory note in satisfaction of that claim, it is no defence to him to say that there is no consideration on the face of that promissory note. There is a case in which it was held that a guarantee is not a binding document—Haigh *vs.* Brooks (10 Ad. & El., 309). In this case it was held by the Court of Queen's Bench, on demurrer, that the words of a guarantee did not necessarily imply a part advance; and that, if they left it even doubtful whether a future advance was not guaranteed, a promise made in consideration of giving it up was valid. Where a man makes a claim for payment, and the other party gives him a promissory note in part payment, it is no answer for him to say that there was no consideration. I submit that this part of the case was lost sight of by the Court below; that the consideration for the mortgage-deed was good consideration; that we were induced by defendant's promise to withdraw that advertisement, to abstain from doing what we desired; and that our having done so was a good consideration.

Taking another view of the case, the defence in this case. The suit was filed under the Bills of Exchange Act V of 1866. The defendant comes in and urges that after institution of the suit, but before decree, a certain promise was given which made it inequitable for the plaintiff to proceed, and upon that allegation His Lordship gives him leave to defend. Upon going into the case, His Lordship upon the evidence finds in favor of my client, and, instead of going on to give him a decree, has dismissed the suit. Even if His Lordship was right as to the Rs. 7,000, what I submit he ought to have done under the Code of Civil Procedure, was, to have struck out those items and given us a decree for an account. When His Lordship gave leave for the suit to be brought under Act V of 1866, the suit should have proceeded under Act VIII of 1859, and then if I could have shown that the consideration was good, I should have obtained a decree. This is a case of great hardship. [*Couch, C.J.*—The question of illegality, as I understand you, was not raised. There is no dispute between you as to that matter.]

As to costs, there is a cross-appeal. They say that there was a binding agreement and that the learned Judge should have dismissed the suit with costs. I submit that there has been no answer as regards the Rs. 7,000; and that as regards the Rs. 2,000, there was good consideration for it.

The Court took time to consider. Judgments were delivered as follows on the 31st August:—

Couch, C.J.—This suit, which was brought on two promissory notes payable on demand for Rs. 7,000 and Rs. 744, was dismissed by Mr. Justice Macpherson, on the ground that part of the consideration for them was illegal, and the plaintiff has appealed against his decree.

The case of the plaintiff as to the note for Rs. 7,000 was, that in July 1871 a written agreement was entered into between him and the defendant, by which the defendant agreed to take the bay English mare "Bridesmaid" on racing terms, which are stated in the agreement; that all winnings were to be divided equally between the parties, and the plaintiff was to have the option of claiming a fourth share of any lottery in which she might be bought by the defendant, or on his account. It was at the same time agreed that the plaintiff should act as trainer to "Bridesmaid," and it was subsequently agreed that he should train and keep several horses belonging to the defendant. Various sums of money having become due to the plaintiff—amounting, as he said, to Rs. 4,456-6—and the defendant having applied to him to advance him Rs. 2,550, the defendant wrote to the plaintiff the following letter:—

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"*December* 22, 1871.

"SIR,—As security for the payment by me to you of the following sums, *viz.*:—

	Rs.
½ Bridesmaid's winnings at Sonepore...	1,180
½ value of three cups ...	750
Balance of bets and lotteries ...	1,149
Balance of bills up to end of November	1,157
½ Bridesmaid's winnings at Barrackpore,	220
	Rs. 4,456

and in consideration of your advancing, on my account, the sum of Rs. 2,350 as a deposit in the matter of the reference from Meerut, and also such further sums (not exceeding on the whole, together with the sums above-mentioned, the sum of Rs. 10,000), as it may be necessary to pay for entrances, I hereby declare that you shall, as from this date, hold my five race-horses, 'Rising Star,' 'Velona,' 'Pirate,' Suliman,' and 'Sultan,' as mortgagee in possession thereof, and I hereby charge the same horses with the payment, at the expiration of one week after the last race of the first Calcutta race-meeting, of all moneys (not exceeding as aforesaid) at that period due by me to you, and I authorize you, in the event of my making default in payment of such moneys at the time aforesaid, to sell the said horses, or any of them, either by public or private sale, and subject to such conditions, and generally in such manner, as shall to you seem proper.

I am,

SIR,

Your obedient servant,

(Sd.) E. R. SOLANO."

Upon receiving this letter, the plaintiff advanced Rs. 2,000 for entrances by a cheque which he authorized the Secretary of the Calcutta Races to fill up for such sum as was required. The "balance of bets and lotteries" appeared by a paper signed by the defendant and annexed to an affidavit filed in the suit, to be the plaintiff's share of bets and lotteries collected by the defendant, after deducting losses. The plaintiff's evidence was, that the bets and lotteries were all in the defendant's name.

On the 15th of January last, the plaintiff gave to the defendant an account which is set out in his written statement. It showed a balance due to him of Rs. 6,874-10-1 and Rs. 1,149, balance of bets and lotteries, and two items as follows:—"Four tickets in the Secundra Raffle, Rs. 64;" "one do. do. do. for Mr. Wollen, Rs. 16." These being in the account under the date of November, are included in the Rs. 1,157, "balance of bills up to end of November," in the letter of the 22nd December 1871. On the 16th of January, the following letter was written by the plaintiff's Solicitors:—

"*Calcutta, January* 16, 1872.

"SIR,—We are instructed by Mr. C. W. Joseph to give you notice that, as you have not paid the amount due to him in the terms of the document signed by you on the 22nd ultimo, he will, in pursuance of the power vested in him by the same document, sell your five race-horses by public auction on Saturday next.

"E. R. SOLANO, Esq."

On the 17th of January the horses were advertised for sale on the 20th, and on the same day the defendant wrote and gave to the plaintiff the following letter:—

"*January* 17, 1872.

"DEAR SIR,—In consideration of your withdrawing the advertisement anent the sale of my horses, and withholding their sale until four days before the commencement of the second Calcutta Race Meeting, 1872, I will give you a promissory note for the balance of your claim. The claim to be satisfied in the beginning of the second meeting."

The promissory note for Rs. 7,000, which is dated the 17th January, was then given, the plaintiff saying he would credit the defendant with the amount in excess of the balance due.

I cannot assent to Mr. Lowe's argument for the plaintiff that the consideration for the note was the withdrawing the advertisement and stopping the sale of the horses. That was the consideration for the promise in the letter of the 17th of January to give the note, but according to that letter the note was to be for the balance of the plaintiff's claim. That was the consideration for it. The payment of the note would satisfy the balance, and the plaintiff says he was to return the excess. Nor would the other view assist the plaintiff's case, for the balance of bets and lotteries, and the money paid for tickets in the lottery, are part of the consideration of the agreement of the 22nd December 1871.

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If the contract in the note is vitiated by that, the contract in the agreement is also vitiated by it. The agreeing not to enforce a contract which is void for illegality, is an illegal consideration, and the contract is void—Chapman *vs.* Black (2 B. & Ald., 588), Wynne *vs.* Callander (1 Russ., 293), and Hay *vs.* Ayling (16 Q. B., 423). The substituted contract stands in the same situation as the original.

Now, with regard to the Rs. 1,149, balance of bets and lotteries, the bets, by Act XXI of 1848, were void and could not be recovered, but the betting was not illegal. But by Act V of 1844, all lotteries not authorized by Government are declared common and public nuisances and against law. Therefore, that portion of the Rs. 1,149 which was won by lotteries was obtained by an illegal transaction. But it was not illegal for the defendant to receive the money, and, having done so, to pay the plaintiff his share or to promise to do so. An agent who has sold goods for his principal and received the price, is bound to pay it over to his principal, although the contract of sale is illegal and void—Farmer *vs.* Russell (1 B. & P., 296); and Bonsfield *vs.* Wilson (16 M. & W., 185). And where two persons joined in an illegal wager which they won, and the whole amount was paid to one of them, the other was held entitled to recover his share from the one who had received the whole—Johnson *vs.* Lansley (12 C. B., 468). It is said in that case that he is bound upon every principle of justice to pay it. I therefore think that the note is not vitiated by the Rs. 1,149 being part of the consideration for it. But a different rule is applicable to the money paid for tickets in the Secundra Raffle. That was money paid in the execution of an illegal purpose to obtain a share in what was declared by the Act to be a common and public nuisance, and against law. It is settled that money so paid cannot be recovered — Cannon *vs.* Bryce (3 B. & Ald., 179), and McKinnell *vs.* Robinson (3 M. & W., 434). And a note given for it is given on an illegal consideration — Amory *vs.* Meryweather (2 B. & C., 573).

The money paid for the tickets is but a small part of the consideration for the note, but it is quite settled that if the consideration is in part illegal the promise is wholly void. I am, therefore, of opinion that the plaintiff was not entitled to recover upon the note for Rs. 7,000.

But, then, the question arises whether he may not recover in respect of so much of the consideration for it as is not illegal. The suit was instituted under Act V of 1866, and the plaint is only for the money due on the notes, but all the facts are stated in the plaintiff's written statement. Mr. Justice Macpherson says that in this suit, the items of the account making up the balance for which the promissory notes were given, were not properly in issue; but upon the whole he finds that these debts were admitted by the defendant to be due after full opportunity for consideration, and he cannot see that he has any excuse for saying that he was unfairly dealt with.

In Mahomed Zahur Ali Khan *vs.* Mussamut Thakooranee Ratta Kooer (11 Moo. I. A., 468),* the Judicial Committee having held that, on the face of the plaint, no relevant case was made against the defendants, but that in a suit properly framed, if he proved his case, he would be entitled to a decree against one, and considering that a new suit would probably be met by a plea of the Act of Limitations, allowed the appellant to amend his plaint, so as to make it a plaint against that defendant alone for the recovery of the money due on a bond. They considered that the liability on the bond might be tried on the issues already settled, but they would not intimate any opinion upon them and the evidence, and remanded the suit for re-trial. Mr. Justice Macpherson having said that the items of the account were not properly in issue, I think we cannot now, if the plaint is amended, make a decree for the amount of the account, deducting the illegal items. We may allow the plaint to be amended, and an issue to be framed as to what amount is due to the plaintiff in respect of the consideration for the note. I think we have power to do this, and that it might have been done at the hearing if the plaintiff had applied for it.

The case of the plaintiff as to the note for Rs. 744, was, that in the account delivered on the 15th of January he had by mistake given the defendant credit for Rs. 744 more than he had received. It was in the item of "cash received from the Secretary of the Calcutta Races, balance of racing account." It was not illegal for the plaintiff to receive this money or to give the defendant credit for it, and there is no illegality in the defendant giving a note for what he has been credited with by mistake. It is true that, if the mistake had not been made, the balance

* 9 W. R., P. C., 9.

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for which the note for Rs. 7,000 was given would have been greater. The sum against which this was credited would have been included in the note, and as due upon it could not have been recovered because of the illegal part of the consideration; but this sum was not an illegal claim, and the defendant would be liable to pay it although the note could not be sued upon. The learned Judge seems to have treated the two notes as jointly forming a security for the whole balance after correcting the mistake, and to have considered that he was bound to hold that both were tainted with illegality. I do not think we are bound to do this. The illegal part of the consideration was in the first note, and need not be held to extend to the second. Justice certainly does not require this if the transaction admits of a different meaning. With regard to this note, I think the plaintiff is entitled to recover in the suit as now framed.

Upon the whole case I am of opinion that the decree dismissing the suit should be reversed; that the plaint should be amended by adding a claim for the consideration for the Rs. 7,000 note, and the case should be referred to a Judge to take the accounts and determine what is due to the plaintiff in respect of it. The plaintiff has partially succeeded in the appeal; but seeing that it might have been unnecessary if he had asked to have the plaint amended and sought to recover upon the consideration for the note, I think each party should pay his own costs of the appeal and of the hearing before Mr. Justice Macpherson.

Markby, J.—In this case I should be disposed to treat the three items in the account, that relating to shares received and those relating to tickets purchased in a lottery, as standing upon the same footing. The allowance of each of these items in the account, I must say, seems to me to stand precisely in the same relation to the original illegal act. It is not, however, very easy to deduce any very clear general principle from the decided cases by which it can be determined whether, where there has been an illegal contract and an illegal act done, a subsequent promise following thereon can be enforced. The subsequent promise is sometimes held to be "tainted" with the illegality and sometimes not. And the Judges appear to me to have determined in each case, according to their own judgment and discretion, whether the illegal act is so far separable from the subsequent promise as that the latter may be enforced. In one set of cases, to use the words of Buller, J., (1 B. & P., 299), the action is considered to be founded, "not on the illegal contract, but on a ground totally distinct from it." In the other set of cases, to use the words of Jervis, C.J., the new promise "springs from, and is the creature of, the illegal agreement." To which of these two classes does the present case belong? Did the promise contained in these promissory notes spring from, and was it the creature of, the original illegal agreements by the defendant to give the plaintiff a share in certain lotteries and to pay for tickets in them, or was it a separate agreement? Was it made by the parties in the character of offenders against the Lottery Act, or was it made in a wholly different character? Expressed at length, the agreement contained in the first promissory note may be stated thus—"Whereas you have trained, kept, and expended money upon certain horses belonging to me at my request, and whereas you have paid certain moneys to the Secretary of the Calcutta Races at my requests, and whereas you have paid for certain tickets in a lottery at my request, and whereas I have received certain sums of money for bets and lotteries on your account, for all which debts I mortgaged to you my horses, which horses you were about to sell, and whereas at my request you withdrew the advertisement for the sale, I promise to pay you Rs. 7,000." The original illegal agreement to give the plaintiff a share in the lotteries, and to pay for the tickets, is so far imported into these notes that, had that agreement not been made, defendant would probably not have allowed, nor would the plaintiff have claimed, the whole of the item of Rs. 1,190, or any part of the items of Rs. 64 and Rs. 16. But it does not seem to me that for this reason we are bound to say that the promissory notes spring from, and are the creatures of, an illegal agreement. No doubt, the illegal promise which has been made was in some sort one of the matters upon which the defendant based his promise to pay; but so it was in many of the cases in which the promises have been upheld.

As, therefore, I think the promissory notes are good and valid notes, it is not strictly necessary for me to say whether the plaintiff may now recover in this suit any portion of the claim in any other form. But, as a matter of fact, I do fully concur with the Chief Justice in thinking that, in the view which he takes of the notes, we can, and ought to, allow the plaintiff so to recover.

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The 2nd September 1872.

Present:

The Hon'ble W. Markby, *Judge.*

Court Fees' Act—Stamp Duty—Application for Review.

In the matter of

Prosunno Chunder Roy Chowdhry, *Petitioner,*

versus

Nubo Kristo Chatterjee, *Opposite Party.*

Baboo Anund Chunder Ghossal for Petitioner.

No one for Opposite Party.

Stamp duty paid in on a petition of the nature of an application for review, may be refunded where there is no final decision.

Note by the Deputy Registrar.—THE stamp law is silent as regards the refund of *excess* stamp fee paid in, or as regards the refund of stamp fee paid in by mistake.

In a matter on the Original side, where *excess* stamp fee had been paid in by an executor on a probate, the Board of Revenue, on the application of the executor for a refund of the excess, held that the law provided for no such refund.* (See note at foot.)

A Full Bench has, however, held (per the late Hon'ble Chief Justice, Sir Barnes Peacock)—"it appears to have been the object "of the Legislature that *where there has* "*been no final decision, and the stamp duty* "*paid on the petition of appeal has conse-* "*quently become ineffectual,* the party "should be entitled to a refund of the stamp "duty." (*Sevestre, Vol. IX, p.* 176.) †

As regards the particular matters now before the Court, it is presumed that the applications, though not directly for review, are of that nature, and may therefore be treated as falling under the purview of Section 15, Act VII of 1870.

Markby, J.—I see no reason why the stamp should not be refunded in this case on the authority of the case referred to.

* Since writing the foregoing, I find that the Government has directed, on a refereuce from Bombay, that excess stamps put in by mistake in matters of administration should be refunded. (See *Gazette of India* of 17th September 1872, page 782).

† 6 W. R., Misl., 65.

The 2nd September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Rent-suit—Civil Decree—Putnee Lease—Abatement—Cause of Action.

Case No. 113 of 1872.

Regular Appeal from a decision passed by the Deputy Commissioner of Maunbhoom, dated the 31*st January* 1872.

Rajah Nilmoney Singh Deo Bahadoor (Defendant) *Appellant,*

versus

Sharoda Pershad Mookerjee (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Baboos Oopendro Chunder Bose* and *Bhowanee Churn Dutt* for Appellant.

Baboos Sreenath Doss and *Bipro Doss Mookerjee* for Respondent.

A putneedar sued his zemindar and obtained a decree for abatement of the putnee rent, on the ground that the assets of the putnee fell short of the amount stated in the lease. While this suit was pending in the Civil Court, the zemindar brought a suit for the rent of two years upon the full jumma; and though the putneedar objected that his suit for abatement was pending, the Collector decreed the rent-suit in full. In execution, the zemindar recovered the full rent, and the putneedar then sued for a refund of excess payments and of the interest realized by the zemindar thereon.

HELD that the decree of the Revenue Court was superseded and modified by the decree of the Civil Court which was subsequently affirmed in appeal.

HELD that the plaintiff's cause of action accrued on the date on which the zemindar recovered from him rent in excess of what he was justly liable for, and also interest on such excess.

HELD (on reference to the decree) that the abatement was to take effect from the commencement of the putnee lease.

Kemp, J.—IN this case, the defendant, Rajah Nilmoney Singh, the zemindar, is the appellant, and Sharoda Pershad Mookerjee, the plaintiff below, putneedar, respondent.

It appears that the plaintiff, Sharoda Pershad, obtained a putnee from the zemindar, Rajah Nilmoney Singh, for lot Echar in Pergunnah Chellama, Chuckla Pachete. The assets of the putnee were stated in the putnee lease to be Rupees 6,720-15-14½ gundas. The putneedar brought a suit in the Civil Court against the Rajah, on the ground that the assets were not, as stated in the lease, Rupees 6,720-15-14½, but that they fell short of that sum by Rupees 1,924-1 anna, and the putneedar obtained a decree in the

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Civil Court for abatement of the putnee rent to the extent of Rupees 1,924-1-5 per annum. The Rajah in the meanwhile brought a suit for the rent of the year 1267 and for that of the year 1268 against the putneedar upon the full jumma of Rupees 6,720-15-14½, and obtained a decree. The putneedar's suit for abatement in the Civil Court had been instituted before the Rajah brought his suit for rent. The putneedar, in the rent-suit, urged that his suit for abatement was pending in the Civil Court, and he objected to pay the full rent until that suit was disposed of. His objection was not, however, attended to by the Collector, and the rent-suit was decreed in full on the 29th of June 1863. In execution of that decree, the Rajah recovered the full rent of 1267 and 1268 from the putneedar. The present suit is, therefore, brought for a refund of Rupees 1,924-1-1, minus a small deduction of Rupees 12-4-5, already refunded under the Civil Court decree, or Rupees 1,911-12-15, for the year 1267, and of Rupees 1924-1-1 for the year 1268, together with the interest recovered by the Rajah on these excess payments made on account of the rent for the two years, 1267 and 1268. The interest was calculated up to the date on which the Rajah took out the money in execution of his decree, that is to say, up to the 12th of Assin 1276. Interest is also charged on the above amounts of principal and interest drawn by the Rajah, or upon Rupees 7,494-7, annas 18 gundas 2, cowrees (namely, principal Rupees 3,855-13-15-2 and interest Rupees 3,658-10-3), that being the sum which the Rajah recovered from the plaintiff on the 12th of Assin 1276, and on which sum of Rupees 7,497-7, annas 18 gundas, 2 cowrees, interest from the date of recovery by the Rajah to the date of the present suit is charged at the rate of 12 per cent., the total amount claimed being Rupees 9,270-11-15.

The Rajah objected that the claim of the plaintiff was barred by limitation; that the final decree which he obtained for rent was passed on the 4th of September 1868; and that no claim on the part of the plaintiff for a refund of the rents which he paid under that decree for a period of time previous to the above order can be maintained.

The Lower Court, the Deputy Commissioner of Maunbhoom, has given the plaintiff a decree for the whole of the amount claimed.

On appeal, the points taken by Mr. Allan, the pleader for the appellant, the Rajah, are these:—1*st*—That as the decree for rent is a final decree, the plaintiff is not entitled to bring this suit for a refund of any sum recovered by the Rajah in execution of that decree. 2*nd*—That the suit is barred by the statute of limitation inasmuch as it has not been instituted within three years from the date of the decree for rent. 3*rd*—That the decree of the Civil Court for abatement operates only prospectively, and not retrospectively; and, lastly, Mr. Allan takes objection to the interest which has been allowed by the Court below.

With reference to the 1st objection, we find that when the rent-suit was instituted by the Rajah, he had full notice that the suit of the plaintiff for abatement was pending in the Civil Court. Objection to pay the full rent was taken by the plaintiff at the time the rent-suit was brought, but the Collector refused to entertain that objection, and a decree was passed for the full amount claimed by the Rajah according to the contract entered into by the parties.

Subsequently, the decree of the Civil Court was in favor of the plaintiff, and abatement of rent to the amount of Rupees 1,924-1-1 per annum was decreed. Therefore, the decree of the Revenue Court is superseded and modified by the decree of the Civil Court which was subsequently affirmed in appeal by the High Court on the 4th of September 1868.

On the 2nd point, the plaintiff's cause of action accrued on the 12th of Assin 1276, corresponding with the 27th of September 1869, on which date the Rajah recovered from the putneedar Rupees 3,835-13-15-2 as rent in excess of what the putneedar was justly liable for, as also interest upon that sum; so that on the 12th of Assin 1276, corresponding with the 27th of September 1869, the Rajah recovered from the plaintiff, the putneedar, Rupees 7,494-7-18-2 in excess of what the putneedar was justly liable to pay.

The present suit was brought on the 4th of Assin 1278, corresponding with the 19th of September 1871, that is to say, well within three years of the date of the cause of action, and it is therefore clearly not barred.

With reference to the 3rd question, it is clear on reference to the decree which the putneedar has obtained for abatement that that abatement was to take effect from the commencement of the putnee lease.

On the question of interest, with reference to the sums under this head that have been demanded prior to the 12th of Assin 1276,

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although they appear in the schedule to be on account of interest, the fact is, as appears from the record, that these sums are not interest which has been accumulating from that period, but interest which the Rajah recovered upon the principal amount of rent decreed to him. The only interest which the plaintiff has claimed in this case, in addition to the sum which was paid by him to the Rajah on the 12th of Assin 1276, is the interest which has accrued from that date to date of suit; and with reference to that interest as the Rajah had notice of the plaintiff's claim for abatement—as he has recovered a large sum in excess of what the plaintiff was justly liable for—the Rajah must pay at the rate of 12 per cent. per annum on the sum of Rupees 7,494-7-18-2 so taken, up to date of suit. From the decree of the Court below, we observe that the Deputy Commissioner has allowed six per cent. from date of institution of suit, and also from the date of the decree to date of realization; and this is a proper rate of interest.

The appeal is, therefore, dismissed and the decision of the Lower Court affirmed with costs.

The 3rd September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Admission—Statement by Pleader—Client's Obligation.

Case No. 247 of 1872.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 23rd March 1871, affirming a decision of the Moonsiff of Bohur, dated the 8th November 1870.

Chunder Coomar Deo (one of the Plaintiffs) *Appellant,*

versus

Mirza Sudakut Mahomed Khan (Defendant) *Respondent.*

Mr. M. L. Sandel for Appellant.

Baboo Doorga Mohun Dass for Respondent.

In a suit to recover possession, where defendant's pleader stated before the Moonsiff that if the thak map (which was not at the time in Court) could show that the lands in dispute had been surveyed as part and parcel of the plaintiff's talook, his client would give up his claim:

HELD that the statement was not one which was within the scope of the pleader's authority to make, and was not binding upon the client.

Kemp, J.—THE plaintiffs are the special appellants in this case. They sued to recover possession of a small quantity of lands, alleging that they belonged to Talook No. 490, by name Enayut Khan Mahomed, of which they had been dispossessed by the defendant on the 1st of Falgoon 1268. The suit was brought on the 4th of Assar 1277, so that at the time the suit was instituted the plaintiffs had been, according to their own showing, nearly 11 years out of possession.

The case of the plaintiffs was met by the defendants who pleaded limitation, and on the merits stated that the lands in dispute belonged to Mouzah Dusbussee, and not to Talook No. 490. The Lower Courts have found that the plaintiffs have not been able to prove possession at any time within twelve years prior to suit. We are not surprised at this finding when we look to the fact of the long delay of the plaintiffs in bringing the suit from date of alleged ouster.

In special appeal it is contended that the pleader for the defendants below made a statement before the Moonsiff that if the thak map could show that the lands in dispute had been surveyed as part and parcel of the plaintiff's Talook No. 490, his client would give up his claim.

Now, this statement of the pleader was made when the thak map was not in Court, and further we are of opinion that it is not a statement which was within the scope of the pleader's authority to make, and as such it is not binding upon the client. There are decisions of this Court on this point, but we shall only refer to one reported in 12 Weekly Reporter, page 279, by Justices Bayley and Sir Charles Hobhouse, in the case of *Gour Pershad Doss* vs. *Sook Deb Ram Deb.* With reference to this map, we may observe further that at the time of admitting the special appeal we were very doubtful whether the statement of the special appellant, that this map was refused consideration by the Courts below, was a correct one. We therefore directed the Moonsiff through the Judge to report. The Moonsiff has not submitted any report, but the Judge has reported that there was an application for review on this very question before the Subordinate Judge which was rejected.

On the other ground taken in special appeal, that the finding of the Lower Appellate Court is wrong on the question of limitation, and that the Judge is not right in saying

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that there was anything inconsistent in the evidence of the witnesses of the plaintiffs, we find that the Lower Court has come to a clear finding that the documentary or oral evidence adduced by the plaintiffs is not sufficient to prove that the plaintiffs were in possession at any time within twelve years prior to the institution of the suit. This finding is a clear finding upon a question of fact, and it is in accordance with the decision of the first Court, which has also found that the plaintiffs were not in possession within 12 years.

The special appeal will be dismissed with costs.

The 3rd September 1872.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Pottah and Kubooleut—Non-delivery of Pottah —Khas Possession.

Case No. 14 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 19th September 1871, *reversing a decision of the Moonsiff of Aurungabad, dated the 7th June* 1871.

Azeezooddeen Khan and others (Plaintiffs) *Appellants,*

versus

Gujdhur Lall Hulwai and others (Defendants) *Respondents.*

Moonshee Mahomed Yusoof for Appellants.

Mr. R. E. Twidale for Respondents.

Where a pottah and kubooleut exist between two parties, and the only reason why the pottah is not operative is that the lessee does not deliver it, he cannot be allowed to take advantage of his own breach of contract and recover khas possession.

Markby, J.—It seems to me that the argument that has been addressed to us in this appeal does not touch the point which we have to consider, or rather does not touch the judgment of the Lower Appellate Court. The Lower Appellate Court says that it is admitted that there were a pottah and kubooleut between the parties; and it says, very properly, that *primâ facie* upon this there can be no recovery of khas possession while that pottah and kubooleut are in force and the term is unexpired. The only answer made to that was that a suit having been brought in the Revenue Court by the plaintiff upon this kubooleut, it had failed. Now, it is not necessary for us to say whether, if that suit had failed in consequence of any misconduct on the part of the defendant, this suit, which is for khas possession, could be maintained, that is to say, whether or no that might be treated as putting an end to the relation between him and the plaintiff. It has been found as a fact, and it has not been, and indeed could not well be, now contested, that the pottah and the kubooleut remained inoperative by the fault of the plaintiff. Therefore, what took place in that suit can have no possible effect upon what is to be the result in this suit.

Then the matters stand thus, that the defendant has been admitted into possession; and though it may be that the lease has not come into operation, yet if it has not done so, it is on account of the fault of the plaintiff. Then can the plaintiff recover khas possession? Clearly he cannot, because he cannot be allowed to take advantage of the breach of contract on his part: the only reason that the pottah is not operative is that he himself prevented its operation by not delivering it. A Court governed by equitable principles could not allow the plaintiff to recover khas possession in such a case as that. Further, if anything more were necessary to entitle the defendant to retain possession, it has been found as a matter of fact that not only the defendant has been put into possession, but that he has expended some money in building *golahs*. It is said that this finding is based upon a misunderstanding of an expression in the plaint; but after the expression of the opinion of Mr. Justice Glover I should not think of discussing for a moment the construction which the Judge below thought right to adopt. I think, therefore, we are bound to say in this case that the Judge is right in point of law, and, as far as I can see, he is also right in his conclusion.

We dismiss this appeal with costs.

Glover, J.—I am of the same opinion. With reference to the sentence about which there has been so much discussion, I wish to say that the word *golah* is generally under-

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stood to be a place where grain is stored for safety or sale. I do not say that it never means a market, but that "market" is not its ordinary meaning. The Subordinate Judge was, I consider, perfectly right in attributing to the word the meaning he has done.

The 3rd September 1872.

Present :

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Sale of Right of Appeal—Position of Purchaser —Costs.

Case No. 198 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Nuddea, dated the 9th May 1872.

Troyluckhonath Banerjee (Decree-holder) *Appellant,*

versus

Brindabun Chunder Sircar Chowdhry (Judgment-debtor) *Respondent.*

Baboos Hem Chunder Banerjee and *Grish Chunder Mookerjee* for Appellant.

Baboo Tarucknath Sen for Respondent.

Where the rights and interests of the plaintiffs in a suit which was dismissed were purchased by third parties who filed an appeal in which they described themselves as plaintiffs, appellants, together with the original plaintiffs, and the original decree was confirmed with costs :

HELD that the purchasers took the position of plaintiffs, with all the risks and liabilities of plaintiffs from the commencement, including liability for all costs awarded against the plaintiffs generally without limitation.

Quære.—Ought the speculative purchase of a right of appeal to be recognized by a Court of justice?

Markby, J.—THIS case arises out of a suit which was originally between the Bengal Indigo Company and Moran and Company as plaintiffs, and one Banerjee and others as defendants. The suit was dismissed. Subsequent to the dismissal, the respondents in this present appeal purchased the rights and interests of the Bengal Indigo Company in the suit. Whether such a transaction ought ever to have been recognized by any Court of Justice, I think it is somewhat doubtful ; but that is a question with which we have nothing to do. I only refer to it because I should not like to be supposed to have sanctioned it. But, as a matter of fact, what happened then is this, that the respondents applied and were allowed to file the appeal in this Court against the decree of the Court below which dismissed the suit, in which they described themselves as plaintiffs, appellants, together with Moran and Company and the Bengal Indigo Company, following in that respect the rule which is acted upon that a plaintiff's name cannot be removed from the record, though a plaintiff may be added. Now, it seems to me that the effect of the steps taken in the case was that the purchasers took the position of plaintiff in the suit, and took upon themselves all the risks and liabilities of plaintiffs from the commencement. I think it would lead to endless confusion if that were not so. Then what follows upon that, is, that this Court confirmed the decree of the Court below and ordered the appellants generally to pay the costs of the appeal. The effect of confirming the decree of the Court below, is, that there is a decree now standing against the plaintiffs for the payment of the costs in the first Court; and the only question before us is whether that can be executed against these present respondents as well as the Bengal Indigo Company and Moran and Company. I think that it can be so executed; for, as I have stated above, the respondents, by being placed upon the record, took upon themselves all the risks and liabilities of plaintiffs from the *commencement.* I think the decision of the Lower Court is wrong and ought to be reversed, and we declare the liability of these respondents to all such costs as are awarded against the plaintiffs generally without limitation.

Costs of this appeal will have to be paid, not by the plaintiffs generally, but by the present respondents.

With this intimation of our opinion, the case will go back to the Lower Court for execution.

Glover, J.—I concur. I wish to add that I entirely concur with what has been expressed by Mr. Justice Markby with respect to this speculative purchase of a right of appeal. It tends to foster most unnecessary and most mischievous litigation. I also entirely concur in making the present respondents pay the costs of this appeal.

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The 3rd September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Religious Endowment—Powers of Sebait—Right of Lessee.

Case No. 173 of 1872.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 25th September 1871, *reversing a decision of the Moonsiff of Pooree, dated the* 16*th February* 1871.

Arruth Misser and others (Plaintiffs) *Appellants,*

versus

Juggurnath Indraswamee (Defendant) *Respondent.*

Baboo Obhoy Churn Bose for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondent.

The sebait of a religious endowment is competent to lease the endowed lands and to appropriate the proceeds for the purpose of keeping up the worship of the idol, and a mokuddum, under such a lease, is entitled to hold possession during the life-time of the lessor or during such period as the latter continues to be the sebait of the endowed lands.

Kemp, J.—In this case the plaintiff is the special appellant. It appears that he sued the defendant, who alleges himself to be a sebait, to recover possession of a small quantity of land, 1 biswa, 1 cottah, 1 gundah, of which he states that he had been illegally dispossessed by the defendant. In the plaint the plaintiff states that his ancestors held the mokuddumee of the village and that they paid a 750-rupees jumma to the lakherajdars, the defendant's ancestors; that subsequently, or on the 15th of April 1870, the defendant granted a pottah to the plaintiff confirming his rights as mokuddum, as also confirming the jumma of rupees 750 which had hitherto been paid. This pottah is not set forth in the body of the plaint, but it is filed with the plaint. The defendant stated that the pottah was not a valid pottah, inasmuch as it had been granted by him as sebait and that in that capacity he was not competent to grant a pottah so as to bind the idol. The issue raised between the parties in the first Court was whether the plaintiff was entitled to recover possession as mokuddum under the pottah, or whether the lakherajdar was entitled to the land in dispute. The first Court found for the plaintiff. On appeal, the Judge has dismissed the plaintiff's suit, holding that he has not been able to prove possession as mowrosee mokuddum within twelve years prior to date of suit. With reference to the pottah of 1870, the Judge is of opinion that the plaintiff did not sue on the basis of that pottah. Had he done so, it is probable, says the Judge, that he would have given him a decree; not having done so, and not having been able to prove possession on the footing of a mowrosee mokuddum within twelve years prior to suit, the suit of the plaintiff must fail.

We may observe that there was also a suit brought by the plaintiff's lessee. It appears that the plaintiff leased the remaining lands of the village of which he held a pottah to a third party, and that party having been dispossessed by the lessee of the lakherajdar, defendant brought a suit against that lessee on the strength of the pottah granted to him by the plaintiff and obtained a decree, which decree was upheld by the same Judge who has dismissed the plaintiff's case. We think that the Judge is wrong in saying that the plaintiff has not based his case upon the pottah of 1870. It is clear that that pottah as already stated, was filed with the plaint. It is also clear that the defendant was well aware of the title upon which the plaintiff came into Court to seek redress, for in the written statement he does not deny the execution of the pottah, but seeks to avoid it by alleging that it was invalid inasmuch as a sebait could not grant such a pottah so as to bind the idol. It is also clear that the issue raised in the first Court was the proper issue, namely, whether the plaintiff was entitled to recover possession as mokuddum under the pottah of 1870 from the defendant, or whether the defendant was entitled to hold the lands as lakherajdar. It has been said by Baboo Mohesh Chunder Chowdhry, who has been heard for the respondent, that this pottah granted by the defendant in 1870 is invalid, and he has referred us to a decision to be found in Volume X, Moore's Privy Council Appeals. There has been no contention in this case that the pottah has been granted upon an inadequate jumma. A sebait is competent to lease the endowed lands to the best advantage and to appropriate the proceeds of the land for the purpose of keeping up the worship of the idol. Indeed, without leasing out the lands, it would be impossible to provide for the expenses of that worship and to carry out

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the object for which the lands were endowed. Therefore, there being no allegation that the jumma at which these lands have been let by the defendant is an inadequate or improper jumma, we must hold that the plaintiff is entitled to hold possession under that lease during the life-time of, or during such period as, the defendant shall continue to be the sebait of these endowed lands, as the pottah, no doubt, is binding upon the defendant. We, therefore, reverse the decision of the Judge and restore that of the first Court to this extent, that we declare the plaintiff entitled to possession under this pottah during the term of the defendant's life or during the time that he may hold the office of sebait. The costs of this appeal and in the Judge's Court to be paid by the respondent.

The 4th September 1872.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Attachment before Decree—Damages.

Case No. 30 of 1872.

Regular Appeal from a decision passed by the First Subordinate Judge of the Twenty-Four Pergunnahs, dated the 30th September 1871.

Dhurmo Narain Sahoo and others (Defendants) *Appellants,*

versus

Sreemutty Dossee (Plaintiff) *Respondent.*

Baboo Kumolakant Sen for Appellants.

No one for Respondent.

Where a Court orders attachment of a defendant's property after it is satisfied that he is about to remove or dispose of it with intent to obstruct or delay the execution of the decree, it must be presumed that there was good and sufficient cause for the plaintiff having moved the Court to do so, even though the suit resulted unsuccessfully; and unless the contrary can be established, damages cannot be claimed.

Markby, J.—I THINK it quite clear that this judgment cannot be supported. Possibly that may be a reason why the plaintiff has not appeared. The attachment which is complained of as a wrongful act of the defendant, and for which damage is sought, must be presumed to have been given after the Court was satisfied that the plaintiff's husband, who was the original defendant in the former suit, was about to remove or dispose of his property with intent to obstruct or delay the execution of the decree. That being so, I think the plaintiff cannot succeed. Although it is true, as the Subordinate Judge says, that a person who dispossesses another without good and sufficient cause must make good the loss sustained by that other for such wrongful act, that is a very different case from this where the party is dispossessed by the act of the Court after being satisfied that the person who was in possession was about to behave improperly. I think, under those circumstances, we must presume that there was a good and sufficient cause for the course taken by the present defendants, the plaintiffs in the former suit, unless the plaintiff can establish the contrary. There was no attempt on Her part to do this, but she relied for this purpose wholly upon the result of that former suit; but that does not show that the attachment was wrong or even improper, and is not evidence upon which a decree can be given to the plaintiff. Therefore we need not go to the question whether or no the damages have been properly assessed, although it would be very difficult to show that she could recover interest in the way in which she has laid the claim, when she had a much more summary remedy, if she had any reason to complain, under Section 88 of the Procedure Code.

The decision of the Lower Court is reversed, and the suit is dismissed with costs in this Court and in the Court below.

Glover, J.—I concur.

The 4th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Knight, Chief Justice,* and the Hon'ble H. V. Bayley, *Judge.*

Pre-emption—Mahomedan Law.

Regular Appeals from a decision passed by the Officiating Deputy Commissioner of Cachar, dated the 11th June 1871.

Case No. 201 of 1871.

Poorno Singh Monipooree and others (Defendants) *Appellants,*

versus

Huree Churn Surmah (Plaintiff) *Respondent.*

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The Advocate General and *Mr. Collis* for Appellants.

Mr. J. T. Woodroffe for Respondent.

Case No. 204 of 1871.

Huree Churn Surmah (Plaintiff) *Appellant,*

versus

Mr. Thomas Ackroyd (one of the Defendants) *Respondent.*

Mr. J. T. Woodroffe and *Babóo Taruck-nath Sen* for Appellant.

The Advocate General and *Mr. Collis* for Respondent.

The right of pre-emption arises from a rule of law by which the owner of the land is bound, and it exists no longer if there ceases to be an owner who is bound by the law either as a Mahomedan or by custom.

The right is not a mere personal one in the pre-emptor, who has it only as a co-sharer or neighbour and loses it on his ceasing to be either.

Couch, C. J.—In the first of these appeals, Poorno Singh, Goona Singh and Jadub Singh, Monipoories, the defendants Nos. 2, 13, and 38 in the original suit, are the appellants, and the principal objection taken in the grounds of appeal is that the right of pre-emption claimed by the plaintiff did not exist as to all or any part of the land in suit, as the vendors to the appellants and their co-defendants were Europeans.

No issue was raised in the suit as to whether the law of pre-emption prevailed by local custom in Cachar, where the land is situated, or as to whether the appellants, as Hindoos, were bound by it. The appellants in their written statement alleged that the law had nothing to do with Europeans from whom they purchased, that the plaintiff was not a co-sharer or a "neighbour," and that he never legally performed, nor observed, the necessary preliminaries.

This being a regular appeal, if it appeared to us essential to the right determination of the suit upon the merits that the other questions should be determined, we night, under section 354 of the Code of Procedure, refer them to the lower Court to be tried; but we think it is not essential, as in our opinion the case is not within the law of pre-emption, assuming that it does prevail in Cachar and that the appellants, the purchasers, are governed by it.

The plaintiff, who claims the rght of pre-emption, is a Hindoo, and the vendor, Mr. Ackroyd, is a European. The Deputy Commissioner, on the issue which was framed—"are Europeans bound by the law of pre-emption in Cachar?"—says, he finds that only two cases are on record in the Courts in Cachar in which Christians or Europeans have been parties in cases of this nature, and that he does not think that these two cases afford any positive evidence on the subject. Having said this, and found that issue for the defendant Ackroyd, upon which he dismissed the suit against him with costs, he proceeded to decide upon the last issue he had framed—as to whether the purchasers and pre-emptor are affected by the fact that the vendor is a Christian—that they are not. The reason he gives for this is that it does not appear to him to be just that the privilege should extend to the Hindoo purchasers, who have nothing to do with the seller's exemption, and that it seems to him that in Cachar it is most important that the right of a share in land to pre-emption should be most carefully guarded. The law of pre-emption was much considered in the case reported in IV Bengal Law Reports, 134, F. B. R.,* where it was held by the Chief Justice and Mr. Justice Kemp and Mr. Justice Mitter that a Hindoo purchaser is not bound by the law in favor of a Mahomedan co-partner, although the co-partner from whom he purchased was a Mahomedan, the plaintiff having failed to prove that the Hindoos in the district had adopted the custom. On the other hand, Mr. Justice Norman and Mr. Justice Macpherson held that whenever a Mahomedan has a right of pre-emption it is not defeated by the mere fact that the purchaser is a Hindoo. The question was referred to a Full Bench in three cases, but in all of them the vendor was a Mahomedan, and the question raised in this appeal did not arise. In the argument before us for the respondent, some expressions of Mr. Justice Mitter and the Chief Justice were relied upon as showing that the vendor need not be a Mahomedan, but we think no such reference can be drawn from them. That question was not under consideration, and the words were used with reference to a case in which the vendor was a Mahomedan.

Mr. Woodroffe, who appeared for the respondent, admitted that he could not produce any case in which the law of pre-emption had been applied, and the vendor was not governed by it either as a Mahomedan or by custom. The absence of any such case, the law being frequently insisted upon, goes far

* 13 W. R., F. B., 21.

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to show what is the law. It appears to us that the right of pre-emption arises from a rule of law by which the owner of the land is bound. When a Mahomedan acquires land, it becomes subject to the law in the same manner as it becomes subject to his law of inheritance. If there ceases to be an owner who is bound by the law either as a Mahomedan or by custom, the right no longer exists. It is not annexed to the land so as to continue to affect it when it has been transferred to a person not bound by the law. The right also is not a mere personal one in the pre-emptor. "The cause of it is the junction of the property of the shufee, or person claiming the right, with the subject of purchase." Baillie 471. He has it only as a co-sharer or neighbour, and on his ceasing to be either his right is gone.

We think it is essential that the vendor should be subject to the rule of law. If it were not so, a Mahomedan might become a partner in an estate owned by Christians or Hindoos, which they could not prevent, and then he might prevent their selling their shares to any other person.

The decision of the lower Court that the law of pre-emption applied in this case is therefore in our opinion wrong, and on this ground the decree should be reversed and the suit dismissed with costs as against all the defendants.

Upon the fourth issue, the Deputy Commissioner says, "there can be no doubt whatever that Haro Thakoor (the plaintiff) fully and exactly performed all the preliminary conditions necessary to enforce the right of pre-emption when he heard of the sale on the spot to the purchasers and the seller, that is to say, if the real sale was the sale of 18th May. The evidence on these points is perfectly good." We think there may be some, if not considerable, doubt, whether the preliminary conditions were performed, and whether there was anything more than an attempt by the plaintiff to induce the purchasers to give up their bargain to him, and it would be more satisfactory if the judgment showed that the Deputy Commissioner had carefully considered the evidence. He may have done so, and we must suppose that he has, but his judgment on either issue raises a suspicion that he has not given the question the full consideration it required.

As we are of opinion, on the other ground, that the suit should be dismissed, we think it is not necessary to decide whether the preliminaries were duly performed.

As to the appeal No. 204 by the plaintiff against the dismissal of the suit with costs against Mr. Ackroyd, it follows from this judgment that it must be dismissed with costs, and the plaintiff must also pay the appellant's costs of this appeal in which he is respondent.

The 5th September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Sale of Decree—Liabilities of Purchaser.

Case No. 209 of 1872.

Miscellaneous Appeal from an order passed by the First Subordinate Judge of Hooghly, dated the 12th April 1872.

Doorga Churn Nundee (Decree-holder) *Appellant,*

versus

Debnath Roy Chowdhry and others (Judgment-debtors) *Respondents.*

Baboo Boykuntnath Paul for Appellant.

Baboos Obhoy Churn Bose and *Anund Chunder Ghosal* for Respondents.

The purchaser of the rights and interests of a decree-holder takes the decree subject to the rights of the judgment-debtor to set off a cross-decree where the latter holds such cross-decree.

Kemp, J.—We think this appeal must be dismissed. The first ground taken is that the Subordinate Judge is wrong in holding that the judgment-debtor is entitled to the set-off claimed under another Court's decree; and, secondly, that the question could not have been re-opened after an order had been passed under Section 208 granting the application of the special appellant to be substituted for the decree-holder by virtue of his purchase.

It appears that in this case the special appellant has purchased the rights and interests of one Sabitree in a decree obtained by her against the judgment-debtor Debnath Roy. The judgment-debtor seeks to set-off a joint decree obtained by him against Sabitree and others, against the decree obtained by Sabitree which has been purchased by Doorga Chun, the appellant before us. It has been ruled by a Full Bench of this Court in a decision to be found in Volume X, Weekly Reporter, page 32, that the purchaser of the rights and interests of a decree-holder is entitled to execute the decree pur-

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chased in like manner and to the same extent as the original decree-holder might have done,—not otherwise or further; and consequently that the purchaser takes it subject to the rights of the judgment-debtor to set off his cross-decree.

Therefore the question we have to decide is whether the decree obtained by the judgment-debtor against Sabitree, the special appellant's vendor, can be set-off against the decree purchased by the special appellant. In the case before us, we find that Sabitree was a joint debtor in a case in which the present judgment-debtor obtained a decree for rent and costs, and therefore that decree can be set off against the claim of Sabitree against the judgment-debtor. We, therefore, think that the Subordinate Judge is right in allowing the set-off.

The second point is not very clearly taken in the grounds of special appeal, but in the second ground it is said that the question should not have been allowed to be re-opened after an order had been passed under Section 208. Under that section the appellant could not have executed his decree without the permission of the Court previously obtained. There is nothing on the record to show that any question was re-opened. The pleader for the appellant, during the course of the argument, stated that, on a former occasion, an application made by the special respondent for a set-off, alleging that the purchase of the decree was benamee, had been rejected, but these proceedings are not before the Court.

We must, therefore, dismiss the special appeal with costs.

The 5th September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Landlord and Tenant—Limitation.

Case No. 248 of 1872.

Special Appeal from a decision passed by the Judge of Dacca, dated the 29th September 1871, *affirming a decision of the Additional Subordinate Judge of that District, dated the* 17*th July* 1869.

Lakhoo Khan and others (Defendants) *Appellants,*

versus

J. P. Wise (Plaintiff) *Respondent.*

Mr. M. M. Ghose and *Baboo Doorga Mohun Doss* for Appellants.

Baboo Ram Churn Mitter for Respondent.

Ryots failing to establish a talookdaree right set up by them, are not in a position to plead adverse possession as against their landlord's right to recover rent.

Kemp, J.—In this case we do not think it necessary to call upon the respondent.

The plaintiff, who has purchased the zemindaree title, sued the defendants to have a summary order, passed under the provisions of Act VI of 1862, Bengal Council, by which the status of the defendants had been recognized as talookdars, set aside.

The first Court, the Subordinate Judge of Dacca, came to a clear finding that the pottah, filed by the defendants in support of their allegation that they were shikmee talookdars, is a forgery. He also found on the evidence that their occupation, although it had been for a very long period, was that of a ryot and not as shikmee talookdars. He, therefore, gave the plaintiff a decree, reversing the order under Act VI of 1862, and declaring that the defendants were the ryots of the plaintiff and that they were as such bound to pay rent to the plaintiff.

On appeal, the Judge of Dacca, Mr. Abercrombie, has confirmed the decision of the Additional Subordinate Judge. The Judge says: "I am of opinion that the decision of the Additional Subordinate Judge must be upheld." The Judge then says that the shikmee talook set up by the defendant is not to be found in the Mouzawaree Register; that, although on a former occasion he felt disposed to doubt whether the claim was not barred by limitation, after going over the case again and on further consideration, he is of opinion that limitation will not bar the claim of the plaintiff. The Judge then goes on to say that, although the appellants had been dealing with the property as if they had a talookdaree right in it, there is nothing to show that the zemindar had ever lost his right to hold the defendants as his ryots. The decision of the Judge, therefore, amounts to this, that the possession of the defendants, although that possession has been for a number of years, is that of a ryot.

The question then, we have to decide is whether such a possession can be held to bar the zemindar's right to have it declared that the alleged talook set up by the defendants is no bar to his recovering the rents due from them as ryots. The defendants have been found by the concurrent decisions of two Courts to be the ryots of the zemindar.

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A decision has been quoted by the learned counsel for the appellants in Volume XII, Weekly Reporter, page 364, but that decision we do not think in any way applicable to the case now before us. In that case the learned Judges found that limitation did not apply to a finding of the lower Court; the finding of the lower Court in that case being that the defendants had substantiated their plea that they held an intermediate tenure between the zemindar and the ryot. In this case, as already shown, both Courts have found that the tenants have not proved any such intermediate tenure. The defendants, therefore, having been found to be the tenants of the plaintiff, are not in a position to plead adverse possession as against their landlord. It may be that, in a suit for enhancement, their long possession would give them a right of occupancy, and might, if they can prove payment of rent at a uniform rate, protect them from enhancement; but it is clear that they, having failed to substantiate any plea of intermediate tenancy between the cultivators of the soil and the zemindar, are not entitled to set up the plea of limitation.

The decision of the lower Court will be affirmed, and the appeal dismissed with costs.

The 6th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Jurisdiction—Suit for Rent on a Tahood-kistbundee (Instalment-bond.)

Reference to the High Court by the Judge of the Small Cause Court at Burrisal, dated the 10th July 1872.

Pearee Mohun Roy Chowdhry, *Plaintiff*,

versus

Assad Khan, *Defendant*.

A suit to recover arrears of rent on a *tahood-kistbundee*, under which defendant had been appointed a *tassildar* to collect rents, having been filed before the Moonsiff, it was returned as being cognizable by the Court of Small Causes. The Judge of the latter Court, seeing that the instalment-bond on which the suit was brought was exactly in the form of a *kubooleut*, and that the defendant was in possession of the land for which the rent was claimed, referred the question of jurisdiction to the High Court, which held—

That the money which the defendant contracted to pay being rent, could not be sued for under Act XI of 1865; and

That the plaint should be returned to the plaintiff for presentation to the Moonsiff, with the opinion of the High Court.

Case.—I HAVE the honor respectfully to state that the case noted above is a suit brought to recover Rs. 24-7, arrears of rent on a *tahood-kistbundee*.

It is stated in the plaint that defendant was appointed a *tassildar* to collect rent from the ryots under the *tahood-kistbundee* for three years, from 1278 to 1280, and that he is in possession of the land for which the *tahood* was given; but as he has failed to pay the rent of 1278, according to the instalments of the *tahood*, this suit is brought to recover Rs. 24-7, *viz.*, Rs. 22, the rent of that year, and Rs. 2-7, resulting interest, as stipulated to be paid by the defendant.

The plaint was originally filed in the Court of the Sudder Moonsiff of Burrisal, who had returned it for presentation to a competent Court, with his remark that the claim did not appear to him to fall under any of the class of suits contemplated by Act VIII of 1869, B. C. It was in his opinion cognizable by the Small Cause Court under Section 6 Act XI of 1865.

On taking the case for hearing by this Court, where it was accordingly filed subsequently, defendant's pleader urges in bar of my hearing that this is not a case which falls under Section 6 Act XI of 1865, and this Court therefore has no jurisdiction to hear it, for it is distinctly stated in the plaint that the defendant was in possession of the land for which the arrears of rent is claimed from him. The *kubooleut* or *tahood-kistbundee* given by defendant shows that, like every other lease-holders, the defendant of this case bears relation with the plaintiff as that of tenant and landlord, and this suit therefore is cognizable only by the ordinary Civil Courts. Plaintiff's pleader argues that the defendant is merely a servant, and the suit is simply for money claim based on a contract called *tahood-kistbundee*, and it is therefore cognizable by the Small Cause Court under Section 6 Act XI of 1865.

Rajah Shutt Shurn Ghossal *vs.* Mahomed Ali.*

In the suit noted in the margin brought to recover money due on account of arrears of rent for which the tenant had entered into instalment-bond with his landlord, who had not taken measures under Act X of 1859, the law of landlord and tenant of the time, the High Court, on the reference of one of my predecessors, was pleased,

* 2 W. R., *References*, 5.

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on the 21st April 1865, to rule that the obligation on the *kistbundee* or instalment-bond constitutes a mere debt which may be sued for in the Small Cause Court. Forbearance to use the landlord's remedies for arrears of rent formed the consideration for the new contract, and the contract which has thus arisen is in the same situation as any other civil contract, and must be enforced by the same procedure. But the document on which the present suit is brought is a quite different one. Had it been a simple instalment-bond, the suit would of course lie in this Court, but it is exactly in the form of a *kubooleut*, in which the annual rent is stipulated to be paid by instalment; and the term for which the *tahood* was given being three years, and defendant failing to pay the rent of the first year, is the cause of bringing this suit, which I am of opinion is to be governed by Act VIII of 1869, B. C., as it falls under Section 23 of that Act, and the defendant I consider as a temporary leaseholder. Plaintiff says, defendant is his *tassildar*, a servant; if so, he is a *tassildar* or *surburakar*, as described in Section 24 of the Act; but as it is admitted in the plaint that defendant is in the possession of the land for which the rent is claimed, I consider him in the light of a temporary lease-holder holding the land for a limited period at a certain rent and of the nature described in Section 23 Act VIII of 1869, B. C., and the suit is cognizable by the ordinary Civil Court. As such suit, under the 4th exceptional clause of Section 6 Act XI of 1865, cannot, without special sanction, be tried by this Court, and the Moonsiff has also refused to receive the plaint, the plaintiff is now without remedy to recover his demand, which considerations specially have led me to solicit, under Section 22 Act XI of 1865, the favor of the Hon'ble Court deciding whether, according to the nature of the document on which this suit is based, this claim is cognizable by this Small Cause Court, or the ordinary Civil Court, which is that of the Moonsiff, and also instructing how the case is to be dealt with by me if I have no jurisdiction, and the Moonsiff has also refused to receive it.

Judgment of the High Court:—

Ainslie, J.—The money which the defendant contracts to pay to the plaintiff by the instrument before the Court is rent, and as such cannot be sued for under Act XI of 1865.

The plaint should be returned to the plaintiff, who may present it to the Moonsiff, with the opinion of this Court.

The 6th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Knight, Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Rent of Lodgings let to a Prostitute—Contracts, contra bonos mores.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Kishnaghur, dated the 8th July 1872.

Goureenath Mookerjee, *Plaintiff,*

versus

Modhoomonee Peshakur, *Defendant.*

A landlord cannot recover rent of lodgings knowingly let to a prostitute who also carries on her vocation there; the principles of English law being applicable to this country in such a case.

Case.—In this case the plaintiff sued the defendant, a prostitute, for rent of a room in a certain building in which she lives and plies her vocation.

The Court held that the plaintiff could not recover the rent sued for, as a Court of Justice would give no assistance to the enforcement of a contract opposed to public policy, and no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. There being no Indian precedent bearing on the subject, the plaintiff desired a reference under Section 22 Act XI of 1865, and the judgment of this Court was pronounced contingent on the opinion of the Honorable the High Court, which is solicited on the following point:—

Whether a landlord can recover rent of lodgings knowingly let to a prostitute who also carries on her vocation there?

The English law on the subject appears conclusive, and it is unnecessary to adduce a cloud of authorities in support of the finding arrived at. I will therefore confine myself to a few taken from law books well known in India. In Broom's Commentaries on the Common Law, 3rd edition, page 370, is the following passage:—"The rent of lodgings let to an immodest woman to enable her to consort therein with the other sex, cannot be recovered."

In the case of Collins *vs.* Blantern,* it is thus laid down:—"The principle upon which "Courts must go is to enforce the perform-

* *Vide* Smith's Leading Cases, 5th ed., page 319.

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"ance of contracts not injurious to society, "and it would be absurd to say that a Court "of Justice shall be bound to enforce con-"tracts injurious to and against the public "good."

A great deal has been said about the civilization of the West being far in advance of the civilization of the East, and that the light estimation in which morality is held by a large body of the natives of the province of Bengal renders the application of the principles of English law unadvisable in this country. The Court observes that, although "the sense of morality is essentially the "result of education and is never so acute as "in free and well-governed countries," yet India, especially Bengal, after a century's beneficial British rule, cannot at the present time be considered a semi-civilized nation; and the following quotation from a living author will not be out of place:—

"The change of rule has wrought and is "working a change in the manners and "institutions of the people perfectly wonder-"ful to contemplate. Climate and position "have much to do with national charac-"teristics, but Government has more. India "under the English no more resembles India "under the Mogul than the England of the "19th century resembles the England of the "Heptarchy. A beneficent revolution in her "fortune has occurred, which is developing "an extraordinary reform in the customs and "ideas of the native race, consequently a "distinction must be observed between the "old and new state of things."

Stress is laid that the trade of prostitution has been recognized and legalized under the Indian Imperial Act XIV of 1868. It is purely a sanitary law; and although it has no effect on public morality, yet the surveilance exercised under it has a salutary effect upon public health in the interests of which it was only enacted. The "sanctioning, moreover, "of an immoral act cannot dignify it into a "moral one."

The cardinal argument pressed on the Court is that contracts between prostitutes and people of other classes are recognized by the old Hindoo legislation, and do not stand prohibited by any Indian statute, and the litigant parties being Hindoos, the Hindoo law ought to govern the disposal of the case. Whatever might be the real doctrine of the Hindoo law on the subject, the Court is not bound to follow it in matters of contract, but only in matters of inheritance, marriage, caste, and religious usages. *Vide* Regulation IV of 1793 Section 15. In the old times, the original institutions of the people were opposed to morality, and immorality to a certain extent was encouraged by their religion. "The forms of administering civil "justice were primitive and sufficed for a "population to whom the distinctions and "refinements of commerce were unknown, and "who appear to have never advanced beyond "a certain point of civilization. There must "always be a close analogy between the state "of society and its laws. Where the one is "neither artificial nor progressive, the other, "as a natural consequence, will be simple and "stationary. This was accordingly the case "with the Hindoos." But after ages their national condition has undergone a great change. Civilization has made great strides in India since the establishment of British rule, and India of the past is not India of the present.

The Court withheld judicial aid in enforcing a contract which "infringed public policy and offended public morality." Such pacts, whether they stand prohibited by statute or not, must be "treated as frauds upon the public or moral law."

"Pacta quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere indubitati juris est."

The "rule of the Civil law on the subject speaks but the language of universal justice." "The object of all law is to repress vice, and promote the general welfare of society, and it does not give its assistance to a person to enforce a demand in violation of its principles."

Judgment of the High Court:—

Ainslie, J.—We are of opinion that the principles which governed the English cases cited by the Judge are applicable to this country, and that his decision was correct.

The 6th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Knight, Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Act XI of 1865 *s.* 21—*New Trial—Deposit of Costs.*

Reference to the High Court by the Judge of the Small Cause Court at Burrisal, dated the 10*th July* 1872.

Mohima Chunder Roy and others, *Plaintiffs,*

versus

Hurnath Chungo, *Defendant.*

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Act XI of 1865 s. 21 does not require a plaintiff applying for a new trial to deposit the costs of the defendants.

Case.—I HAVE the honor respectfully to state that the case noted above was dismissed on default of plaintiff, who on the same day appeared and gave notice of his intention to apply for re-opening his case, and in his application for new trial satisfied the Court that, under unavoidable circumstances, he was prevented from appearing before the Court when his case was taken up for hearing, and accordingly it was granted and summons issued against defendant fixing date for the final hearing of the case.

On the fixed day, defendant appears and urges that the application for new trial was illegally allowed, as the plaintiff did not deposit the costs of defendant with his notice of application for new trial. He cites the precedent in the margin in support of his argument, and says that in that case the Hon'ble L. S. Jackson, one of the Judges of the High Court, has observed "that a party applying under the latter provision of Section 21 of the Mofussil Small Cause Court Act for a new trial must deposit in Court, with his notice of application, the amount for which a decree shall have been passed against him." When the words "a party" have been used, it means either plaintiff or defendant, and the expression "amount of decree" used there may also signify costs of defendant charged to plaintiff.

* Volume V, Appendix, page 57, Bengal Law Reports — Kylash Chunder Sandyal and others *versus* Dowlut Shaikh and others.

In another case published in page 388, Volume VI of the Bengal Law Reporter,† it has been held that the Judge of the Mofussil Small Cause Court cannot review his judgment, except as provided by Section 21 Act XI of 1865. In that Section I do not find any provision by which plaintiff is also required to deposit the costs of the opposite party. The latter part of the Section I understand distinctly refers only to cases where a defendant applies for a new trial, and for him it is incumbent to deposit the amount of decree passed against him, together with the costs of the opposite party (plaintiff); and the decision given by the Hon'ble L. S. Jackson also refers to cases in which defendant had moved for new trial.

Of course, it may however be asked, when the defendant is required to deposit the costs of decree, including the costs of the opposite party, why the plaintiff shall not be required when applying for the same to deposit the costs of defendant? But I do not find any express provision to that effect in the law or any reason given therein. Hence, and specially as the defendant's pleader very confidently argues that the plaintiff is not protected from depositing the costs of the defendant, and requests me to make a reference to the High Court, I have the honor, under Section 22 Act XI of 1865, to submit the above for the decision of the High Court on the two following points which I beg the Court will be pleased to decide, *viz.*, whether a plaintiff applying for new trial is required to deposit with his notice of application the costs of defendant?

Secondly.—When plaintiff's application for new trial made without deposit was granted, and defendant summoned accordingly, it can now be set aside for not depositing the costs of defendant as above?

Judgment of the High Court:—

Ainslie, J.—Section 21 Act XI of 1865 does not require a plaintiff applying for a new trial to deposit the costs of the defendant.

* 14 W. R., *Civil*, 42.
† 14 W. R., *Civil*, 442.

The 6th September 1872.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Special Appeal—Admission — High Court's interference on question of fact.

Cases Nos. 146 and 147 of 1872.

Special Appeals from a decision passed by the Officiating Judge of Gya, dated the 30th September 1871, affirming a decision of the Subordinate Judge of that district, dated the 16th March 1871.

Lalla Imrit Lall and another (Defendants) *Appellants,*

versus

Mahomed Lallzamah and others (Plaintiffs) *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Baboo Mohesh Chunder Chowdhry and *Moonshee Mahomed Yusoof* for Respondents.

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The High Court, in special appeal, interfered with the concurrent finding of the first Court and the Lower Appellate Court on a *finding of fact*, where the decision turned entirely on the construction of a written admission which had been wrongly understood.

Markby, J.—It seems to us that we ought to dispose of both these appeals upon one ground,—a ground which is applicable to both suits, and upon which we think both suits ought to have been dismissed.

The two suits were brought,—one by the representatives of Aleemoollah and Lallzamah, the two younger sons of Torab Ali; and the other by the two widows of the elder son of Torab Ali, *viz.*, Leakut Ali, on the allegation against the zemindar that Torab Ali had obtained from the predecessors in title of the zemindar an hereditary mokururree tenure of eight annas of Mouzah Jaffrabad. It was alleged to have been obtained by Torab Ali from Mussamat Chet Kooer in the name of his adult son, Leakut Ali, under a pottah dated the 14th Falgoon 1238. The claimants in both suits admit that they have been out of possession since the 12th Assin 1268, that is to say, for a period of about 11 years. They further assert that the original mokururree pottah has been lost; the history which they tell about that being that it was filed in a Fouzdaree Court so long ago as the year 1838; that it remained there until the time of the mutiny, when the records of that Court were destroyed, and this document was destroyed with them. Those suits have been disposed of by one judgment; and the judgments of both the Lower Courts find that the contents of the document, so far as they are material for the purposes of these suits, have been proved by the admissions of Chet Kooer; and the defendants in these suits being persons who purchased from her, the Courts have held that the defendants are bound by her admission.

The point on which those admissions have been brought to bear upon the case, and which is one upon which we think these cases ought to be disposed of, is whether or no this pottah, which was undoubtedly granted in the year 1238, created an hereditary interest or one only for the life of the grantee.

Now, it is to be observed that in these judgments there is no observation whatever upon the very extraordinary story which is told as to the mode in which this document came to be destroyed, namely, that this document, which is of so highly valuable a character, should have been left in the Criminal Court for a period of two and twenty years without any enquiry. Neither have the Courts below noticed another very important point, namely, what has happened with regard to the possession of this property, and which is wholly consistent with the story put forward by the defendants, namely, that it was a life-interest which was created by this pottah, and which is wholly inconsistent with the story put forward by the ptaintiff, namely, that it was a grant creating an hereditary tenure. Had it created an hereditary tenure, it is difficult to see how it was that none of the heirs either of Leakut Ali or Torab Ali got into possession. Probably, however, if there had been evidence in the case upon which the Courts were justified in coming to the conclusion they did as to the contents of the pottah, there would have been considerable difficulty in this Court interfering merely upon the ground that the Courts below had not adverted, when deciding questions of fact, to circumstances which appear to us to be important. But though we could not interfere on this ground, still we are justified in narrowly scrutinizing the evidence in order to see whether the admissions were really made, upon which the Courts below have relied.

The evidence which was relied on by the first Court was two-fold. In the first place, it is said that in the year 1832, before the present defendant's purchase, in a civil suit, at least in a suit which ultimately went to the Civil Court, Chet Kooer distinctly then admitted that this was a pottah creating an istemorary mokurruree interest, that is to say, an hereditary tenure. That admission stands thus: the suit was originally brought by the members of the zemindar's family other than Chet Kooer, she not being a party, to get rid of this pottah. It was brought at a time when both Leakut Ali, the grantee, and Torab Ali, the alleged beneficial owner, were alive: and the question which was then raised was not whether this pottah was hereditary or not, but whether this lady had any power to grant a lease which was alleged to have affected property of persons other than herself. There is no doubt, however, that Torab Ali, both in the plaint and subsequently in his answer to the petition of appeal, distinctly alleged that it was an hereditary pottah. Now, in the appeal stage of the suit, this lady Chet Kooer was made a respondent, and she put in an answer to the grounds of appeal which is recited in the judgment in these words:—"That the proceedings mentioned in the petition of appeal and the plaint of the plaintiffs, appellants,

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"were owing to the sex of your petitioner and her being a purdanusheen, and "because the appellant Chummun Lall was "her general mookhtear. His acts being "proved wholly fraudulent, he has been "dismissed by me from his post, karpurdaz-"ship; he is in no way connected with the "properties left by my husband, which are "solely in my possession."

Then the judgment goes on to say—"The "remaining portions of the statement (of this "respondent) are in support of the answer "to the petition of appeal and plaint put in "by the first party, *viz.*, she states that the "appellants are unconcerned parties, and she "declares her own rights."

The other piece of evidence relied on by the Subordinate Judge is this, that in the petition of objection filed by the father of the defendant in the year 1859, he speaks of the interest created by this pottah as an istemorary mokurruree one. But the second time he uses that expression, he adds to it these words—"That is to say, a life mokurruree."

That is the whole evidence upon which the first Court found that this document created an hereditary tenure. The District Judge, in dealing with that evidence, says he considers the latter rather to be against the plaintiff and in favor of the defendant, because, as he points out, the construction which was then contended for by the owner of the land was that this pottah created a life-interest only. And it certainly must be admitted that, upon the decisions of this Court as they then stood, and also possibly upon these terms as they were then understood in some parts of the country, there was some ground for the contention. At any rate, the District Judge thinks that document does not contain anything in favor of the plaintiff. He relies entirely upon the admission which we have alluded to as made in the suit of 1832. Now, really when one comes to see what that admission is, it only amounts to this, that it is an assertion by the plaintiff that he held an hereditary tenure, which question was not then the question in dispute between the parties. The person who granted that tenure comes in at the appeal stage of the suit, and says in one part of her statement that she supports the answer to the petition of appeal and the plaint put in by the other party. She undoubtedly did support that plaint and that answer in this respect, that she claimed a right to grant the lease which had been granted by her, and upon which the plaintiff relied. But there is no reason whatever to suppose that her attention in making that admission was drawn to the particular terms of the pottah, or that in making that admission she made it for any other purpose than what she says, *viz.*, in order to contend that the appellants had no concern in the matter and to assert her own rights. The admission, as recited in the document before us, expressly says that that was the only object which she had in making that admission. That being so, we do not think that the Courts below were justified in treating that as an admission amounting to anything more than this, namely, that it was an admission that she granted a pottah, and there is no admission at all as to the exact nature of the rights of the grantee.

We think, therefore, the Lower Courts have gone astray in this case by not sifting with sufficient care the nature of the admission which was relied upon by the plaintiff. If that construction be put upon it, which we have stated above, and which seems to us to be the proper construction, it is valueless as an admission in this suit, for it admits nothing as to the point now in dispute.

That, however, is the whole evidence upon which the finding rests. The other admission is got rid of, and no reference whatever is made in either Court either to the copy which is suggested to have been produced or to the oral evidence. We must therefore hold that there is no evidence in respect of the contents of the pottah that it was an hereditary mokurruree grant. That being the case, the plaintiff's case wholly fails in this suit.

We are aware that it is an unusual course for this Court to interfere with the concurrent finding of two Courts on a question of fact in special appeal; but the decision has turned entirely on the construction of a written admission, and that admission has, we think, been wrongly understood.

In this view, it is not necessary for us to say anything as to the question whether the decree obtained against the widows of Leakut Ali was final, nor as to the question which has been suggested, *viz.*, whether the grant when made was to Leakut Ali or whether it was for the benefit of Torab Ali in the fictitious name of Leakut Ali.

These two appeals will be allowed, and the judgments of the Lower Courts in both cases reversed, and both suits dismissed with costs in all the Courts.

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The 9th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Illegal Contracts.

Reference to the High Court by the Moonsiff exercising the powers of a Judge of the Small Cause Court at Serajgunge, dated the 18th July 1872.

Protima Aorut, *Plaintiff*,

versus

Dookhia Sircar and others, *Defendants.*

A contract which is against public policy and intended to evade the course of law cannot be enforced in a Court of justice; and money paid under such contract, *e. g.*, for an illegal purpose, such as bribing a darogah, cannot be recovered by a suit in Court.

Case.—THE facts of this case are as follow:—The plaintiff alleges that her husband was in *hajut* in a case of *budmaheshee*, and while there the defendants took from her Rs. 50 on condition of causing the release of her husband, but they failed to perform the contract. The defendants deny the receipt of any money from the plaintiff, or the entering into any contract with her for the purpose of causing the release of her husband. The plaintiff in her plaint has not stated anything as to how the money that she paid to the defendants was to be spent, and to whom it was to be paid. From the evidence of two of plaintiff's witnesses, it appears that the defendants received the money from the plaintiff for paying the same as a bribe to the darogah under whose custody her husband was. This fact, elicited from plaintiff's own evidence, renders it quite clear that the contract on which the money was paid was an illegal one. It was in fact a contract which was against public policy and intended to evade the course of law. Such a contract cannot be enforced in a Court of justice, and money paid under such an illegal and immoral contract cannot be recovered by suit. I am of opinion, therefore, that the plaintiff's case must fall down on her own evidence. It being clear from plaintiff's own evidence that she paid the money to the defendants for an illegal purpose, I am of opinion that she cannot sue for the recovery of the money if the defendants failed to perform their part of the contract or to account to her for the money. The plaintiff's claim is, therefore, liable to dismissal on this account; but as her pleader has pressed it upon me that the case may be referred to the Hon'ble High Court for opinion, I deem it proper to refer this case for the opinion of the Hon'ble High Court under Section 22 of Act XI of 1865. I therefore dismiss the plaintiff's claim with costs and interest, subject to the opinion of the Hon'ble High Court as to whether money paid for an illegal purpose, as bribing a darogah, can be recovered by a suit in Court.

Judgment of the High Court:—

Couch, C.J.—The Judge's view of the law is right.

The 9th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Breach of Contract — Limitation — Cause of Action.

Reference to the High Court by the Judge of the Small Cause Court at Burrisul, dated the 19th July 1872.

Ram Dyal Koondoo, *Plaintiff*,

versus

Gooroo Dass Sen, *Defendant.*

In a suit to recover a balance due for articles supplied to defendant on account current between the parties, where an oral contract existed to the effect that, on defendant's giving *chittees* as security, articles of food for daily consumption would be supplied to him from plaintiff's shop, the *chittees* to be returned to defendant at intervals after payment on presentation, it was found that plaintiff last, on the 1st Assar 1276, returned to defendant the unpaid *chittees* then on hand; but defendant did not pay their amount. Subsequently, on different dates, he paid a portion. The suit was for what remained due.

HELD that the breach of contract on which the suit was brought occurred when the defendant failed to pay, on presentation of the *chittees*, the amount then due and payable.

Case.—I HAVE the honor respectfully to state that the plaintiff of the above case, after filing his plaint, where it is stated that he wants to recover Rs. 201-15-6 due on account of articles supplied to defendant up to 1st Assar 1276 on account current between them, states in length in his examination on oath to the purport that his suit is not based on any *khatta-buhee* which bears the signature of defendant. Plaintiff keeps a *khatta* of his own as a memorandum. But that there existed a previous contract with the

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defendant to the effect that on his (defendant's) or his *karpurdauz's* giving *chittees* or notes as security, articles of food for daily family consumption would be supplied to defendant from plaintiff's shop. At the end of the year, or after any shorter or longer interval, whenever plaintiff or his man shall go to defendant's house, he must return those *chittees* to defendant, and receive their amounts from him. Accordingly, the transactions were carried for upwards of 20 years since the time of plaintiff's father, who is now dead, and that plaintiff has also likewise continued the *karbar* for some time as above. Plaintiff lastly, on the 1st Assar 1276, went to defendant's house, and as usual returned him the unpaid *chittees* then on hand, but the defendant did not pay him their amount, Rs. 478-4, due at that time. Subsequently, on different dates up to 4th Kartick 1278, defendant, by adjustment and cash, has paid only Rs. 276-4-6, but the remainder, Rs. 201-15-6, are yet not paid; and as defendant has committed a breach of contract by stopping further transaction from 1st Assar 1276, plaintiff brings this suit to recover from defendant the balance, Rs. 201-15-6, reckoning his cause of action as accrued from 2nd Assar 1276, since when defendant has left taking any article from plaintiff's shop.

Defendant, with the permission of the Court, granted on his application, through his *karpurdauz* Dinonath Sen, who he asserts is aware of the whole transaction, on oath deposes to the effect which in every respect confirms plaintiff's statements as regards the nature of the transaction and the manner in, and the period for, which it was carried, as well as the transaction being closed from 1st Assar 1276, when the unpaid *chittees* were made over to defendant by plaintiff. But he does not admit the entire sum claimed by plaintiff as now due. He says plaintiff's demand against defendant on the 1st Assar 1276 stood at Rs. 219 and some odd annas. After subsequent part-payments made in different ways by defendant on three occasions up to the end of 1278, of Rs. 159 and odd annas, plaintiff's claim against defendant now stands at Rs. 69 only.

Defendant's pleader says that notwithstanding a part of plaintiff's claim is admitted by defendant, but it is barred by the Law of Limitation; and the Court cannot decree it even on admission. He argues that this is a suit to recover the amount of a tradesman's bills for articles sold in retail, and governed by Clause 8 Section 1 Act XIV of 1859, and every item of unpaid transaction under the *chittees* which falls prior to three years from the date of the presentation of the plaint is barred. He cites the precedent noted in the margin in support of his argument.

22nd May 1866, Wooma Soonduree Dassee, defendant (appellant), *vs.* Bullessur Roy.

Plaintiff's pleader says that, under the High Court Ruling of the 25th July 1864, held in the case of Woomesh Chunder Bose *vs.* W. Smith and others,* the Small Cause Court is not tied down by the strict form of a plaint; hence, though plaintiff has omitted to mention the particulars of the contract in the plaint, but from his statements on oath, which are not denied by defendant, it is evident this is a suit based on a contract which, though oral, is valid. The demand, though it refers to price of articles under the circumstances of the dealings, cannot be taken from the category of contract transaction, and as the breach on the part of defendant to purchase articles from plaintiff's shop, as was agreed upon on the commencement of the *karbar*, took place on the 1st Assar 1276, three years from that date to the presentation of the plaint, which was filed on 31st Joisto 1279 B. S., have not elapsed. Further, though the defendant's pleader urges limitation in bar, the defendant admits the demand in part. He cites the precedent held by Her Majesty's Privy Council noted in the margin to show that this case, under its peculiar circumstances, is governed by Clause 9 Section 1 Act XIV of 1859.

Dated 1st July 1871, Dookeney Pershad Misser *vs.* Fool Koomaree Debia, Volume XVI, page 53, Weekly Reporter.

The plainitiff in this case is not come to recover the amount of his bills. Hence the cause of action in the present case under the peculiar nature of the transaction which was carried on between the parties for so long a period as upwards of 20 years continually, I am of opinion, ought to be reckoned, under the principle of Section 8 Act XIV of 1859, from the end of the year when the transaction closed; but as that Section is enacted for suits on account of account current between merchants and traders, and there is no definite rule how to compute the limitation of three years under Clause 8 Section 1 Act XIV of 1859, this case, if it be not considered a suit on contract, should be

* Sutherland's S. C. C. References, 94.

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governed by Clause 16 Section 1 of the Act, the time of limitation under which is six years. But I see there was a contract made by defendant to purchase articles from plaintiff's shop if plaintiff acted up to the terms laid. Plaintiff has regularly supplied articles, and returned the *chittees*, notwithstanding defendant has stopped transaction with him, and also withheld the price of the things supplied, which is a breach of contract on his part, which occurred on the 2nd Assar 1276, which both parties admit. Also subsequent payments were made up to the close of 1278, which is also not denied, and from that time not even one year has elapsed. The period of limitation under Clause 8 and Clause 9, which pleaders of the both parties respectively argue should govern the case, is three years. The dispute is about the time from which the limitation is to be computed. I am of opinion that, according to the nature of the case, the cause of action in the suit has occurred from 1st Assar 1276, when the breach on the part of defendant to purchase articles from plaintiff's shop took place: that is, the date when the demand was last settled and the transaction closed. I have, therefore, overruled the objections of the defendant's pleader; and as of the sum of Rs. 159 on account of subsequent part-payments urged by defendant, Rs. 80 has been proved by him to have been actually paid, I have deducted only this amount from the sum of Rs. 219, admitted by him as the demand which stood on the 1st Assar 1276, and given defendant a modified decree of Rs. 139, with proportionate costs, which shall not be realized until the opinion of the High Court is obtained on the following points, which I beg respectfully to refer under Section 23 Act XI of 1865 on the motion of defendant's pleader.

The points submitted for the decision of the Hon'ble Court are these, *viz.*, whether, under the peculiar circumstances of the dealings between the parties, the limitation of plaintiff's suit is to be governed under Section 1 Clause 8 Act XIV of 1859; if so, when the cause of action has accrued in this case, or is this a suit to be governed by Clause 16? If neither, as the plaintiff's pleader argues, and with whom I have agreed, whether I have correctly considered it a suit based on a contract the breach of which, under Clause 9 Section 1 of the Act, having taken place from the 2nd Assar 1276, the cause of action accrued from that time? The decision of the Hon'ble Court on the above points is most respectfully solicited.

The judgment of the High Court was delivered as follows by—

Ainslie, J.—The Judge of the Court of Small Causes has found as a fact that there was an oral contract between the parties; and on the facts as stated, we are of opinion that the breach of contract in respect of which the suit is brought occurred on the 1st of Assar 1276, when the defendant failed to pay to the plaintiff, on presentation of the *chittees* or vouchers, the amount then due by him and payable under the contract.

The 9th September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Decree after Local investigation—Appellate Court.

Case No. 312 of 1872.

Special appeal from a decision passed by the Judge of Cuttack, dated the 4th October 1871, *reversing a decision of the Moonsiff of Dhamnugger, dated the 13th February* 1871.

Brindabun Bharotee (one of the Defendants) *Appellant,*

versus

Rajah Dhunnunjoy Narain Bhunjo Deo (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee and *Mohendro Lall Mitter* for Appellant.

Baboo Nil Madhub Sen for Respondent.

An Appellate Court ought not to reverse the decision of a first Court based upon very careful inspection of the land in dispute, except upon a very clear and strong opinion upon the evidence, and upon recording sufficient and satisfactory reasons for such opinion.

Pontifex, J.—In this case, the respondent sued to recover possession which he admitted to be in the appellant.

It was therefore incumbent on the respondent to prove his title.

The Moonsiff, after sending an ameen, very carefully himself inspected the locality, and examined the pleaders of each party, and also the ameen on the spot; and as the result of such inspection, he finds in his judgment that the ryots, residents on the disputed lands, are the appellant's ryots, and that the disputed land is in fact bounded on two sides by the appellant's undisputed land.

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From such inspection, and from the evidence of the appellant's witnesses not examined on the spot, the Moonsiff found distinctly that the land in dispute is part of Trilochanpore, the appellant's estate, and that it has all along been in the possession of the appellant and his ancestors. With respect to the oral evidence he remarks—"The witnesses "have given evidence in support of the state-"ments of the parties by whom they have "been adduced. There is, however, this much "difference between these witnesses, thus: "most of the plaintiff's witnesses are residents "of distinct villages, while most of the "defendant's witnesses are not only neigh-"bours, but nine witnesses are resident ten-"ants of the land in dispute."

The Lower Appellate Judge, without any personal inspection of the lands, has reversed the decision of the Moonsiff; and it has been urged by the appellant's pleader that in accordance with the rulings of the Privy Council and of this Court, it is incumbent on an Appellate Judge, who reverses the decision of a Judge who has made a personal inspection of the lands in dispute, to give his reasons for reversing the original judgment; and that, unless such reasons are given, or if such reasons are unsatisfactory, the original judgment should be restored.

On the other hand, it has been urged by the respondent's pleader that if the judgment of the Lower Appellate Judge contains clear findings of fact, we cannot in special appeal go behind such findings, except to correct a mistake in law; and that in fact, the Lower Appellate Judge has shown in his judgment that he was aware that he ought not to reverse the decision of the Moonsiff, who has visited the locality, unless for substantial reasons.

With respect to the question of limitation, the Lower Appellate Judge rightly enough asserts that an inspection of the locality can avail but little without an examination of witnesses on the spot; and he relies upon an Act IV case, instituted by the guardian of the appellant during his minority, in 1859, with respect to the greater part of the land in dispute, in which the petition specifically prays for restoration of possession to the appellant.

The conclusion which the Judge draws from that petition is that it is at least sufficient to prevent the appellant from pleading limitation in the present suit, and he finds clearly that on the whole evidence the respondent's suit is not barred by limitation. On that finding we need give no opinion, as we do not think it necessary to decide the case on that issue. But with respect to the question of title, we are of opinion that the Act IV case, the petition in which has been read to us, does not raise a presumption strong enough to excuse the plaintiff, who was suing for possession, from proving his own case.

The prayer of the petition is no doubt for restoration of possession. But the recitals in it show that it was preferred for the purpose of protecting the possession of the appellant, then threatened by the acts of the respondent, rather than for restoring possession to the appellant.

The Lower Appellate Judge does not in terms rely upon the Act IV case as sufficient to excuse the respondent from proving his own title; but it is impossible for us to divest ourselves of the impression that it did in fact considerably influence his decision on the question of title.

On the merits, the Judge finds that there is "no good evidence that the lands are in Trilochanpore," the appellant's estate; and again he says—"There is no evidence on which I can find that the land really belongs to that village." The Judge thus seems to have required proof of the appellant's title, he being in possession, and to have decided on the absence of such proof rather than upon the strength of the respondent's evidence.

It is true that he says—"*I think* the evidence all leads to the conclusion that the lands are within Jolashapore;" and he says further—"The plaintiff has proved his former possession and dispossession; for *I think* his witnesses on that point more worthy of credit than those of the defendant;" but he had previously stated his reason for disbelieving the appellant's witnesses, namely, because they had ignored the fact of the appellant's alleged admission of dispossession under the Act IV case. With the exception of that reason with which we are, on the grounds before stated, unable to agree, the Judge has given no reasons for the conclusion at which he arrived; and there is no clear finding by him on the question of title as on the question of limitation; and he entirely disregards the finding of the Moonsiff that the tenants of the appellant were, and had long been, in actual possession.

We think that the Judge ought not to have reversed the decision of the Moonsiff, who had very carefully inspected the land, except upon a very clear and strong opinion

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upon the evidence. and upon recording sufficient and satisfactory reasons for such opinion. The Judge has indeed stated that there are "strong reasons" for coming "to a different finding from the Moonsiff;" but the only reason which he has given we consider is not borne out upon a reference to the petition in the Act IV case. We are, therefore, of opinion that the Lower Appellate Judge ought not to have reversed the decision of the Moonsiff, and we allow this appeal with costs.

The 9th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Error in Summons—New Trial—Limitation.

Application forwarded by the Judge of Sylhet, pursuant to Circular Order, No. 13 *of the* 4*th June* 1870.

Bijoy Gobind Deb (Plaintiff) *Petitioner*,

versus

Muddun Ram Pal (Defendant) *Opposite Party*.

An error as to date in the summons to plaintiff's witnesses is sufficient ground for setting aside an order dismissing his suit.

The time prescribed by Act XI of 1865 s. 21 for an application for a re-trial, is exclusive of the date on which the suit was dismissed.

THE Petitioner submitted the following application in this case:—

The Judge of the Small Cause Court of this Zillah, Sylhet, having dismissed the said suit on the 2nd Jeyst last, corresponding with the 14th May 1872, injustice was done to me on the following grounds. Hence I pray that the papers connected with the above suit being called for and looked into, orders for a re-trial of the case be passed.

1.—The 26th Jeyst, corresponding with the 7th June, having been fixed in the summons served upon the witnesses cited by me for final decision, my witnesses were ordered to appear in Court and give evidence on that day. Knowing that the aforesaid 26th Jeyst, corresponding with the 7th June, was the day on which my case was to be finally decided, I dismissed all thoughts about it.

2.—To my misfortune the Judge of the Small Cause Court dismissed my case on the 2nd Jeyst, corresponding with the 14th May, in my absence, without taking the evidence of my witnesses.

3.—I was not in the least aware, nor was there any means of knowing, that the 2nd Jeyst, corresponding with the 14th May, in place of the 26th Jeyst, corresponding with the 7th June, was the day fixed.

4.—Having come on other business to the town of Sylhet on the 10th Jeyst, and learnt that my case was dismissed, I filed a petition praying for a re-trial, eight days after the said decision, but the Judge rejected the same.

Ainslie, J.—The order of the Small Cause Court Judge, dated 22nd May 1872, refusing a re-trial of the case was wrong, for excluding the date on which the suit was first dismissed, *viz.*, the 14th May, the application was within the time prescribed by Section 21 Act XI of 1865; seven days from, that is exclusive of, the date of the decision. The first order of 14th May must also be set aside, as it appears on an inspection of the summons to plaintiff's witnesses that they were directed to attend on 7th May, corresponding to 26th Jeyst; but the 26th Jeyst corresponded to 7th June 1872, and this error in the summons must have misled the plaintiff and caused his non-attendance on the 7th May. The suit should be restored to the file.

The 10th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Anislie, *Judge*.

Possessory action—Right of suit—Primâ facie title.

Case No. 116 of 1871.

Regular Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 27*th January* 1871.

Ram Bhurosee Singh and others (Defendants) *Appellants*,

versus

Bissesser Narain Mahata (Plaintiff) *Respondent*.

Baboos Mohesh Chunder Chowdhry and *Romesh Chunder Mitter* for Appellants.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondent.

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In a suit for possession of land claimed as part of a mouza which plaintiff held under a mokurruree lease and a bill of sale, and which he alleged had been taken possession of by defendant under color of an order of the Criminal Court under Section 318, Code of Criminal Procedure, relating to a different land, defendant objected that plaintiff was not the real owner of the mouzah, and therefore not entitled to bring the suit:

HELD that the *primâ facie* title which the plaintiff had under the lease and bill of sale was sufficient to enable him to bring the suit, and the defendant was not at liberty in a suit of this description to raise the question whether plaintiff was only the nominal owner.

Couch, C. J.—The plaintiff alleged that Raj Coomar Singh, his vendor and lessor, had purchased the talook to which Mouzah Bhedia appertained, and subsequently transferred it to the plaintiff under a mokurruree lease, dated the 3rd of April 1864, and by a bill of sale dated the 15th of January in the same year; that he was in possession under those documents; and that he had been dispossessed by the defendants of land which formed part of Mouzah Bhedia. His case was that an order having been obtained from the Criminal Court, by which the defendants were to have possession of a portion of land which lay to the south of their mouzah and to the north of the mouzah which the plaintiff said belonged to him, the defendants, taking advantage of that, took possession of the land still further to the south.

An objection has been made that the plaintiff was not the real owner of Mouzah Bhedia, and therefore not entitled to bring this suit.

The case which has been quoted and is reported in III Weekly Reporter, page 159, is one in which the plaintiff sought for a declaration of his rights by reason of an auction-purchase. He alleged that he had purchased at a sale for arrears of Government revenue with his own funds and in his own name, and that he obtained possession of his purchase, but that the defendants resisted his taking possession. It may be that in such a case as that, and upon a plaint so framed, the plaintiff took upon himself to show that he was the real owner. But the dispute in the present case was what land belonged to the one mouzah and what to the other; and whether the defendants, as the proprietors of the one, had got possession of land which did not belong to them, but belonged to the owner of the other. I think that the title which the plaintiff had by the mokurruree lease and the bill of sale was sufficient to enable him to bring the suit, and that the defendants were not at liberty, in a suit of this description, to raise the question whether he was only nominally the owner of the property, somebody else being the real owner. The difficulties which are suggested in the judgment in the case quoted might all be met without holding that the party who brings the suit and has a *primâ facie* title, is bound to prove that he is the real owner. I think that the authority which has been quoted, supposing it is to be considered as the law of this Court and binding upon us, does not govern the present case.

Then we have to consider whether the judgment of the Court below is right upon the merits and also on the law of limitation.

The Judge appears to have proceeded with considerable care. After hearing the arguments in the case, he says that he went to the spot, accompanied by the representatives of the parties. He had with him the thakbust map and the survey map, the accuracy of which has not been disputed, and he proceeded to Mouzah Bhedia; and by means of those maps he traced the boundaries of the two mouzahs, and in doing so he found, as it appeared to him, that in the laying down of the boundary by the darogah, there had been a mistake, which put the boundary of the defendant's mouzah 10 beegahs to the south of what the maps showed it to be. Now, whether that is true or not, the Judge has given the defendants the benefit of it, because, although he has treated the darogah's boundary as not being the right one, he has held that the defendants have had possession of the portion of the land which is colored red in the map annexed to the plaint for more than 12 years, and has refused to give the plaintiff a decree for that.

With regard to the other part, the question is whether the plaintiff is entitled to that upon the evidence which has been given. The proceedings in 1867 show that upon enquiry the Magistrate came to the conclusion that this mistake had been made. He says it is evident that "in the present case the dispute was with regard to the boundary, and "that if something was not done there would "be a disturbance. I brought the case under "Section 318, and at the same time ordered "the Inspector of Police within whose "thannah the land was to proceed to the "spot, and, taking the thakbust map with "him and the report of 1849, make out where "the boundaries were first laid down." Then the Magistrate says that this was done, and it was reported that the land about which they were disputing was in Mouzah Bhedia, because, according to the thakbust map, from No. 68 only 17 beegahs ought to have been measured; whilst in the measurement of 1849, the darogah himself reports that, not being

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able to find any coal at 17 beegahs he had measured on to 27 beegahs, where he did find coal. He then says that the Inspector had therefore not followed the old measurement of 1849, but the thakbust map, and had measured 17 beegahs instead of 27, by which means the land fell into Mouzah Bhedia; that he sent him back again and told him to measure it according to the measurement of 1849, *i. e.*, 27 instead of 17, and then he reported that the land fell into Nugwan. Upon this the order was made under which the defendants were put into possession of that portion.

It appears to me upon this evidence that what took place then was what the plaintiff alleges. Up to that time the question in dispute between the parties had been where the boundary of the land was. The defendants had got possession of the part which was measured and found to belong to them in 1849; and when they speak of having been in possession, and evidence is given and statements made about possession, I think possession of that portion of it is meant, and what the plaintiff's witnesses say is correct. When that proceeding took place and that order was made, the defendants, not content with taking possession of the 10 beegahs to the south of their land, according to the survey map, took advantage of the proceeding and took possession of a portion still further to the south, which the plaintiff now claims. The evidence appears to me to show (and it is not met by the evidence of the defendants) that it was not until that time that possession was taken of the part which is now in question and the subject of the present appeal. I see no ground for saying that the plaintiff was not in possession of the part which has been decreed to him. Upon the facts, there is the judgment of the Lower Court most carefully come to after an examination and measurement made on the spot in presence of the parties. It appears to me that that is correct, and is supported by the evidence we have before us. We ought to attach weight to such an investigation which is more likely to be accurate and to lead to the truth in a question of this kind, than an examination by this Court of the evidence on paper, when we have no opportunity of looking into the matter in the way the Judge did. I think the defence on the ground of limitation fails, and that the decree of the Court below is right upon the merits in awarding to the plaintiff that portion of the land which lay to the south of the land which was laid down in 1849.

The appeal will be dismissed with costs.

Anislie, J—I wish to add a few words to the judgment delivered by His Lordship the Chief Justice. It has been contended for the appellant that the Judge himself has found a certain *anjeer* tree to be situated within that portion of the boundary which is marked on the map as No. 61, and that the darogah's statement shows that the boundary was 5 russees and 7 beegahs to the south of that. But the Darogah's statement also shows that the boundary marks from 62 to 71 were ascertained by digging up the charcoal which had been buried by the survey operations to mark the site of the several boundary pillars erected by the Ameens, and that from 49 to 57, where no such marks were found in consequence of the place being under water, no dispute existed, and there is no indication in the report of any great and sudden deviation to the south from the boundary, as given in the thakbust maps, between these two portions. Then, on turning to the examination of Domee Lall, manager of the defendant, taken on the 19th of November 1870, we find that he gives a description of the boundary claimed by defendant corresponding exactly with the thakbust map, with this exception that he adds 10 beegahs to the measurement between Nos. 69 and 70 by one map, and 38 and 39 by the other. He says that the boundary goes to the south in a direct line 84 beegahs, thence to the west 44 beegahs, thence again to the south 67 beegahs, and again from 67 to the west 84 beegahs, thence again direct to the south 11 beegahs and after that *straight to the west.* Now, according to this statement, the last deviation from the east and west line is at the point from which the line runs south 11 beegahs, and so far there is no difference between the parties as to the angles or bends in the boundary. It seems to me impossible that a man should notice a break of 11 beegahs and omit to notice a little further on a break or turn extending 107 beegahs to the south, or that he should describe as a single line running to the west a line made up of three parts, first, 160 beegahs running west, then 107 beegahs running south, and then again 496 beegahs more or less (I take the numbers from the maps) to the west. This, with the other arguments stated by His Lordship, satisfies me that the Judge was correct in finding the boundary as he has done.

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The 11th September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Act VIII of 1859 *s.* 119—*Ex parte Decision.*

Cases Nos. 213 and 214 of 1872.

Miscellaneous Appeals from an order passed by the Judge of Midnapore, dated the 13*th April* 1872, *reversing an order of the Moonsiff of that District, dated the* 11*th March* 1872.

Denoo Paroye and another (Judgment-debtors) *Appellants,*

versus

Chinta Monee Chowdhry (Decree-holder) *Respondent.*

Baboo Ashootosh Mookerjee for Appellants.

Baboo Motee Lall Mookerjee for Respondent.

Where a defendant was prevented by the fraud of the plaintiff from appearing on the last day of hearing, the suit was held to have been decided *ex parte*, notwithstanding that the defendant had been represented on the first day of hearing; and the first Court was held to have done right in restoring the case to the file under Act VIII of 1859, s. 119.

Kemp, J.—It is admitted that one judgment will govern these two cases. The judgment-debtor was sued by the opposite party for enhancement of rent. In that case, the agent of the plaintiff appeared and gave his evidence. Upon this, the Deputy Collector in his judgment observed "that "notwithstanding the issue of the usual "summons and the execution of a Mookh-"tarnamah by the defendant, the defendant "had taken no further notice of it, and that "as the plaintiff's case was sufficiently "proved he decreed the case *ex parte* in "favor of the plaintiff with costs." Under this decree the jumma of the defendant, appellant before us, has been enhanced threefold. The defendant then applied for a restoration of the case to the file under Section 119 of Act VIII of 1859. The Moonsiff, after taking the evidence adduced by the defendant in support of his allegation that he was prevented by sufficient cause from appearing when the suit was called on for hearing, set aside the *ex parte* judgment passed by the Deputy Collector and appointed a day for proceeding anew in the suit.

On appeal, the Judge was of opinion that the decree is not an *ex parte* one, for the defendant in the rent-suit was represented on the first day of hearing, and therefore the fact of his not being present or represented on the second day of hearing cannot turn the order into an *ex parte* one, and this being the case, that the Moonsiff acted without jurisdiction in allowing a re-hearing under Section 119. He accordingly reversed the order of the Moonsiff.

We think this decision is wrong in law. Section 119 enacts that no appeal shall lie from a judgment passed *ex parte* against a defendant who has "not appeared." The Section then goes on to say:—"But in all "cases in which judgment may be passed "*ex parte* against a defendant" (and here the words "who did not appear" do not occur) "that defendant may apply within a "reasonable time not exceeding thirty days, "after any process for enforcing that judg-"ment has been executed, for an order to set "it aside; and if it shall be proved to the "satisfaction of the Court, either that the "summons was not duly served or that the "defendant was prevented by any sufficient "cause from appearing when the suit was "called on for hearing, the Court shall pass "an order to set aside the judgment, and "shall appoint a day for proceeding with the "suit." We mark the difference here that in the first part of the Section it is said that no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared, while in the latter part of the Section the law says that a defendant (generally) who is prevented by sufficient cause from appearing *when the suit was called on for hearing*, may apply. Now, in this case there can be no doubt that the Moonsiff has found on the evidence that the defendant was prevented by the fraud of the plaintiff, who induced him by false promises of coming to an amicable arrangement and that he would take rent from him at the old rate for his tenure, from appearing when the suit was called on for hearing. We, therefore, think that the suit having been decided *ex parte* and the defendant having proved to the satisfaction of the first Court that he was prevented by sufficient cause from appearing when the suit was called on for hearing, the Moonsiff was perfectly right in setting aside the *ex parte* judgment and appointing a day for proceeding with the suit. We, therefore, reverse the decree of the Lower Appellate Court and affirm the order of the first Court restoring the case to the file.

The suit will, accordingly, go back to the first Court for a re-trial, and these appeals will be allowed with costs.

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The 11th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Joint Contract—Act VIII of 1859 *s.* 2.

Case No. 177 of 1871.

Regular Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 19*th May* 1871.

Nuthoo Lall Chowdhry and others (Plaintiffs) *Appellants*,

versus

Shoukee Lall and others (Defendants) *Respondents*.

Mr. C. Gregory for Appellants.

Mr. Lingham and *Baboos Unnoda Pershad Banerjee* and *Romesh Chunder Mitter* for Respondents.

If a party sues upon a joint contract, which is not also several, and gets a judgment, he cannot bring a fresh suit against the persons who were jointly liable with the defendant but were not included in the former suit: such second suit being expressly prohibited by Act VIII of 1859 s. 2.

Couch, C.J.—On the 11th of Jeit 1271, a bond was given by the defendants Domun Lall and Bhowanee Pershad to the plaintiffs, the bond reciting that the parties had taken a loan of Rs. 20,000, and that they had appropriated that sum "to the use of all of us," and then going on to say, until payment of the said amount, principal with interest, we pledge and hypothecate our own share of the property in Mouzah Chirowtha and 11 annas and 9 dams in Mouzah Nowada Kullan. In the beginning of the bond, they describe themselves as proprietors and shareholders of Mouzah Surood. Whether that means some other Mouzah or not, does not appear; probably it means the one which is afterwards mentioned in the bond.

That was in June 1864. In February 1865, the plaintiffs instituted a suit against Domun Lall and Bhowanee Pershad, the parties to the bond. In that, they claimed to recover 22,250 rupees, principal with interest, by virtue of the bond.

The defendants apparently did not appear, and evidence having been entered into as stated in the judgment, a decree was made in favor of the plaintiffs that they should recover the sum which they claimed from Bhowanee Pershad, Domun being exonerated from the claim.

It is not we think without significance that so soon after the bond was given, the plaintiffs put that construction upon it treating it as a bond by the two only,—Domun Lall and Bhowanee Pershad.

It appears that the plaintiffs executed that decree, and according to the statement in the plaint in the present suit, they sold the right and interest of the two persons named in it, still in the execution of the decree treating it as an instrument which had pledged the shares of those two. They recovered the sum of 7,435 rupees; and now, instituting a suit on the 3rd of December 1870, they say, "since the decree was not against all the "defendants, the whole of the mortgaged property in which second party defendants "held a share was not put up to sale; but the "fact is that there being community of "interest, the loan was taken and mortgage "concluded alike by all defendants; hence all "of them are jointly liable to your petitioners "and the entire property ought to be held "liable." So their case now is that this, instead of being a bond by the two and a mortgage of the shares of the two, was in reality a bond by all the members of the family jointly and a mortgage of the family property.

We will assume they might show that although this bond purports to be made by two only of the family, the transaction really was a borrowing of money by the family through these two persons as the managers, and a pledging of the family property as a security for the money so borrowed:—they might show that the transaction was one in which the persons whose names are in the bond and who entered into the contract were acting as agents for the family.

But the bond must be one thing or the other. It must be either a bond by the two and a mortgage of the shares of the two only, or the joint bond of the family; it cannot be treated as two bonds. If it is only a bond by the two, the plaintiffs have no cause of action in the present suit, because they have already sued the two and recovered a portion of the money from them, and they cannot sue other persons not bound by it; but if it is a joint bond by the members of the family, then they have already sued upon it. They have elected to sue some of the persons jointly liable, and not the others, and they have got a decree upon the bond, the cause of action being the non-payment of the money which the parties

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were jointly liable to pay. They now sue on the same cause of action the persons whom they might have joined in the former suit, but did not choose to do so. If there is a joint contract, not a joint and several, but a joint contract,—and that is all this can be,—and the party sues upon it and gets judgment, he cannot bring a fresh suit against the persons who were jointly liable but were not included in the former suit.

Notwithstanding the authority of the case to which we have been referred, and with every respect to the learned Judges who held apparently to the contrary, we are of opinion that if this is to be considered as a joint bond by all the members of the family, the present action cannot be maintained. It is a second suit on the same cause of action. It is expressly prohibited by Section 2 of Act VIII of 1859, as the defendants in the first suit must, if the other defendants insist upon it, be made parties to the second; and, without that, we should say on principle that it cannot be maintained.

Upon the merits of the case also, it seems to us that the plaintiffs have failed to make out what they allege in their plaint, that it was a bond by which all the members of the family were bound, and that the mortgage was concluded alike by all of them. If we look at the whole of this document, although it does in one part contain words which might be construed as meaning that the money was borrowed for the use of all the family and for the purpose of being used in the business which was being carried on by the family, because we may take it that the family was joint, in the other portion the parties to it profess to pledge only their own shares in the property. We must put such a construction upon the whole instrument as will make it reasonable. It would not be reasonable to suppose that these two were borrowing money on account of the family, the whole family being considered as the debtors and liable to pay the money, and yet were only pledging their own shares as a security for it. The reasonable construction we think is that which was in the first instance put upon it, namely, that it was a loan to the two and a pledging by them of their own shares. And opposed to that, which is the natural and *primâ facie* meaning of the document, we have really little or no evidence either given on the part of the plaintiffs or that they can gather from the evidence for the defendants. At the utmost, the evidence seems to amount to this, that the family at that time was a joint one and the business was being carried on with the money of the family by these two persons, and that probably the money which was borrowed on this occasion was carried to the account of the business and was made use of in it. We do not think that is sufficient to prevail against the apparent meaning of the document itself. The *onus* is upon the plaintiff suing upon such an instrument as this to make out that the transaction really was one on behalf of the family and a pledging of the family property, and he has produced no evidence that can be considered as proof of that. He has failed to show that the case which he now puts forward is a true one. When he in the first instance treated it as a bond of the two, he was probably putting the true construction upon the transaction. It appears to us, therefore, that both on the question of law and on the merits, the plaintiff's case fails, and the appeal must be dismissed with costs.

The 11th September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Presumption—Self-acquired Property—Separation of joint family.

Case No. 262 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 7th September 1871, *reversing a decision of the Sudder Moonsiff of that district, dated the 21st January* 1870.

Drobo Moyee (one of the defendants) *Appellant,*

versus

Tara Chand Pal (Plaintiff) *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

Baboo Obhoy Churn Bose for Respondent.

Plaintiff having objected unsuccessfully under Act VIII of 1859 s. 246 to the sale of certain property sold in execution, brought a suit to establish his right to it as the self-acquired property of his father. The first Court found it to be the joint property of plaintiff and the judgment-debtor, whose rights and interests had been properly sold. This decision was reversed by the lower Appellate Court, which raised two presumptions, *viz.*, first, that the inference to be drawn from the fact of the property having been acquired in the name of the plaintiff or of the plaintiff's father is that the plaintiff, to the exclusion of the judgment-debtor, was the owner of the lands so acquired; and, *secondly*, because the elder branch of the family separated from the younger branch, therefore the younger branch must be held to have separated as amongst themselves.

HELD, that both these presumptions were wrong in law.

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Kemp, J.—In this case the defendant, who is the special appellant before the Court, brought certain properties to sale in execution of a decree obtained against Ram Tunoo on a bond debt. The plaintiff, present respondent, objected under the provisions of Section 246, but his objection was overruled, the sale took place, and the decree-holder, special appellant before us, became the purchaser. This suit was then brought by the plaintiff under the provisions of the aforesaid section to establish his right. The plaintiff contends that the property in dispute is the self-acquired property of his father, Bungshee, and that Ram Tunoo and his heirs, the judgment-debtors, have no right or title whatever in the property. It appears that Nimaye Chand Pal had three sons by his first wife and two sons by his second wife. The elder branch of the family separated from the younger branch, and this is admitted.

The first Court found that the property in dispute was the joint property of the plaintiff and Ram Tunoo, and that as such the rights and interests of the judgment-debtor had been properly sold and purchased by the defendant, special appellant.

This decision has been reversed by the Subordinate Judge on appeal.

The Subordinate Judge starts by assuming, first, that the inference to be drawn from the property having been acquired in the name of plaintiff or plaintiff's father is that the plaintiff, to the exclusion of the judgment-debtor, is the owner of the lands so acquired; and the second presumption which he raised is that because the elder branch of the family, that is to say, the three sons of the first wife, separated from the younger branch of the family, the two sons of the co-wife, therefore the two sons of the co-wife must have separated as amongst themselves. Starting upon these presumptions, the Subordinate Judge throws the *onus* upon the defendants to establish that the properties in dispute were purchased from the joint stock, and he holds that they have not been able to prove that they have been so purchased, and that the plaintiff had proved the acquisition of these properties from separate funds and also their possession by him to the total exclusion of the judgment-debtor.

We think that in this case there can be no doubt that the two presumptions which have very much influenced the decision of the Subordinate Judge are wrong in law. No inference can be made, as supposed by the Subordinate Judge, from the fact that because the property in dispute was acquired in the name of the plaintiff's father, the plaintiff alone is the proprietor and that the other members of the family have no interest in the property; and the second presumption is also wrong in law, namely, that because one branch of the family separated from the other branch, therefore the junior branch must be held to have separated as amongst themselves. That being the case, and being of opinion that the Subordinate Judge's judgment has been mainly influenced by these presumptions which he has erroneously considered to be applicable to the case before him, although he has, on the evidence, after throwing the *onus* on the defendants, found that the defendants have not been able to prove that these properties were acquired from the joint stock, still we think that he came to that finding because he considered that the presumptions which he raised applied to the case. We find that on the important question as to who paid the consideration-money, the Subordinate Judge found that although the deed of conveyance recites that the consideration-money was paid by the judgment-debtor, Ram Tunoo, though the deed itself is in the name of the plaintiff's father, Bungshee, he, the Subordinate Judge, believes the evidence that the money was paid by the plaintiff, not because the plaintiff had proved the payment by evidence, but because the defendants have failed in his opinion to prove that the moneys were paid from the joint stock. We, therefore, think that the case has not been properly tried by the Subordinate Judge, and we remand the suit to the Judge of the district for a re-trial as an appeal from the decision of the Moonsiff.

Costs to follow the result.

The 11th September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Julkur rights—Accretions.

Case No. 13 of 1872.

Special Appeal from a decision passed by the Officiating Additional Judge of Dacca, dated the 30th June 1871, reversing a decision of the Moonsiff of Nesragunge, dated the 12th December 1870.

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Kalee Soondur Roy and others (some of the Plaintiffs) *Appellants*,

versus

Dwarkanath Mojoomdar and others (Defendants) *Respondents*.

Baboo Nullit Chunder Sen for Appellants.

Baboos Kalee Prosunno Dutt, Rujonee Nath Bose, and *Bussunt Coomar Bose* for Respondents.

In a suit to establish a right of fishery in a river, where the right was not opposed and the plaintiffs obtained a decree, the Lower Appellate Court—which also found that the disputed body of water south of the river occupied what was once its bed and was connected with the river by a narrow inlet—reversed the decree on the ground that it was possible this communication might silt up later in the year.

HELD that the Lower Appellate Court's decision was wrong in law, and that, on the finding, the plaintiffs were entitled to a decree.

HELD, also, that if the flowing stream dried up, and the defendants acquired a right to the land by the law of accretion, that right would be subject to the exercise by the plaintiffs of their prior right of fishery.

Kemp, J.—WE think the decision of the Judge in this case is wrong in law. It is admitted that the plaintiffs have the right of fishery in the Khurye river, and the Judge himself says that this right is not disputed by the opposite party. The Judge also found that the disputed body of water shewn in the map on the south of the river Khurye occupies what was once the bed of that river, and he also says that it is connected with the river Khurye on the west by a narrow inlet. The Judge does not find on any evidence that the river Khurye has become disconnected from the disputed sheet of water; but he seems to think that it is possible that the communication may silt up later in the year, and on this ground alone he reverses the decision of the first Court.

In special appeal, it is contended that this decision is wrong in law, on the ground that as the Judge has found that the disputed julkur occupies the original bed of the river Khurye and is connected with the flowing channel as shewn in the undisputed Ameen's map, the plaintiffs, as the undisputed proprietors of the julkur rights in the Khurye, are clearly entitled to a decree. This being so, and there being a finding that the river Khurye is connected with the disputed sheet of water, and moreover, even if it was not so connected, it having also been found that the disputed sheet of water covers the original bed of the river which has been decreed to the plaintiffs, they are entitled to exercise their right of fishery over that water. It has been said in the course of the argument that the Court should hold that the plaintiffs' julkur rights would cease when the communication between the disputed sheet of water and the flowing stream of the Khurye river dries up, as the plaintiffs would have to trespass upon the lands of the defendants to enable them to exercise their rights of fishery. We do not see that this would follow at all, for there is an approach to the disputed sheet of water by the Mirzapore Khâl which would not necessitate any trespass on the defendants' lands for the exercise of their julkur rights by the plaintiffs; and moreover, the defendants having acquired their right to this land by the law of accretion, this right must be subject to the exercise by the plaintiffs of their right of fishery which had been decreed to them prior to the accretion of the land in the defendants' occupation.

We, therefore, reverse the decision of the Judge and restore that of the first Court with costs.

The 11th September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges*.

Jurisdiction—Partition (Butwarrah)—Act XI of 1859 s. 11—Identification—Act VIII of of 1859 s. 25.

Case No. 177 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 4th October 1871, affirming a decision of the Moonsiff of Aosgram, dated the 25th July 1870.

Meer Aftabooddeen and others (some of the Defendants) *Appellants*,

versus

Shumsoddeen Mullick (Plaintiff) *Respondent*.

Baboo Grija Sunkur Mojoomdar for Appellants.

Baboo Bama Churn Banerjee for Respondent.

The purchaser at a sale, under Act XI of 1859 s. 54, of a share of an aymah estate, sued for possession of the lands in the occupation of the sharer whose rights and interests he had purchased. The other sharers (also defendants in the suit) who had previous to the sale preferred an application under Section 11 and made a separate account of their shares with the Collector, alleged that plaintiff was in possession of all that he could claim

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as purchaser. The Lower Courts gave plaintiff a modified decree, from which some of the defendants appealed.

HELD that the suit was not a suit for partition and that the Civil Court had jurisdiction.

HELD that, under Act VIII of 1859 s. 25, all that it was necessary for plaintiff to do was to describe the property in such a manner as may suffice for identification; it was not absolutely necessary to set forth boundaries.

HELD that each party to a butwarrah need not have the same quantity of land, nor should the land awarded be always in exact proportion to the jumma paid. The object of the butwarrah being to divide the lands in as compact a form as possible, one party may have to pay the jumma on a smaller area than another, though on more valuable land.

Kemp, J.—WE think this special appeal must be dismissed. The plaintiff has purchased at a Government sale for arrears of revenue the share of the defendant No. 1 in an aymah estate No. 1104. The plaint alleges that the total area of the aymah estate is 65 beegahs 3 cottahs 8 gundahs, paying a jumma to Government of Rs. 7 12 annas 7 pie; that the defendants 2 and 3, under Section 11, Act XI of 1859, made an application to the Collector to have the specific portion of land appertaining to their share separated; that the Collector accordingly opened a separate account with the defendants 2 and 3; that subsequent to that proceeding, which took place in 1865, the share of the defendant No. 1, which remained unprotected by Section 11, was sold for its own arrears, and as the Government revenue was satisfied from the proceeds of that sale, it was not necessary to sell the remaining shares. The plaintiff purchased the share of the defendant No. 1 at the auction sale, and he now sues alleging that the total area of the aymah is 65 beegahs 3 cottahs 8 gundahs; that the defendants 2 and 3 having opened a separate account with the Collector under Section 11, according to the provisions of which section they were bound to specify the lands contained in their share and the extent thereof, and as they had stated that their share comprised 33 beegahs 7 cottahs, that it followed that the remaining area, namely, the difference between 65 beegahs 3 cottahs 8 gundahs and 33 beegahs 7 cottahs, was in the possession of his predecessor, the defendant No. 1, whose rights and interests he has purchased under Section 54 of the Sale Act XI of 1859; and that he, the plaintiff, as the purchaser of the share of the defendant No. 1, has acquired all the rights which were possessed by the defendant No. 1.

The written statement of the defendants is to the effect that the total area of the aymah tenure was not 65 beegahs but 48 beegahs 12 cottahs; that, on this total area, the defendants 2 and 3 have opened a separate account of their share, namely, 33 beegahs 7 cottahs, which they hold under defined boundaries and separate from the defendant No. 1; and that the defendant No. 1, whose rights the plaintiff has purchased, was in possession of the remaining lands, namely, 15 beegahs, also within defined boundaries. There were other defendants in the case who set up a claim to a portion of the land under a lakheraj title. They set forth their title clearly and within definite boundaries, and with reference to their claims both Courts have found that the lakheraj land must be excluded from calculation, and both Courts have given the plaintiff a modified decree against the defendants Nos. 2 and 3.

The grounds of special appeal are that this suit is virtually a suit for partition of a revenue-paying estate, and therefore that the Civil Court has no jurisdiction to entertain it; secondly, that the plaintiff not having stated the boundaries of the land claimed, his suit should not have been entertained by the lower Court; thirdly, that the decree was incapable of execution; and lastly, that if there is any excess over the 48 beegahs stated by the defendants to be the total area of the aymah Mehal, the excess ought to be given to the plaintiff and defendants in proportion to the jummah paid by them respectively to Government.

We think that the first ground is not tenable. This is not a suit for partition. The defendants Nos. 2 and 3, as already observed, have separated themselves, in so far as the protection of their shares is concerned, from sale by reason of the default of the joint-proprietors by proceeding under Section 11 Act XI of 1859. The present plaintiff did not sue to have a re-distribution of shares with a specific jumma apportioned to each share, but his suit is for possession of the lands in the former occupation of the defendant No. 1, whose rights and interests the plaintiff has purchased.

On the second ground, that the boundaries have not been stated in the plaint, it is sufficient to say that, under Section 25 of Act VIII of 1859, all that it is necessary for the plaintiff to do is to describe the property in such a manner as may suffice for its identification. It is not absolutely necessary that the boundaries should be set forth, and as long as the land can be identified it is sufficient; and there is in this case a sufficient description. We, therefore, overrule this objection.

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We also think that the decree is capable of execution. Under Section 11 of Act XI, under which the defendants Nos. 2 and 3 opened a separate account with the Collector, they were bound to specify the boundaries of the lands comprised in their share, and we must assume that they did so, for there is the Collector's proceeding of 1865 on the record stating that the provisions of the Act were complied with and that a separate account was consequently opened under the provisions of Section 11. Therefore the lakheraj lands having been defined, and the claim of the lakherajdar defendants having been admitted within defined boundaries, any excess over the 33 beegahs 7 cottahs held by the defendants Nos. 2 and 3, minus the lands awarded to the lakherajdars, can be given possession of to the plaintiff; and the plaintiff already being admittedly in possession of 15 beegahs odd cottahs, the balance may be made over to him.

With reference to the last ground, namely, that the excess lands ought to have been given to the plaintiffs and to the defendants Nos. 2 and 3 in proportion to the amount of their respective jummas, it has been found by the Lower Appellate Court that the lands in the occupation of the defendants Nos. 2 and 3 are more valuable than the lands in the occupation of the plaintiff. The lands held by the defendants are apparently homestead lands or lands in the immediate vicinity of these homestead lands, and the lands held by the plaintiff are lands of a less valuable description and which do not pay so high a jummah as those of the defendants.

In every case of a Butwarrah it does not follow that each party will have awarded to him the same quantity of land. It often happens that one party gets more land, or less land but of a more valuable quantity than the other party; the reason being that the object of a Butwarrah is to divide the lands in as compact a form as possible. One party may have to pay the jummah on a smaller area than the other; and it does not follow that the lands to be awarded to each party should be in exact proportion to the amount of jummah paid by them respectively to Government.

On the whole case, we think that the decision of the Court below is a right decision, and we dismiss this appeal with costs.

The 20th July 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Execution-sale—Refusal to pay Proceeds—Proceedings.

Case No. 107 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Patna, dated the 6th January 1872.

Khajah Mahomed Hossein Khan (Judgment-debtor) *Appellant,*

versus

Syud Lootf Ali Khan (Decree-holder) *Respondent.*

Mr. C. Gregory for Appellant.

Moulvee Mahomed Yusoof for Respondent.

Where, by declining to pay to the decree-holder the proceeds of an execution-sale which has been confirmed, a Court obliges him to take proceedings to satisfy the Court that there is no other possible claimant, such proceedings must be considered as proceedings to enforce the decree and obtain satisfaction thereof.

Couch, C.J.—If, after the confirmation of the sale on the 5th of January 1862, the decree-holder had had nothing more to do but apply to the Court to have the money paid to him, and the money would, as a matter of course, have been paid, we do not see that his application to have the money paid can be taken to be a proceeding which would save the operation of the law of limitation. But the present case is of a different character. It appears now that the decree-holder could not, upon confirmation of the sale, as a matter of course, have obtained the money. There had been a notice to the Court of the existence of another decree which the Court might be called upon to execute, and it is clear that for a considerable time the Court declined to pay the money out to the decree-holder; and before it would do so, it required that it should be satisfied that there was no other person who might have a claim to a portion of the money.

The proceedings which the decree-holder was obliged to take in order to get that matter determined, and to induce the Court to order the money to be paid to him, must be considered as a proceeding by him to enforce his decree and to obtain satisfaction of it. Therefore, that clearly being within the

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period of three years before the time when he made the subsequent application to enforce the decree, the present proceeding cannot be held to be barred by the law of limitation.

The appeal must be dismissed with costs, pleader's fees being fixed at two gold mohurs.

The 12th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Landlord and Tenant—Rents—Attachment.

In the matter of

Pritun Koormee and others, *Petitioners*,

versus

Edil Singh, *Opposite Party*.

Mr. R. T. Allan for Petitioners.

Mr. C. Gregory for Opposite Party.

A landlord may have a right to receive a share of the produce as rent, and if the share is not made over, to compel it to be done or to recover damages; but the property in the crops is in the ryot until transferred by some act of his own. It is illegal for the landlord to attach every thing in the possession of the ryot which he considers may be liable to satisfy the rent; all that he can do by way of attachment is to treat the rent as a debt due from the ryot to the landlord and to attach it as such.

Couch, C.J.—It appears upon the proceedings of the decree-holder and the statements which he filed in answer to the objector that this property was not liable to attachment and could not be attached in the way in which it was. The landlord had a right, it may be, to receive a share of the produce as rent, and if that was not handed over to him he might have power by law to compel it to be done or to recover from the ryot damages for not doing it. But the property in the crops is in the ryot until he has transferred it by some act of his own to the landlord in payment of the rent. Up to that time all that the landlord has is a right, by the contract of tenancy, to insist on this being done. It seems upon the decree-holder's own statement that it had not been done at the time of the attachment. We think it is very clear that what he did was to attach every thing which was in the possession of the ryot and which he considered might be liable to satisfy the rent. He speaks of it in his answer to the claim as property which was pledged for the payment of the rent. The attachment was illegal. All that could have been done by way of attachment was to treat the rent as a debt due from the ryot to the landlord, and to attach it as such. The present proceedings are irregular, and as the case has come before us in the exercise of the superintending power of the Court, we cannot allow them to stand. We set aside the attachment.

We think that in the two rules upon which the opposite party has appeared (338 and 423) the petitioner should have his costs including pleader's fees, they being fixed at Rs. 16 in each case, and that in the remaining cases he will have the costs except the pleader's fee.

The 12th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Misjoinder of Causes—Decree—Appeal—Review—Jurisdiction.

Case No. 75 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Patna, dated the 17th November 1871, modifying an order of the Subordinate Judge of that district, dated the 13th May 1871.

Mussamut Pegoo Jan and another (Decree-holders) *Appellants*,

versus

Mullick Waizooddeen and others (Judgment-debtors) *Respondents*.

Moonshee Mahomed Yusoof for Appellants.

Mr. R. E. Twidale for Respondents.

In a suit in which several defendants were joined, to set aside alienations made at different times and to different persons, plaintiff succeeded in the first Court partly, and on appeal wholly, and obtained a decree ordering the alienated property to be restored to him. Then the defendants, their interests being separate, brought separate special appeals, which were dismissed. After this, two of them applied for a review, and the decrees were modified (a portion of the claim being declared barred by limitation), but on a ground not applicable to all the defendants:

Held that, if these decrees were separate decrees in each appeal, the High Court had no power to modify the decrees in which there was no application for review, and which therefore remained in force, and should be executed.

Couch, C.J.—The plaintiff in this suit appears, as the Judge says, to have unnecessarily (certainly not wisely) joined in his suit

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several defendants against whom there were different causes of action. The alienations which he sought to have set aside were made at different times and to different persons. In this case that has been done which the late Chief Justice spoke very strongly against in the case reported in VIII Weekly Reporter, page 50.

The plaintiff succeeded in the first Court partly, and on appeal he succeeded wholly, and obtained a decree setting aside the alienations which he objected to, ordering the property to be restored to him.

Then the four defendants brought separate special appeals. This they might do, their interests being separate, and it might be that the case as to each of them was different from that as to the others. Upon these special appeals, the plaintiff was also, in the first instance, successful, and the appeals were dismissed.

Then it appears that two of the defendants applied for a review, and the Court upon that modified the decrees which had been before made. It held that a portion of the claim was barred by the law of limitation, because more than three years had passed since the plaintiff obtained his majority, and the last alienation was in 1849,—more than twelve years before the institution of the suit. The decrees therefore declared that the plaintiff's suit as regards the property claimed by inheritance was barred, and the suit as regards such property was dismissed.

It appears from the judgment, which is now appealed against, that the ground upon which the decrees in the special appeals were so modified is not applicable to all the defendants, because the Judge, speaking of an application by the plaintiff for a review of that decision, says—"the effect of the order of "the High Court would have been better "stated in the interests of the plaintiff if, as "it has now been shown to me, it had been "shown to the High Court that the aliena-"tions in favor of other parties had been "made less than twelve years previously, that "they therefore did not fall within the rule "of limitation." The plaintiff, as the Judge said, has in reality suffered from the way in which he has mixed up the claims against the several defendants.

That being so, it certainly would not be just or proper, if the language of the decree of the High Court on the review is ambiguous, to put a construction upon it which would bar the plaintiff as to the two defendants who did not apply for a review, and in whose special appeals the decree originally passed remains in force. We think that the Court, if these are to be treated as separate decrees in each appeal, had not power to modify the decree in the appeals in which there was no application for a review. The only way in which it seems to us the construction which the respondent now contends for can be put upon the decree is this, that the High Court having, on the application of one of the parties for a review, got the case again before it, would deal with it in the same way as it would originally upon the appeal, and the ground upon which an alteration of the decree was asked for was one which was common to all the defendants, it might be proper that the decree should be modified as regards every defendant.

But that is not the case here. We think, therefore, that we ought not to put the construction upon the words of the decree which would make the plaintiff barred by the law of limitation as to all the defendants—those who did not apply for a review as well as those who did. Both the Lower Courts appear to us to have put much too strict a construction upon the decree as altered. Their orders must be set aside, and they must be directed to restore the case to the file and proceed to execute the decree in accordance with the view which this Court has taken.

We think that the costs of this appeal ought to be paid by Luteefoonissa and Waizooddeen: the other respondents will pay their own costs.

The 12th September 1872.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Landlord and Tenant—Forfeiture—Khas Possession.

Application for the admission of a special appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 1st June 1872, modifying a decision of the Moonsiff of Raojan, dated the 7th February 1871.

Doorga Kripa Roy (Plaintiff) *Appellant,*

versus

Sree Janoo Lathak and others (Defendants) *Respondents.*

Baboo Bussunt Coomar Bose for Appellant.

No one for Respondents.

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The fact of a tenant having stated in a former suit that he had a good title as against a person alleging himself to be the assignee of the original landlord, does not constitute a forfeiture of the tenure in favor of the landlord or warrant a suit by the landlord for khâs possession.

Markby, J.—THE only ground taken in this case is the third ground contained in the memorandum of appeal, *viz.*, "that the defendant having denied your petitioner's title in the suit for a kubooleut, your petitioner is entitled to a decree for khâs possession."

That assumes that there was a tenure granted to the defendant. The ground upon which this suit is based is, that there is a forfeiture of the tenure on account of what took place in a former suit. All that happened in the former suit was, that the tenant, as against the person who alleged himself to be the assignee of the original landlord, and to whom he had not attorned or acknowledged as his landlord, stated that he had a good title as against him. No authority has been shown that that constitutes a forfeiture.

The application is refused.

The 12th September 1872.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Act XIV of 1859 *s.* 15—*Jurisdiction—Act IV (B. C.)* 1870 *s.* 11—*Collector's Powers.*

In the matter of
Kalee Doss Roy, *Petitioner.*

Baboo Obhoy Churn Bose for Petitioner.

Case.—H. R., a Hindoo, died intestate, leaving two sons, W. C. R. and K. D. R., his heirs and representatives. W. C. R. and K. D. R. continued joint for some time, when W. C. R. died intestate, leaving a widow and two minor sons. The widow, as mother and guardian, managed the property jointly with K. D. R. Subsequently the estate and effects of the minors were, by an order of the Civil Court, made on a petition by the widow, vested in the Collector, who appointed one S. as manager thereof under Act XL of 1858. S. then brought a suit against K. D. R. in the Court of the Subordinate Judge, and obtained a decree under Act XIV of 1859 s. 15. K. D. R. then applied to the High Court to set aside this decree as made without jurisdiction:

HELD that, supposing there was no difficulty as to the authority to bring the suit, the Subordinate Judge had full jurisdiction in the matter.

As the High Court was not prepared to say that, under Act IV of 1870 (B. C.) s. 11, the Collector had not power to give authority to the manager to bring the suit, and as the objection on this score was technical, and no substantial injury had been done, it refused to interfere.

Markby, J.—I DO not think we ought to interfere in this case. I think there is no ground whatever for supposing that any substantial injury has been done to the applicant. He says that, in consequence of this decision that he complains of as having been passed without jurisdiction, he is to be plaintiff in the suit which he will have to bring to recover possession. But the question whether or no the proceedings were authorized by the Court of Wards cannot alter the facts of the case; and upon the facts of the case it has been found that the applicant was not in possession, and so he is only put into the position in which he ought to be. The Subordinate Judge who made this order had full jurisdiction in the matter supposing that there was no difficulty about the authority to bring the suit, and he has found as a fact, which we must assume he has found correctly, that the applicant had wrongfully dispossessed his opponent. Therefore, upon the merits of the case, he is exactly in the position that he ought to be, viz., that he should be the plaintiff in the suit.

Besides that, the point upon which we are asked to interfere is one of a very technical kind, namely, that the authority given by the Collector was not sufficient. I do not wish to express any opinion on this matter; but I am by no means prepared to say that, under Section 11 Act IV of 1870, B. C., this was not a duty of the kind which the Collector had power to perform.

Looking, therefore, to the fact that no substantial injury has been done and to the nature of the objection, we think we ought not to grant the rule.

The application is refused.

Glover, J.—I am of the same opinion.

The 12th September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Partnership—Limitation—Act XIV of 1859 *s.* 1 *cls.* 9 *and* 16, *and s.* 8.

Case No. 70 of 1872.

Regular Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 12*th March* 1872.

Donald McCorkindale (one of the Defendants) *Appellant,*

versus

Edward Young (Plaintiff) and another (Defendant) *Respondents.*

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Mr. Marsden for Appellant.

Mr. Lingham and *Baboo Kamala Kant Sen* for Respondents.

Plaintiff was in the service of the principal defendant (C), who was carrying on a partnership business with another as founders and engineers. During such service, plaintiff, C, and a third party entered into a joint adventure or partnership, with respect to the purchase, employment, and sale of a steam tug,—the profit or loss to be shared equally,—it being arranged that C should retain in his hands plaintiff's monthly salary and appropriate so much as might be necessary to plaintiff's share of the expenses. After sale of the tug the account was made up, showing a separate loss to each partner of Rs. 2,341, and was allowed and approved by each sometime prior to 29th July 1868. On the date last mentioned, plaintiff signed an account between himself and C, in which a balance was struck in plaintiff's favor, and immediately reduced by payment of a part to Rs. 4,054. On the same date, C instructed his clerk to write to plaintiff claiming to deduct board and lodging expenses, and on 30th July 1868 plaintiff replied refusing to allow the deduction. A further portion of the balance was afterwards paid by C. On the 31st July 1871, plaintiff instituted a suit against C and the third partner, framing his claim as if it were in the nature of a partnership demand.

HELD that, on the 29th July 1868, when plaintiff signed the account, and a balance had been struck, all partnership transactions had ceased between the parties, and that he was entitled to sue C for the balance of all salary and moneys in C's hands; but that his claim was not a partnership demand to be regulated by Act XIV of 1859 s. 1 cl. 16.

HELD that the accounts did not fall within s. 8 of the same Act, but that the case was governed by s. 1 cl. 9, under which the claim was barred by limitation.

Pontifex, J.—THE plaintiff and principal defendant in this case were employed as engineers on board the steam ship *Clan Alpine* belonging to Messrs. Jardine & Co.

The defendant, McCorkindale, while on such service, carried on, in partnership with a Mr. Unsworth, at Seebpore, a business as engineers and founders. Upon Mr. Unsworth's death in 1865, McCorkindale left the *Clan Alpine* and entered upon the personal management of the business at Seebpore, which he thenceforward carried on for his own benefit, subject only to the claim of Mrs. Unsworth as the representative of his deceased partner.

On the 15th of March 1866, the plaintiff left the *Clan Alpine*, and entered the service of McCorkindale according to his own account as 'foreman,' but according to McCorkindale's account as 'assistant.'

The plaintiff swears that McCorkindale contracted to pay him as wages "a salary as good as that of any chief engineer in Jardine's service." In the present suit he has claimed for salary at Rs. 500 per mensem, with board and lodging. That amount seems to have been arrived at not so much from the rate of pay in Jardine's service, as from an entry in McCorkindale's books which charges the account between McCorkindale and Mrs. Unsworth with the payment of a salary to the plaintiff at the rate of Rs. 500 per mensem for four months, and which is relied on by the plaintiff as an admission binding on McCorkindale.

McCorkindale, on the other hand, refers to entries in the books kept by him after settlement with Mrs. Unsworth in which the plaintiff's salary is, during the whole period of his service, entered at Rs. 300 per mensem.

For the decision of this case it will not be necessary for us to determine what was the original arrangement between the parties; for whatever might be the amount of salary, the whole of it became due more than three years before the institution of the present suit.

During his period of service with McCorkindale, the plaintiff, McCorkindale, and a person named Walker entered into a joint adventure or partnership with respect to the purchase, employment, and sale of a steam tug called the *John Bull*. That vessel was purchased in April 1866 and sold in December 1866. It is admitted that the three co-adventurers were to take upon themselves the profit or loss of the adventure in equal shares.

After the sale of the *John Bull*, and so far as can be discovered from the evidence, about the end of 1867, the account of the *John Bull* was made up by a Mr. Pittar. That account appears at page 4 of the printed book. It does not pretend to show the amount contributed by any of the parties to the joint adventure, but is simply an account of profit and loss on the ship from the time of purchase to the time of sale, and it shows a total loss in the adventure of, in round numbers, Rs. 7,032, and the separate loss of each partner in the adventure as Rs. 2.341.

This statement of account was submitted to the plaintiff and the defendants McCorkindale and Walker, and was allowed and approved by each of them, at all events, some time prior to the 29th of July 1868.

The plaintiff's case is that he arranged with McCorkindale that the latter should retain in his hands the monthly salary of the plaintiff, and appropriate and apply so much as might be necessary to the plaintiff's one-third share in the expenses of the steam tug.

Assuming that this was the real arrangement between the parties, it is clear that the partnership transaction with respect to the

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steam tug closed with its sale in December 1866, and that from the time the account at page 4 was accepted by the parties as correct and final, the plaintiff immediately became entitled to demand from the defendant McCorkindale the whole amount of his wages and any other moneys in McCorkindale's hands belonging to him, after deducting Rs. 2,341-15-2, the plaintiff's share of the loss shown by the account at page 4.

The plaintiff left McCorkindale's service on the 15th of May 1868.

It is admitted by the plaintiff that, on the 29th of July 1868, he signed an account between himself and McCorkindale in which, after being debited with the Rs. 2,341-15-2, and being credited with, among other items, his wages at the rate of Rs. 300 per mensem, a balance of Rs. 5,054 was struck in plaintiff's favor, which was reduced to Rs. 4,054 by the payment on the same day of Rs. 1,000 by cheque.

We are of opinion that the signature by the plaintiff to that account shows that, at the date thereof, he acknowledged that the partnership transaction with respect to the *John Bull* had come to an end, and that a final balance with respect thereto had been struck. Subject therefore to the payment of the Rs. 2,341-15-2, his share of the loss, the plaintiff was entitled, on the 29th July 1868, to sue McCorkindale for the balance of all salary and moneys of the plaintiff then in McCorkindale's hands.

On the same 29th of July, the defendant McCorkindale instructed his head clerk to write to the plaintiff claiming to deduct Rs. 1,300, on account of the plaintiff's board and lodging expenses, from the balance of Rs. 5,054 appearing on the account which had been signed by the plaintiff, and sent an amended account in which such deduction was accordingly made.

In answer to such amended account and letter, the plaintiff, on the 30th July 1868, wrote to McCorkindale refusing to allow the deduction of anything for his mess expenses, alleging that his salary was to be Rs. 300 per mensem at the least, and insisting that McCorkindale should pay him the balance appearing on the account signed by the plaintiff as before stated, after deducting the Rs. 1,000 already paid.

It would seem from the evidence that not more than Rs. 1,000 of such balance of Rs. 4,054 has since been paid by McCorkindale to the plaintiff, and the plaintiff, on the 31st July 1871, or more than three years after the date of the account signed by him, instituted the suit in which this appeal has arisen.

In order to prevent the plea of limitation, the plaintiff has endeavoured to frame his claim against McCorkindale as if it was in the nature of a partnership demand, and as if the partnership accounts between himself, McCorkindale, and Walker were still open. He has accordingly made both McCorkindale and Walker defendants to his suit, and has prayed that accounts may be taken with respect to the steam tug.

The defendant McCorkindale, in his written statement, pleaded that the plaintiff's demand was barred by limitation.

The Subordinate Judge appears to have overruled the objection as to limitation, on the ground that the case fell within Section 8 of Act XIV of 1859 as a suit for a balance of account current between merchants, and on the merits he decided that a considerable sum was due from McCorkindale to the plaintiff.

Against that decision McCorkindale has appealed, and has again raised the question of limitation.

The respondent's Counsel has argued that limitation does not apply, because the case is one of partnership account, and therefore falls under Clause 16 Section 1 Act XIV of 1859; or that at all events it falls within Section 8 of the same Act which would prevent limitation commencing to run until the close of the year 1868; and further that, inasmuch as McCorkindale has sworn that he, at sometime before the commencement of the suit, sent the plaintiff another account signed by himself (a copy of which is filed with McCorkindale's written statement), in which entries of subsequent payments bearing date in September and November 1868 appear, such account must be taken as an admission by McCorkindale within three years of the institution of the suit.

With respect to the last ground, we think that even if the account last referred to had been sent by McCorkindale (and the plaintiff demurs having ever received it), it cannot be relied on as an acknowledgment by McCorkindale to stop limitation, as it in fact is an account which states a balance as due from the plaintiff to McCorkindale, and cannot therefore be considered either as a written engagement to pay, or an admission that a debt was due to the plaintiff.

It is with considerable reluctance that we find ourselves obliged to hold that the plaintiff's suit is barred by limitation.

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We are of opinion that, at all events, on the 29th July 1868, all partnership transactions between the parties had ceased, and that a final balance of such matters had been struck and agreed on; and that therefore, on that day, the plaintiff's demand against McCorkindale was not a partnership demand to be regulated by Clause 16 Section 1 Act XIV of 1859.

We are clearly of opinion that the accounts do not fall within Section 8 of the same Act; and we think the case is governed by Clause 9 Section 1 of the Act, and that as the plaintiff's suit was not instituted until the 31st July 1871, his claim against McCorkindale was barred, and his suit ought therefore to have been dismissed with costs.

We, therefore, reverse the decree of the Subordinate Judge, and dismiss the plaintiff's suit with costs both in this Court and the Court below.

The 12th September 1872.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

"Talook"—Questions of Fact—Estoppel.

Case No. 62 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 21st December 1871.

Khaja Asanoollah (Defendant) *Appellant,*

versus

Kalee Mohun Mookerjee and another (Plaintiffs) *Respondents.*

Messrs. J. T. Woodroffe and *R. E. Twidale* and *Baboo Chunder Madhub Ghose* for Appellant.

Baboos Hem Chunder Banerjee and *Bykunt Nath Doss* for Respondents.

Where the word "talook" occurs without any sort of qualification and restriction, it refers *primâ facie* to a hereditary interest.

No Privy Council decision is a binding authority on a question of fact, as the decision of one Court cannot bind another on such a question between other parties.

Quære.—Is an investigation of the title of a talookdar commenced in the Revenue Court, and either decided there or carried up in appeal to the Civil Court, a bar to a suit by the talookdar to recover possession and mesne profits?

Markby, J.—THIS was a suit to recover possession and mesne profits of 12 annas of what the plaintiff describes as a putnee talook in certain mouzahs, to which he alleges he is entitled under a grant which was originally made to persons from whom he claims by the zemindar.

The defendants rested their defence on several grounds, and those which have been raised for our consideration are:—

First.—Whether the zemindar did create any such talook.

Secondly.—Whether, if it was so created, it had not been cancelled.

Thirdly.—Whether the right of one Taranath, to whom it was alleged this putnee had passed by inheritance, had been sold to Ramgutty, and again sold by Ramgutty to the plaintiff's brother.

Fourthly.—Whether the suit is barred by the decision which took place with reference to this property in the Revenue Court under Act X of 1859.

And, lastly, whether anything should be allowed for mesne profits in case the plaintiff should recover possession.

It is not necessary to trace exactly the title of the plaintiff. The only ground upon which that title is disputed, supposing the talook to be hereditary, and not to have been cancelled, is that it did not pass by successive sales from Taranath, through the person named Kalee Kristo, to the plaintiffs; and we may dispose of this question at once, because as the Subordinate Judge says that, if Taranath's right and interest in the talook had not been parted with before Ramgutty bought it, and Ramgutty did buy it and sell it to the person from whom the plaintiffs claim, then there would be no further question as to what other proceeding there was with reference to this property. The Subordinate Judge finds as a matter of fact upon the evidence, and which is uncontradicted, that the property did so pass, and no reason has been shown to us why we should disturb that finding.

Then the next question to be considered is as to what is the nature of that interest which the zemindar granted to the ancestor of Taranath. Now the document by which that interest was created was not produced. I do not think any very satisfactory reason has been given why it was not produced. But, on the other hand, I do not understand that any charge has been made against the plaintiffs that they attempted to conceal that document. I do not think, therefore, that any ground has been made why we should presume that that document contained anything adverse to the plaintiffs. What we have to do is to ascertain, in the absence of that document, as well as we can, what the

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nature of the interest was which was created by it.

In the first place, the interest, wherever it is referred to, is called a *talook*. In another case, heard before Mr. Justice Glover and myself, we expressed the opinion that the word "talook" itself rather imported that the tenure was hereditary, and we pointed out that Sir William Macnaghten, in a note to the case of the Sudder Dewanny Adawlut, reported in the Volume for 1806, page 139, takes a distinction between a talook and a mowrosee ijarah, which (he says) though both hereditary, yet in other respects differ.

That view is confirmed by a provision of the Legislature which has been pointed out to me by Mr. Justice Glover in Section 16 Act VIII of 1869, B. C., where it is said that "no dependent talookdar, or other "person possessing a permanent transferable "interest in land intermediate between the "proprietor of an estate and the ryot, "&c. &c." That certainly imports that a talookdar does possess a permanent transferable interest in land. The same words are used in the corresponding Section of Act X of 1859.

It will not be necessary to say, nor do we say, that every talook must be an interest, permanent and transferable, and therefore hereditary, because it is quite clear from the terms of Regulation VIII of 1793 that there are talooks which differ very materially in character. But what we do say is that, where the word "talook" occurs without any sort of qualification and restriction, that that does *primâ facie* refer to an hereditary interest. But in this case the question by no means rests there. Not only is there nowhere to be found anything which would lead us to suppose that this talook was in any way restricted, but we find upon an enquiry held in July 1842, when Taranath put forward his rights, and there was a careful inquiry into those rights, that the result of that was that the Collector found that Taranath *as the heir of his father* was entitled to a settlement. It being the business of the Collector so to do, he, on that occasion, enquired strictly into what the rights were. These cannot be treated as a mere careless expression of opinion, because they were necessary to the purpose which the Collector had at that time in view, *viz.*, to ascertain what the rights of Taranath were: and we find that not only the Collector uses that expression, but he acted upon it, by making a settlement with him.

We also find in the same document that he says, "that it appears to me that this land was held by Taranath as a putnee." He does not say that it was a putnee talook. Probably that would not be an exact description of the interest, but by saying that the lease was held as a putnee it is implied that the tenure is hereditary.

I think from those declarations by the Government in an enquiry into what the nature of the interest was, and from the presumption arising out of the ordinary and general meaning of the word itself, there can be no doubt whatever that the interest which this person had was of an hereditary character.

Then comes the next important question whether or no that interest is still existing, or whether it has been cancelled by the acts of the Government.

This is one of the cases in which the Government had itself purchased at a sale for arrears of revenue. The property was put up to sale by auction in consequence of the zemindar having fallen into arrears, and the Government purchased it. Now there is a case which had gone up to the Privy Council,* very closely connected with this: how closely it is connected it is not necessary to enquire, but certainly it is so far connected with it that it relates to property which is a part of the same estate. Of course the question which I have to consider being entirely a question of fact, no Privy Council decision would be a binding authority upon a question of fact. The decision of one Court can be no binding authority on another in a question of fact between other parties. Moreover, although the facts do agree very closely, there are some important distinctions. Nevertheless, that decision is of the greatest importance in this case, as showing in exact terms the question which is to be considered in this case. The question to be considered in this case is, as pointed out in that judgment, whether the Government has taken any clear step for the purpose of declaring an avoidance or cancellation of the tenure.

We can also take the same position which was taken by the Privy Council in the former case: we may assume for the purposes of this decision that this was a tenure which the Government had a right to cancel. Therefore, that question need not be discussed further.

Then we have to consider whether that cancellation had taken place.

Now, in the case before the Privy Council,

* 12 W. R., P. C., 24.

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there was in evidence a letter from Mr. Colvin, an officer of Government, which the Privy Council thought declared the intention of Government originally to be not to cancel this tenure, unless circumstances so turned out that it was necessary to do so; and the question in that case, therefore, was whether the Government had subsequently departed from that original intention. But this letter of Mr. Colvin is not upon the record in this case, and we have no knowledge whatever whether that letter has any application to this case.

The first important event in this case took place in the year 1836, when a proclamation was issued to all persons who claimed to have any interest in the settlement of the estate to come in and state their claim. Upon that the talookdar sent his agent; and the claim which he then made was that the tenure should be considered mokururee. That claim was disallowed: and the result of the proceeding in 1836 was in this case just as it was in the case of the Privy Council, an order (perhaps in a little stronger terms) that the talook should be set aside and cancelled and this mokururee jummah cancelled.

No doubt, if that proceeding stood alone, it would be somewhat difficult to get over those very clear words. It is not necessary for us to say how this would be, because, in this case, as in the Privy Council one, this proceeding was followed by others that have a very material bearing in this case. The immediate result of this proceeding was that the Government held the property themselves for some time. In 1839, they issued a notice in which it was stated that, if the tenants did not appear, their non-appearance should be considered as a relinquishment of their tenure; and if the parties were willing to come in and take a settlement at the pergunnah rate, they would have a settlement for 20 years. Of course, as was pointed out by the Privy Council in the case before them, these directions in the notice imply that the tenure was still subsisting. The plaintiff, or whoever was then the holder of the talook, did not appear upon that notice, and the result of that was that a temporary settlement was made with a person named Gopeenath, as in the other case a temporary settlement was made with Shaikh Aynooddeen. This brought in the talookdar, and then it was that that enquiry took place to which I have already alluded. It seems to me that that enquiry not only has an important bearing upon the point whether or no this talook was an hereditary one, but also upon the point as to whether or no this talook was cancelled. The Collector there recites the previous proceedings which had taken place; and when reciting the proceeding of 1836 where those words are used "*the talook should be cancelled*," he entirely ignores that part of the transaction, and merely treats that as an investigation of the claim to hold the talook mokururee at a fixed rent. He says the result of that was that the tenant was not entitled so to hold. But he nowhere treats that proceeding as having cancelled the talook. On the contrary, he says most distinctly in the passage I have already referred to that the applicant, as the heir of his father, was entitled to the settlement, and accordingly a temporary settlement was made for 20 years with Taranath.

I think, under those circumstances, notwithstanding that there is no letter of Mr. Colvin in this case, there are other circumstances stronger than those in the case before the Privy Council, and that we must hold that the Government had taken no clear steps for the purposes of cancelling the talook.

The result, therefore, is, that there having been a tenure of hereditary character which has never been cancelled, that tenure is still in existence, and has passed to the plaintiff.

Then the only other point for consideration is whether or no the suit is barred by the decision in the Act X case. Now, perhaps, it is not quite certain under the decisions of this Court what the effect of an investigation of the title of the talookdar commenced in the Revenue Court, and either decided there or carried up in appeal to the Civil Court, would be. But it is not necessary for us to consider that question in this case, and we express no sort of opinion upon it. We come to the conclusion that, merely upon the decree which has been put in, and which is the only information we have of what took place before the Collector, there is not sufficient ground for excluding the parties from this suit: all that we know is that the suit was dismissed with costs.

But as has been pointed out in another case connected with this estate, decided by Mr. Justice Glover and Mr. Justice Mitter, it is quite possible that that dismissal of the suit by the Collector might have proceeded upon a ground quite independent of the merits of the case. The Collector would only have jurisdiction if the plaintiff before him had been ousted by his superior landlord. And as pointed out in that case, and as is the fact in this case, before the suit

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was brought in the Collector's Court, the 20 years' settlement with Taranath had ceased, and the talookdar had in fact been put out of possession by a notice given by the Government to the ryots not to pay their rent to Taranath or to any one else, but to Government. The rights of all persons between the Government and the ryots were in fact at that time in suspense. And, therefore, it is very difficult to see how the Collector could have had jurisdiction, because the person who ousted the tenants, if any body, was not the purchaser from Government, but the Government themselves; and the act of the Government in giving that notice to the ryots could not be called an ouster or ejectment of the ryots by the zemindar. It was merely a notice given to the ryots how to deal with the property. But all that is necessary for us to say for the purposes of meeting this objection is that it is quite possible that the dismissal of the suit by the Collector should have proceeded upon this ground; for, of course, to make that decision a bar to this suit it must be clear that it was given upon the merits of the case. I think, therefore, notwithstanding that decision, without going into the question of law as to the general effect of a suit commenced in the Revenue Court in which the title is adjudicated upon, we ought to hold that this suit is not barred.

The only remaining question is as to the mesne profits. Under the circumstances, we suggested yesterday that it was not a case where full mesne profits ought to be assessed; and the parties have acted with prudence by accepting our suggestion, which was that we should take the same course as was taken by Mr. Justice Glover and Mr. Justice Mitter in the case already referred to. Mr. Justice Glover there says:—

"But under the circumstances, and to "avoid the necessity for a further and pro-"bably a very protracted enquiry, I think that "we might very properly assess these mesne "profits at the rate of malikana, *viz.*, 12½ "per cent. allowed by the Government, when "this land was held as a khas mehal; and I "think that, on this understanding, the amount "of this profit may be ascertained and made "over to the plaintiff."

I think that is a proper course to be taken in this case, and that is the way in which the decree should be drawn up. In other respects the decree of the Court below should be confirmed, except that the costs in the Court below should be calculated upon the value of the property and mesne profits as allowed by us, and not as claimed by the plaintiffs.

Each party will bear his own costs in this Court. The case was a difficult one, and the appellant has shown no disposition to press his claims to an unreasonable extent.

Glover, J.—I am of the same opinion.

The 13th September 1872.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Debuttur Land—Service—Khâs Possession.

Application for the admission of a special appeal from a decision passed by the Judge of Chittagong, dated the 7th June 1872, reversing a decision of the Moonsiff of that district, dated the 8th February 1872.

Gopeenath Chowdhry and others (Plaintiffs) *Appellants,*

versus

Gooroo Dass Surma (Defendant) *Respondent.*

Mr. J. S. Rochfort for Appellants.

No one for Respondent.

Where land has been given as *debuttur* land and the requisite service is not performed, all that the zemindar can do is to take steps to have the service performed; he cannot recover it in a suit for khâs possession.

Markby, J.—THE plaint in this suit is drawn quite clearly for the purpose of recovering land, which the zeminder says he had granted for the performance of certain services, viz., worship of a certain idol. He seeks to recover khâs possession of the land in consequence of that service not being performed. The only evidence that he has produced in the case points, not to that state of things at all, but to a different state of things, namely, that the land was given as *debuttur* land. Now, if that is so, that does not give the zemindar any right to recover the land if the service is not performed. All that he can do is to take steps to have the services performed. He has not done that, and therefore he cannot recover in this suit, which is brought for a totally different object.

The application is refused.

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The 13th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Grounds of Special Appeal—Error of Procedure —Omission to state Reasons.

Case No. 336 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 30th September 1871, *affirming a decision of the Subordinate Judge of that district, dated the 28th January* 1871.

Doolee Chund and others (Defendants) *Appellants,*

versus

Mussamut Oomda Begum (Plaintiff) *Respondent.*

Baboo Kalee Mohun Doss for Appellants.

Mr. R. T. Allan for Respondent.

A Lower Appellate Court's omission to give reasons cannot be considered a ground for special appeal when it has not produced error or defect in the decision upon the merits. Where a Lower Appellate Court has omitted to state reasons, and it appears to the High Court that reasons should have been stated, the proper course is to retain the case on special appeal, but to return the proceedings and require the omission to be supplied.

Couch, C.J.—SECTION 359 of Act VIII of 1859 directs that the judgment shall contain the point or points for determination, the decision thereupon, and the reasons for the decision, and where the judgment does not contain them, it may be said that there is an error in the procedure. There is no error in the investigation of the case or in the decision, as the case may be perfectly well decided, although the reasons are not stated in the judgment. We think we must suppose that the Judge has made up his mind before he proceeds to write his judgment, at least before he finally writes it.

Then is it a ground for a special appeal? An error in the procedure is so when it may have produced error or defect in the decision of the case upon the merits. It does not appear to us it can be held that the omission to give the reasons may have done this, and therefore we cannot consider it a ground for a special appeal and for reversing the decree and remanding the case for re-trial. We cannot agree in those decisions in which that appears to have been done, and the party appealing to this Court has had a re-trial or re-hearing of the case simply because the Judge has not in the first instance given the reasons for his decision. At the same time it is important that this Court should see what the reasons of the Appellate Court were, so that it may be able to decide whether there has been any substantial error in its decision; and in cases where it appears to this Court to be necessary that the Appellate Court should fully state the reasons for the decision, the proper course, it seems to us, would be, not to reverse the decree, but to require the Judge of the Appellate Court to state the reasons. The Court would retain the case in special appeal, but it would return the proceedings to the Lower Court and require the Judge to state the reasons. There may be cases where that could not be done, in consequence of the death of the Judge or of his removal: but where it can be done, that is the course which ought to be adopted.

In the present case, when we consider the judgment which Mr. Allan has read by which the Judge sent the case back to the first Court for certain matters to be inquired into, and read the judgment now appealed against by the light of the first judgment, we do not see any reason for being dissatisfied with what the Judge has said. He seems to have considered the case, and he adopts the conclusions which had been come to by the first Court: he says that he considers them to be correct. In this case, therefore, we see no ground for even sending the case back and requiring him to state his reasons in detail, and, as we have said already, certainly no ground for reversing his decision.

In regard to the other point, we have already expressed our opinion that the objection cannot prevail. No authority has been produced to us for what was contended for on the part of the appellant.

The appeal must be dismissed with costs.

The 16th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Maintenance—Execution.

Case No. 203 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 28th March 1872, *reversing an order of the Subordinate Judge of that district, dated the 5th September* 1871.

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Ram Kullee Koer (Decree-holder) *Appellant,*

versus

The Court of Wards, on behalf of Shiba Sunkur Pershad, minor (Judgment-debtor) *Respondent.*

Baboo Rughoobuns Sahoy for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

A decree against the proprietor of an estate for a monthly maintenance, so long as it remains, creates a debt payable out of the estate and liable to be met out of any portion passing to the son. If new circumstances arise requiring that the original allowance ought not to be continued, the proper course would be to apply for a review to the Court which made the decree. The propriety of the sum allowed cannot be questioned in execution.

Couch, C.J.—As the case stands, it seems to us that the order of the Judge is wrong. There was a decree for the appellant for 16 rupees a month for maintenance against the father of the minor, and that decree was being executed when the application was made by the Court of Wards to withdraw the attachment. Now, the decree, so long as it remained, created a debt payable by the father. It is a debt payable out of his estate; and if the son had any property which came from his father, it would be liable to satisfy the decree.

There might be circumstances in which it could be shown that the sum allowed for maintenance originally ought not to continue to be allowed. It may be that in this case there are such circumstances, but we do not think that such matters can be gone into in the execution of the decree. As the Judge seems to have considered in this case, probably, the proper course where a new state of things has arisen according to which the sum is not a proper sum to be allowed for maintenance, would be to apply to the Court which made the decree for maintenance, asking that it might be reviewed on the ground of the new circumstances which had arisen. Then the Court could enquire whether it would be proper to continue to allow the sum which had been originally fixed.

That has not been done here. The Subordinate Judge having in execution of the decree declared the property, which he found to be ancestral and in the hands of the minor, liable to satisfy the decree, the Judge has taken upon himself to say that there ought to be an enquiry as to whether the sum allowed was a proper sum to be still allowed and for the minor to pay. He was wrong in this; he had no power to do it in these proceedings. It may be, if there is a proper case, that the Court of Wards representing the minor is not without some remedy; but the order of the Judge in this case must be reversed, and the order of the first Court will remain. The appellant will have his costs in this Court and in the Lower Appellate Court.

The 16th September 1872.

Present:

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Ex parte Judgment—Act VIII of 1859 *s.* 119—*Charter Act s.* 15.

In the matter of
S. J. Leslie, *Petitioner,*

versus

The Land Mortgage Bank of India, Limited, *Opposite Party.*

The petitioner appeared in person.

Mr. G. C. Paul for the Opposite Party.

Act VIII of 1859 s. 119 gives no remedy to a defendant who has wilfully or carelessly failed to appear after due service of summons; and where a defendant failed to make out any right to a re-opening of the case under that Section, he was not allowed the extraordinary remedy provided by s. 15 of the High Court's Act.

Ainslie, J.—We held at the former hearing that the Judge had jurisdiction to ascertain the debt due by the petitioner to the Land Mortgage Bank, and to make an order for the sale of the mortgaged property which is situated within the local limits of the jurisdiction of his Court, and to award the costs of the action to the plaintiff. We declined to entertain the question whether the decree should be set aside in part, on the ground that there was nothing before us to enable us to make any declaration as to the extent to which such an order should operate. It is now said that the materials necessary for distinguishing the portion of the decree that ought to be set aside were and are before us, though at that time this fact was overlooked. But it does not follow that we must modify the decree because it is shown to us that it contains provisions which should not have been embodied in it. This is an application under Section 15 of the High Court's Act, asking us to proceed under the general power of superintendence thereby vested in the

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Court, with a view to supplying to the petitioner a remedy in lieu of that which he has lost by his own deliberate act. Under ordinary circumstances, the petitioner would have been entitled to an appeal against any decree made by the Judge in the suit, and on such appeal this Court would have had power to confirm, reverse, or modify the decree of the Lower Court, and so to make a proper decree in the suit. But Section 119 expressly enacts that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared," and then proceeds to provide a remedy for a defendant who can establish to the satisfaction of the Court either that the summons to him was not duly served, or that he was prevented by sufficient cause from appearing when the suit was called on for hearing, but it gives no remedy to a defendant who has wilfully or carelessly failed to appear after due service of summons. It has been found both by the Court below and by this Court that the petitioner failed to make out any right to a re-opening of the case under Section 119, and that he has consequently, by his own omission to attend to the summons, lost his right to appeal against the decree. We are now in effect asked to restore to him the benefit of an appeal by dealing with the case under our general powers of superintendence. We do not think we are called on to consider in a proceeding in this form what may be the consequences of the Bank's taking further steps to realize the balance still due under the decree. The question is simply whether we ought to give an extraordinary remedy to a defendant who has deliberately thrown away his ordinary remedy. We think we ought not to do so, and that the rule should be discharged with costs.

The 16th September 1872.

Present :

The Hon'ble F. B. Kemp and C. Pontifex,

Judges.

Special Appeals—New Rules—Right to Review.

Case No. 265 of 1872.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 13th March 1871, affirming a decision of the Subordinate Judge of that district, dated the 26th April 1870.

Joy Koomar Dutt Jha (Plaintiff) *Appellant,*

versus

Esharee Nund Dutt Jha (Defendant) *Respondent.*

Mr. J. T. Woodroffe and *Baboos Rash Beharee Ghose* and *Woomesh Chunder Banerjee* for Appellant.

The Advocate-General and *Baboos Juggadanund Mookerjee* and *Romesh Chunder Mitter* for Respondent.

The new rules which regulate the admission of special appeals do not and cannot take away an unsuccessful applicant's right to apply for a review.

Such applications may be made for the review of an order as well as of a decree.

Kemp, J.—A PRELIMINARY objection has been made by the Advocate-General, who appears for the special respondent to the hearing of this appeal. He contends, first, that an order rejecting an application for the admission of a special appeal is not open to review ; secondly, that, in the present case, the Court has reviewed its order without giving notice to his client.

The original application for the admission of the special appeal was filed in proper time: it was rejected on an *ex parte* hearing on the 12th July 1871. On this Mr. Money applied to the Court to re-consider its order, and the Court, after hearing Counsel and being satisfied that there was good and sufficient reason for so doing, on the 2nd December 1871 directed the application to be registered.

Previous to the passing of the new rules, which regulate applications for the admission of a special appeal, parties could, as a matter of right, file a special appeal ; and in the event of their appeal being unsuccessful, they could apply for a review, and that too more than once.

The new rules do not and cannot take away this right, and we find that this Court has recognized such a right in cases where an application for the admission of a special appeal has been rejected,—Weekly Reporter, Volume XVII, page 484.

Then it is said that, under Section 376 of Act VIII of 1859, applications for review can only be made of a decree of a Court, but it has been held by a Divisional Bench that this Court has power to review an order, —Weekly Reporter, Volume VII, page 79.

Lastly, it was contended by the Advocate-General that, under Section 378 of Act VIII of 1859, no review of judgment can be

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granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited.

Now, in the case before the Court, there could be no opposite party. The first application for the admission of a special appeal was necessarily *ex parte*, as also was the second application praying the Court to re-consider its order rejecting the first application. We overrule the preliminary objection, and proceed to try the special appeal.

The plaintiff, special appellant, sued to recover his share of the profits of the temple of Bydonath, alleging that he is entitled to a 12*g*. 3*c*. 1¼*k*. share. The claim is for the profits of the years 1273, 1274, and 1275.

The substantial defence of the principal defendant, who is the chief priest of the aforesaid temple, is that the plaintiff is not a co-sharer but a subordinate servant of the temple, and that the plaintiff has never received or enjoyed any share of the profits; that the plaintiff is only entitled to a salary at the rate of Rs. 30 per mensem.

The defendant No. 1 having raised the plea of limitation, both Courts below have found on the evidence that the plaintiff is not a co-sharer but a subordinate servant, and that he never at any time enjoyed a share in the profits. His suit was dismissed as barred, as also upon the merits. We may here observe that those profits are what remains of the offerings of pilgrims to the shrine of Bydonath, after defraying the expenses of the worship of the idol and providing for the payment of the salaries of the servants of the temple.

The main grounds of special appeal are:—

1*st*.—That the defendant being a trustee, and in that capacity accountable to the plaintiff for his share of the profits, the suit is not barred.

2*nd*.—That the decision of the Judge on the point of limitation is not sufficient in law, inasmuch as there is no distinct finding as to what period of limitation is applicable to a suit of this description.

3*rd*.—That the plaintiff having been admittedly in the enjoyment of a certain payment within the statutory period, the suit is in time.

4*th*.—That the present suit being for the plaintiff's share of the collections for 1273, 1274, and 1275, the cause of action arose at the end of each year, and the suit having been instituted on the 22nd of Bhadro 1276, the action is in time.

In the application for re-consideration of the Court's order rejecting the application for the admission of the special appeal, the plaintiff added a new ground, namely, that the Judge had not considered the decision of the 7th June 1856 passed by the late Sudder Court in a suit to which the present defendant was a party, as well as other decisions on the record which, it is alleged, go to show that the plaintiff is a sharer, and as such entitled to participate in the profits, and further that, although the plaintiff is a *mushrif*, there are decisions to show that a *mushrif* is in receipt of a share in the profits of the temple, the chief priest being accountable to the *mushrif* for the same.

On the first ground there has been a clear finding by both the Lower Courts that there is no evidence to prove that, in respect of the subject-matter of suit, the defendant is liable as trustee to the plaintiff.

On the second ground, we are of opinion that the decision of the Judge on the plea in bar is sufficient in law, for he finds that the plaintiff offered no reliable evidence of his *ever at any time* having received any share of the offerings of the temple.

On the third ground, we can find no admission of any enjoyment by the plaintiff of any share of the profits.

On the fourth ground, it was contended by the learned Counsel for the special appellant that, as the profits depend upon the number of pilgrims visiting the shrine and the liberality of their offerings, the amount of profits can only be ascertained at the end of each year, and therefore the plaintiff's cause of action is a recurring one, dating from the close of each year of account.

Even if this argument were valid, the clear finding of the Lower Court on the whole evidence that the plaintiff was not entitled to any share of the profits, and that he never at any time had enjoyed any portion of the profits, would prevent it arising.

With reference to the last ground, we find that the decisions referred to were considered by the first Court, whose judgment was affirmed by the Judge. In the first application for the admission of a special appeal, the ground that the Judge had not considered these decisions was not taken. We have, however, referred to the decision of 1856 and other proceedings on the record, and we do not find that the plaintiff's *status* as a co-sharer, and his right as such to enjoy any portion of the profits of the temple of Bydonath, have been established by that decision and proceedings.

We dismiss the appeal with costs.

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The 16th September 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Act VIII of 1869 *ss.* 22 *and* 52—*Act X of* 1859 *ss.* 21 *and* 78—*Arrears of Rent—Ejectment—Cancellation of Lease.*

Case No. 252 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 27*th September* 1871, *affirming a decision of the Sudder Moonsiff of that district, dated the* 16*th February* 1871.

Shaikh Abdoor Ruhman (Defendant) *Appellant,*

versus

Digamburee Dossee (Plaintiff) *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Motee Lall Mookerjee for Respondent.

Where a suit is brought both to recover arrears of rent and to eject the ryot, it falls under the purview of Act VIII of 1869 s. 52, and not within s. 22; and if decreed, the defendant is entitled to pay into Court, within 15 days from the date of decree, the arrear with interest and costs.

Where the Lower Court's decree was altered to this effect by a decision of the High Court, the 15 days were held to date from the later decision.

Act VIII of 1869 s. 52 (as answering to Act X of 1859 s. 78) applies to cases in which it is sought to cancel a lease for non-payment of rent, as well as to all suits for ejectment.

Kemp, J.—We think that the decision of the Subordinate Judge must be altered. In this case it is clear that the plaintiff having sued to eject and for recovery of an arrear of rent in the same action, his case falls within the purview of Section 52 of Act VIII of 1869, and not within Section 22 of that Act, as supposed by the Subordinate Judge. Section 22 enacts that when an arrear of rent remains due at the end of the year, the ryot shall be "liable" to be ejected. Under that Section, the landholder could not sue both to recover the arrears of rent and for ejectment. The plaintiff having brought his suit under Section 52, the defendant is entitled to pay into Court, within 15 days from the date of the decree, the amount of the arrear, together with interest and costs of suit. As we have thought proper to alter the decree of the Subordinate Judge, the 15 days allowed under Section 52 will date from the passing of this Court's decision, under the ruling to be found in Marshall's Reports, page 471, in the case of Radhamohun Mundul.

With reference to the question as to the non-application of Section 22 of the Act to a suit of this description, we may refer to a Full Bench Ruling published in Volume X, Weekly Reporter, page 12, in which it was held that Section 78 of Act X of 1859, which corresponds precisely with Section 52 of Act VIII of 1869, applies to all cases of suits for the ejectment of a ryot for non-payment of rent. The learned Judges in that case held that it applied not only to cases to eject a ryot under Section 21, corresponding with the present Section 22, but to all cases in which it is sought to eject a ryot or to cancel a lease for non-payment of rent, and that the words are general,—to all cases of suit for ejectment.

The appeal will, therefore, be allowed with costs of this Court only, and the case will be sent back to the Lower Court with directions that if the defendant do pay into Court the amount of the arrear specified in the decree, with interest and costs of the first hearing, within 15 days from the date of our decree, execution will be stayed. The record of the case will be sent down at once to the Lower Court.

The 16th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Knight, Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Hindoo Law—Inheritance (unobstructed or liable to Obstruction)—Father's Power of Alienation.

Case No. 62 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 30*th December* 1870.

Baboo Nund Coomar Lall and another (Plaintiffs) *Appellants,*

versus

Moulvee Ruziooddeen Hossein and others (Defendants) *Respondents.*

Baboo Unnoda Pershad Banerjee for Appellants.

Mr. C. Gregory for Respondents.

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A son cannot control his father's power of alienation in respect of property the succession to which is liable to obstruction, *i. e.*, to the succession to which there is an impediment, and to which he may never succeed. The wealth of the father and paternal grandfather becomes the property of his sons or grandsons by virtue of birth, only in respect of property not liable to obstruction, and it is here only that the father's power of alienation is restricted.

Couch, C.J.—THE plaintiffs in this suit are the sons of Laek Ram Lall, and the case in the plaint was that Laek Ram Lall held a share in the recently settled Mehal Jehangeerpore Mungarpal as ancestral property, two-thirds of which share was the share of the plaintiffs, and one-third the share of their father; that in a suit brought by the plaintiffs against Laek Ram and others, the Zillah Judge of Patna decreed the disputed two-thirds to them, and on the 7th of May 1869 the writ for delivery of possession was issued by that Court; that subsequently on the application of the principal defendants who had purchased the right and interest of Laek Ram, the Judge passed an order giving possession to the principal defendants; and the plaint prayed for possession of the two-thirds and mesne profits.

The case of the principal defendants, Hurukh Lall and others, was that the property in suit was brought to sale under a lien of a good and just debt of Mohesh Doss, and the share of the plaintiffs was sold, and further that the property in suit had not descended from ancestors. The suit was heard by the Subordinate Judge of Patna with two others of the same nature, and he found that the property in this suit was purchased by Laek Ram as manager for himself and his sons, and was to be viewed in the light of ancestral property; but holding that the sale, which was under a decree of the Court of Shahabad, was valid, he dismissed the suit with costs. In his judgment he refers to the judgment in the suit, which is the subject of the appeal No. 41 of 1872, and we take that as part of the judgment in this suit. In that it appeared that, of the share of 2 annas 1*d.* 6¼*c.* held by Laek Ram, he directly inherited from his father or grandfather 12½*d.*, and the remainder he inherited collaterally from the widows of two of his brothers and of a nephew. Two questions were raised in the appeal: first, whether the sale of the plaintiff's share was justified and was binding on them; secondly, whether, if it was not, the plaintiffs were entitled to a decree in respect of the property which Laek Ram inherited collaterally. The plaintiffs were not parties to the suit by Mohesh Doss under the decree in which the property was sold, and are not bound by it. It is, therefore, necessary for the defendants to show in this suit that the shares of the plaintiffs were liable to be sold under it. The money was lent by Mohesh Doss on three bonds dated the 1st of December 1862, the 23rd of May 1863, and the 2nd of October 1864, and the only witness examined in this suit was the writer of two of them, who said that Laek Ram told Mohesh Doss that, in order to meet expenses attending on his journey to Gya, where he was going to perform some religious ceremony, he was obliged to borrow. The first bond recites that the money, Rs. 1,200, was borrowed on account of his personal necessity. The second and third contain similar statements. As the Subordinate Judge in his judgment in this suit appears to have introduced facts proved in the other suits, we will see what they were. The evidence is in the suit which is the subject of the appeal No. 42. The first witness for the defendant only proved that he had lent Rs. 600 to Laek Ram in Aughran 1276. The second, a servant of Laek Ram, said that Mukhun Coomar lent Laek Ram money under several bonds; he had borrowed money with the view to pay Government dues, liquidate Gooroo Pershad's debt, Shuffee Khan's debt, and for meeting expenses of law suits. A third, witness No. 5, said that Laek Ram borrowed money from Khooldeep Sahoy, why, he could not tell; Laek Ram met legal expenses for conducting and defending law suits from his own funds and from funds borrowed; that he expended Rs. 8 or 9,000 on the occasion of his daughter's marriage, a daughter by his first wife; that the expenditure on the occasion of the plaintiff's marriage was small. No. 8 said, Laek Ram borrowed several sums of money from Mukhun Coomar in order to meet expenses attending the prosecution and defence of law suits and to pay Government dues; that he paid off Gooroo Pershad's debt (which has been decreed) and also Shuffee Khan's from the sums borrowed; that he borrowed Rs. 3,000 from Essur Sahoy, which debt he paid off by borrowing money from Moulvee Abdool Luteef or Chowdhry Wahid Ali. This witness, who was mookhtar of Laek Ram, said on cross-examination he did not remember what Laek Ram did actually with the specific sums that he borrowed of Mukhun. There was no evidence how or for what purpose the debts which were said to have been paid off with the borrowed money were contracted.

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The evidence is altogether insufficient to establish a case in which a mortgage by a father of ancestral property would be binding on his sons. The judgment of the Subordinate Judge is mainly founded upon the assumption of facts of which there was no proof. It is, therefore, necessary to decide the second question whether the plaintiffs are entitled to a decree in respect of the property which Laek Ram inherited collaterally.

In the Mitakshara, Chapter 1, Section 1, Verse 3, heritage is said to be of two sorts: unobstructed, or liable to obstruction. The wealth of the father or paternal grandfather becomes the property of his sons, or of his grandsons, in right of their being his sons or grandsons, and that is an inheritance not liable to obstruction:—"But property devolves on parents (or uncles), brothers, and the rest upon the demise of the owner, if there be no male issue: and thus the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction." Verse 27 of the same Section,—which was much relied upon in the argument for the appellant, where he says:—"Therefore, it is a settled point that property in the paternal or ancestral estate is by birth,"—must be considered to refer to inheritance not liable to obstruction; what is described in Verse 3, as becoming the property of sons or grandsons, is in right of their being sons or grandsons. They do not by birth acquire a right in property to the succession to which by their father there is an impediment, and which he may never succeed to. Verse 33 says:—"In respect of the right by birth to the estate, paternal or ancestral, we shall mention a distinction under a subsequent text." In Section 5, Verse 9, it is said:—"So, likewise the grandson has a right of prohibition if his unseparated father is making a donation or a sale of effects inherited from the grandfather; but he has no right of inheritance if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependant." And Verse 10 is:—"Consequently, the difference is this: although he have a right by birth in his father's and in his grandfather's property, still, since he is dependant on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction if the father be dissipating the property."

According to these texts the restriction upon the father's power of alienation only applies to the grandfather's property. Verses 8 and 11 of the same Section confirm this, and so also does Verse 5 of Section 5.

Doubts have been raised on this question by commentators, and the arguments on each side are stated in Colebrooke's Digest, Volume II, Madras Edition, page 274, where the author is of opinion that the rule of equal dominion vested in father and son only aplies where the property has regularly descended. The state of the question is very well stated in West & Babler, Book II, Introduction, page XIX:—"Ancestral property as amongst descendants comprises property transmitted in the direct male line from a common ancestor, and accretions to such property made with the aid of the inherited ancestral estate. Thus in the case of a father, head of a family, property inherited from his father or grandfather is ancestral property, however acquired by its previous possessors. On the other hand, property inherited by him from females, brothers, or collaterals, or directly from a great-great-grandfather, appears to be subject to the same rules as if self-acquired. Ancestral property, in fact, may be said to be co-extensive with the objects of the apratibaudhadáyn, or 'unobstructed inheritance.' The view, here stated, agrees with that arrived at by Jagannátha, after a discussion of the contrary doctrines held by other lawyers. This discussion itself shows, however, that there is much to be said on both sides, and the question must be regarded as one still in controversy."

What appears to be the result of the text of the Mitakshara and the better opinion among commentators is supported by two decisions. In Rayadar Nullatambi Chetti, III Madras High Court Reports, 455, it was held that a suit by a son against his father to compel a division of immoveable property inherited by the latter from his paternal cousin could not be maintained. And in Jowahir Singh *v.* Guyan Sing, IV Agra High Court Reports, 78, it was held that a son cannot control his father's act in respect of a property the sucession to which is liable to obstruction; and it is only in respect of property not liable to obstruction that the wealth of the father and grandfather becomes the property of his sons or grandsons by virtue of birth.

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We concur in these decisions. The decree of the Court below must be reversed as to two-thirds of 12½ dams of the property in suit, and it must be decreed that the plaintiffs do recover two-thirds of 12½ dams of the property claimed in the plaint with mesne profits and costs of suit in proportion.

A similar decree will be made in the appeal No. 41 of 1872 between the same parties, where the property in suit is the mehal under the old settlement, and in appeal No. 42 of 1872, where the suit was against another purchaser.

Costs of the appeals to be borne by the parties in proportion.

The 31st July 1872.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Divorce a vinculo—Limitation (XIV of 1859)—Affidavit—Examination by Commission—Evidence.

On Appeal from the Chief Court of the Punjaub.

Lord William Hay

versus

Gordon.

In an appeal brought by the co-respondent against a judgment of the Chief Court of the Punjaub, confirming a judgment of the Additional Commissioner at Umballa, whereby the petitioner had obtained a dissolution of his marriage with his wife, on the ground of her adultery with co-respondent, who had been ordered to pay the costs of the suit:

HELD that the provisions of the Statute of Limitations (XIV of 1859) did not apply to suits for divorce *a vinculo.*

HELD that it would have been desirable and proper for the Chief Court to have acceded to co-respondent's application for a commission to examine him, and that his general denial in his affidavit was not equivalent to what might have been a circumstantial denial or explanation of the facts alleged against him.

HELD that the statements of the respondent were not evidence against the co-respondent.

HELD that there was no sufficient evidence on which the decree could be supported, and the Privy Council reversed so much of it as was appealed against.

THIS is an appeal brought by Lord William Hay, the co-respondent, against a judgment of the Chief Court of the Punjaub, confirming a judgment of the Additional Commissioner at Umballa, whereby Colonel Gordon obtained a dissolution of his marriage with his wife, on the ground of her adultery with Lord William Hay, and Lord William Hay was ordered to pay the costs of the suit.

Before the year 1869, the Indian Courts had only power to decree divorces *a mensa et thoro.* The power of the Court of Divorce in this country of granting divorces *a vinculo* was first introduced into India by Act IV of 1869, which enacts that, subject to its provisions, "the High and District Courts "shall, in all suits and proceedings hereunder, "act and give relief on principles and rules "which in the opinion of the said Courts are "as nearly as may be conformable to the "principles and rules on which the Court for "Divorce and Matrimonial Causes in Eng-"land for the time being acts and gives relief." There is a power to make rules and regulations not inconsistent with the Act and the Code of Civil Procedure in India. But it would appear that no rules have been made, and therefore the principles and rules which obtain in the Divorce Court in this country are as nearly as may be to be applied in India. Power is given to District Judges in the first instance to hear divorce causes, but their decrees are not final, or indeed operative at all, until confirmed by the decree of the High Court, which is empowered to direct further enquiry to be made, or additional evidence to be taken.

In this case the High Court was the Chief Court of the Punjaub.

The first question which has been raised is whether or not the Statute of Limitations is a bar to this suit? It is argued that the cause of action arose in 1859 or 1860 when the acts of adultery are said to have been committed, or at all events in the year 1862, when Colonel Gordon says that the misconduct of his wife came to his knowledge. Act XIV of 1859, after prescribing particular terms of limitation for certain actions, enacts that, with respect to all suits and actions not before specifically provided for, the term of six years shall apply, that is, six years from the time when the cause of action accrued. Their Lordships are of opinion that the provisions of that Act do not apply to suits for divorce *a vinculo,* which at the time when it passed were unknown in India. They are confirmed in the view which they have taken of the intention of the Legislature by the Limitation Act which was passed last year (Act IX of 1871), which expressly enacts that its provisions shall not apply to suits under the Indian Divorce Act.

The appellant further relied upon substantially two grounds: the first was that

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justice had not been done him in this suit, inasmuch as he ought to have an opportunity of being examined in this country by a commission; and, secondly, that, upon the general merits of the case, the decree was wrong.

With respect to the first question, the material facts appear to be these. The alleged adultery was in the years 1859 and 1860. The petitioner does not aver with any particularity at what time in those years the acts of adultery were committed. Lord William Hay left India in 1862, and has resided in England ever since. In 1862 Colonel Gordon says he became aware of his wife's adultery by what he regarded as a confession by her in a certain letter which will be subsequently referred to, and that at that time he endeavored to establish a case by the examination of witnesses in India; but it would appear that those very witnesses, who have been now called for him, at that time either could not or would not give evidence sufficient to establish his case. This suit was instituted in June 1869. Lord William Hay for the first time heard of it on receiving the summons in the beginning of August in that year. Upon that he immediately took, what undoubtedly was, the proper proceeding, of applying to an able Counsel for his opinion, and that Counsel advised in substance that application should be made to the Court in India for further particulars, and upon these particulars being obtained for a commission for the examination of Lord William Hay.

Lord William Hay, upon the 13th of August, wrote to Mr. Chisholm at Simla, who held a power of attorney from him, enclosing a copy of his Counsel's opinion, and requesting that an advocate might be retained for him to act upon the instructions therein contained. It appears that Mr. Cunningham was so retained, but it does not appear that this gentleman acted in conformity with those instructions: the reasons for his not so acting do not appear.

The cause was heard before the Commissioner of Umballa on the 18th and 19th November 1869. The Commissioner pronounced against Lord William Hay, decreeing a dissolution of the marriage on the ground of adultery with him, and condemning him in costs. Lord William Hay states in his affidavit that he was not aware of this decision until January of the next year, 1870, when he received a short report of the case in the *Mofussilite* newspaper; that he then sent out an affidavit (which appears in the record) denying his guilt, stating a variety of circumstances, and among other things setting out the opinion of Counsel above referred to. In pursuance of that affidavit, and a petition which he also sent to India, it appears that his Counsel before the Chief Court of the Punjaub, Mr. Plowden, upon the 19th of May, presented a petition to that Court containing various grounds of defence, and stating this among other things: —"The co-respondent is and always has been "willing to tender himself as a witness in "the case, and prays that, if the petition be "not otherwise dismissed as against him, his "evidence may be taken by commission." Upon the hearing of the cause before the Chief Court of the Punjaub in July 1870, the Court declined to comply with this request on these grounds; they say:—"We see "no likelihood of any sort of advantageous "result from the issue of a commission. We "have Lord William Hay's positive denial "on oath on the record, and though we "should be anxious to offer a litigant so "circumstanced every possible facility and "indulgence in the hearing of the case, it is "not, we think, necessary, and would not "therefore be expedient now, at the last "moment, to re-open the proceedings by the "grant of a commission which could scarcely "bring any new fact before us, would place "Lord William Hay's disavowal in no stronger light, and would postpone the relief "prayed for;" and the Court subsequently make this observation:—"With regard to the "co-respondent, we have further to remark "that his explanation of his proceedings is "not, in our opinion, satisfactory, and that "we cannot regard the course which he has "pursued as in any degree adequate to the "gravity of the occasion, or as indicating a "serious intention to resist the present "proceedings."

Their Lordships are not able to agree with the Chief Court that Lord William Hay's general denial in the affidavit is at all equivalent to what would or might have been a circumstantial denial by him of the facts stated by the witnesses, or an explanation of these facts, upon an examination by a commission; and they are also unable to agree with the Chief Court in the remark that they cannot regard the course pursued by him as adequate to the gravity of the occasion, or as indicating a serious intention to resist the proceedings. Their Lordships see no reason to doubt that Lord William Hay has all along seriously and earnestly

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desired to resist these proceedings to the best of his ability.

Upon this part of the case, their Lordships have come to the conclusion that it would have been desirable and proper, under all the circumstances, to accede to Lord William Hay's application for a commission to examine him.

But their Lordships do not rest their decision upon this ground. After giving the whole case their best consideration, they have come to the conclusion that there is no sufficient evidence upon which this decree against Lord William Hay can be supported.

In their Lordships' opinion, the evidence against Lord William Hay is entirely that of the native witnesses. Before coming to this, however, it is well to make an observation upon other evidence which was admitted in the case, and which undoubtedly was admissible as against the respondent Mrs. Gordon, *viz.*, her own confessions, or what are contended to have been her own confessions. As far as the correspondence is concerned, the only passage which in any way bears upon her relations with Lord William Hay is the following in letter H, which must have been written somewhere about April 1862 from England to her husband then in India :—"I have your letters as "to what occurred at Simla. Herbert always "told me that *you knew of it, and did not* "*care.* Lord William Hay told me the same "thing. Herbert always told me that Emily "knew of it, and I firmly *believe* that both "*you and she did.*" What she is writing about here is clearly misconduct of her own, and it may be assumed to be adultery with a gentleman at Simla, referred to by the name of Herbert. It appears that the person here designated as "Herbert," told her that her husband knew of this adultery, and did not care. She also says, "Lord William Hay told me the same thing." It appears to their Lordships that the view taken of this expression in her letter by the Court above, is more correct than that taken by the Court below, *viz.*, that it does not amount to a confession on her part of any adulterous intercourse with Lord William Hay, but merely to a statement of a conversation with him on the subject of her misconduct with another person, and her husband's supposed sentiments regarding it.

On this part of the case—the lady's confessions—a Mrs. Byrne is called, who lives at Simla, and whose house Mrs. Gordon rented. This lady is the grandmother of a Mr. Johnson, who was retained in this case to get up the evidence on the part of Colonel Gordon, and she does speak to a communication from Mrs. Gordon which would undoubtedly lead to the inference that she had committed adultery with Lord William Hay. It is certainly somewhat remarkable, as has been forcibly remarked by Dr. Deane, that this lady should, if the statement be correct, not have communicated it in 1862 to Colonel Gordon, who was then attempting to procure sufficient evidence to obtain a divorce, as Mrs. Byrne must probably have well known.

Their Lordships have thought it necessary to say a word upon this part of the case, although no statements of Mrs. Gordon, written or verbal, are, according to well-known principles of law, admissible against Lord William Hay ; and they now refer to the only evidence against him, which is that of the native witnesses. Without going through that evidence in detail, it may be enough to say that part of it is simply hearsay, and of an extremely unsatisfactory and loose character, to say the least of it, such as that of "Boonah," who speaks of having seen a horse tied up near Mrs. Gordon's house at 12 o'clock at night, which she heard from some grooms was the horse of Lord William Hay, those grooms not being called. There is evidence of Lord William Hay coming to the house on a good many occasions and dining there very frequently, but that is not evidence which, if taken alone, would at all lead to the inference of adultery. There is the evidence of a jampan bearer to the effect that, on three occasions, he, together with other bearers (it appears there would be four bearers of the jampan), took Mrs. Gordon to Lord William Hay's house about 8 or 9 o'clock at night, it does not appear at what time in the year. According to his account the jampan bearers and the jampan remained outside, visible to all persons who might be passing, which would not point to the conclusion that the visits were of an adulterous, or even of a clandestine character. Further, there is the evidence of a man of the name of Torab, who had been in the service of Colonel Gordon from the year 1856 down to the present time, and this is the only witness who speaks of any familiarities between Lord William and Mrs. Gordon. His statement is to the effect that Lord William Hay frequently came to Mrs. Gordon's when her husband was absent (indeed her husband does not seem to have been much at Simla); that Lord William came to dinner two or three times a week, sometimes in company, sometimes alone, and the witness goes on to say that

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when he would take away the coffee, Mrs. Gordon and Lord William Hay would be sitting on a sofa together, he with his arm round her waist. This witness appeals in confirmation of his statements to the evidence of an ayah of the name of Peerun, who, if not supposed to have witnessed the same familiarity, still was constantly in the house, and would of course perfectly well know whether Lord William Hay was there frequently or not. Torab says that the ayah was aware of the frequency of Lord William Hay's visits, and of the familiarity between Lord William Hay and Mrs. Gordon, and that he and the ayah were in the habit of discussing it together, and both of them discussing it with Mrs. Byrne. He also states that in the year 1862, when he was in Colonel Gordon's service, upon Colonel Gordon questioning him concerning the facts to which he was then deposing, he denied all knowledge of them; he adds:—"Last year Colonel Gordon gave me great encouragement" (*dilasa* is the native word) "to speak the truth, "and promised to forgive me everything if "I would; then I told the sahib."

The ayah Peerun, upon being called, contradicts the evidence of Torab; and is, in fact, a witness in favor of Lord William Hay. She, instead of confirming the account which Torab had given as to Lord William Hay's frequent visits and his intimacy with Mrs. Gordon, says this:—"I was in Mrs. "Gordon's service about nine years ago. "Know of nothing between her and Lord "William Hay. He only called on her "twice to my knowledge;" this entirely agrees with Lord William Hay's own account in his affidavit, where he says that he only called twice upon Mrs. Gordon; one of his visits being to a certain extent on a matter of business, and that he dined once in the house of Colonel Gordon. She does speak, and so does one other witness, to an occurrence, certainly somewhat extraordinary, *viz.*, Mrs. Gordon going to Lord William Hay's house at night, or late in the evening, breaking some of his windows, and cutting some creepers outside the house. Pursoo, the other witness who speaks to this transaction, represents that Lord William Hay declined to have anything to say to her. He says:—"I told the sahib; he said, if she "won't go send for the guard, as she was "drunk and might strike me with the knife. "I persuaded her to go home." That is all we know of that transaction, which certainly appears to their Lordships to be no evidence of adultery.

It has been already said that their Lordships are of opinion that the only evidence against Lord William Hay was that of the native witnesses. It is true that the Chief Court does speak of that evidence as being corroborated in one highly important particular by Mr. Johnson, the gentleman who was employed to get up the case. But their Lordships do not take the same view of the evidence of Mr. Johnson. The passage to which the Chief Court refers would appear to be this:—"One morning I was "taking my early ride about 7 or 7-30. I "saw Mrs. Gordon coming down the "steps which lead out of Littlewood; the "ayah was with her. I passed close to her, "but did not speak; her hair was hanging "down." It does not appear to their Lordships that the fact of Mr. Johnson meeting this lady between 7 and 8 o'clock in the morning in company with a maid walking down steps, which would seem to be public ones, leading, it is true, to Lord William Hay's house, but also to other places, does afford any corroborative evidence which can be relied on of the statements of the native witnesses.

The case, therefore, in their Lordships' view, as far as Lord William Hay is concerned, resolves itself into this: the only part of the evidence of any importance is that a native servant who in 1862 denied all knowledge of what he asserted in 1869, and this servant is contradicted by a fellow-servant whom he vouches.

Lord William Hay must be taken, as the Chief Court of the Punjaub properly assumes, to have given a general denial of the truth of this evidence; if that denial has not been specific, and has not been tested by cross-examination, the fault, having regard to his desire to be examined on commission, cannot be regarded as his.

Under these circumstances, their Lordships have come to the conclusion that this decree cannot be maintained.

Their Lordships are not unmindful that they have, on more than one occasion, laid it down as a general rule, subject to possible exceptions, that they would not reverse the current findings of two Courts on a question of fact. But they consider that the circumstances of this case are of so peculiar a character as to take it out of the scope of that general rule. They are dealing with a jurisdiction of an important and delicate character, new to the Courts of India. This is certainly the first case which has come before their Lordships, and probably not many suits of this description have been tried in India.

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It is to be observed that in this case it can scarcely be said that there have been two separate judgments, inasmuch as the Legislature has not thought it safe to entrust the Court below with the power of pronouncing decisions which would be binding if not appealed against, but have made these decisions operative only on confirmation by the High Court, whose confirmatory judgment is practically the judgment in the suit. It is further to be observed that the Court below was clearly wrong in accepting as evidence against Lord William Hay the statements of Mrs. Gordon, and regarding those statements as confirming the credibility of the evidence of the native witnesses against him. It is true that the Chief Court distinguishes between the evidence which was admissible as against the respondent and that which was admissible as against the co-respondent. At the same time they attach a good deal of importance to the finding of the Judge below upon the credibility of the native witnesses, based as that finding was in a great measure upon evidence not admissible.

For these reasons their Lordships have come to the conclusion that it is not one of the cases to which the ordinary rule above mentioned should be applied.

Their Lordships will, therefore, humbly advise Her Majesty to allow this appeal, and to reverse so much of the decree of the Chief Court of the Punjaub as is appealed against, and that in lieu thereof the suit be dismissed as against Lord William Hay, with the costs in the Courts below and the costs of this appeal.

The 17th September 1872.

Present :

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Jurisdiction—Contract—Act XI of 1865 *s.* 6—*Special Appeal—Act XXIII of* 1861 *s.* 6 *cl.* 4.

Case No. 315 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 29th September 1871, *affirming a decision of the Moonsiff of Suleemabad, dated the 1st July* 1871.

Wuzeer Mullick Sircar (Plaintiff) *Appellant,*

versus

Nitumbinee Debee (Defendant) *Respondent.*

Baboo Boykuntnath Pal and *Moulvee Syud Murhumut Hossein* for Appellant.

Baboo Bama Churn Banerjee for Respondent.

Plaintiff took a lease from defendant and a *bakijaee*, setting forth a certain sum (Rs. 473-10) as due from the tenants on account of rent, and on the faith of the *bakijaee* paid that sum to the defendant. He then sued the tenants for the same, and was met with pleas either of payment to the defendant or of payments by assignment for the defendant's debts. He then sued defendant for a refund.

HELD that the claim was for money due under an implied contract for the re-payment of a sum under Rs. 500, and cognizable by a Small Cause Court under Act XI of 1865 s. 6, and that the case fell under Act XXIII of 1861 s. 6 cl. 4, and no special appeal would lie.

Kemp, J.—WE think that the preliminary objection taken by the pleader for the special respondent must prevail. This is a suit to recover a sum of Rs. 473-10 and a fraction from the defendant under the following circumstances. It is stated in the plaint that the plaintiff took a lease from the defendant, and that the defendant gave him a *bakijaee*, setting forth the sum of Rs. 473-10 as due for rent from the tenants of the property leased ; that, on the faith of that *bakijaee*, the plaintiff paid to the defendant Rs. 473-10 in two instalments. The plaintiff then sued the ryots to recover the sums due by them according to the *bakijaee*, but was met by the ryots with pleas either of payment to the defendant or of payments by assignment for the defendant's debts. The suit, therefore, was for a refund of this money.

It is now contended that under Section 27 Act XXIII of 1861 no special appeal will lie against this decision, the amount claimed being under Rs. 500 and the suit being one of a nature cognizable by the Small Cause Court under Act XI of 1865.

We think it very clear that such is the case. Under Section 6 Act XI of 1865, suits for money due under a contract or for damages, &c., where the demand does not exceed in amount the sum of Rs. 500, are cognizable by the Court of Small Causes. Now, this is clearly a claim for money due under an implied contract for the re-payment of Rs. 473-10 on the ground that that sum was not recoverable from the defendant's tenants. It was, therefore, clearly a case falling under Clause 4 Section 6 Act XXIII of 1861, and the appeal must be dismissed with costs.

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The 17th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Ancient Documents—English Rule of Law—Its Applicability to this Country — Admissions—Estoppel.

Regular Appeals from a decision passed by the Subordinate Judge of Sarun, dated the 31*st December* 1870.

Case No. 71 of 1871.

Mussamut Phool Bibee and others (some of the Defendants) *Appellants*,

versus

Goor Surun Doss and another (Plaintiffs) *Respondents*.

Baboo Chunder Madhub Ghose for Appellants.

Mr. R. T. Allan and *Baboo Sreenath Doss* for Respondents.

Case No. 75 of 1871.

Mussamut Luteefoonissa (one of the Defendants) *Appellant*,

versus

Goor Surun Doss and another (Plaintiffs) *Respondents*.

Mr. C. Gregory for Appellant.

Mr. R. T. Allan and *Baboo Sreenath Doss* for Respondents.

The English rule that a document more than 30 years old, if free from suspicion of dishonesty, may be admitted as evidence without proof of the execution or writing, was held to be founded on a reason which had less weight in this country, where less credit should be given to ancient documents which are unsupported by any evidence that might free them from a suspicion of being false or fabricated. Even in England, such evidence unsupported was held to be of very little weight. Accordingly it was not allowed to prevail here in a case in which there was other evidence inconsistent with the title which those documents professed to create.

Where a defendant seeks to make use of statements which have been put in evidence, and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate, and to get rid of the effect of the apparent admissions.

Couch, C.J.—THE plaintiff is the purchaser from one Asgur Ali of the entire ayma mehal Mukdoompore Hubeeb *alias* Kowaree, with the exception of 56 beegahs of land, under a conveyance dated 17th September 1867, which purports to have been executed for a consideration of R. 38,500.

This village was granted as an ayma by the Emperor Mahomed Shah in 1724 A. D., under a sunnud of the 11th Zilhij of the seventh year of his reign, to Shaikh Khissalooddeen and Shaikh Bhola. This sunnud is not on the record, but the originals of two firmans of the 24th Zilhij and 15th Mohurrum of that year have been put in by the plaintiff.

It is alleged that, in the tenth year of the reign of the same Emperor (1727), a grant was made to the same persons of Mouzah Kêlee (in Zillah Tirhoot), and the plaintiff has put in copies of two papers relating to this estate under the seal of Cazee Meer Mahomed Ameen.

It is said that Shaikh Khissalooddeen and Shaikh Bhola, also called Taiboollah, made an arrangement between themselves by which the former took the whole of Mouzah Kêlee to himself, and the latter took the whole of Mukdoompore Hubeeb to himself. This allegation is supported by a written instrument dated 15th Rubee-ool-awul 1144 H., corresponding to the English year 1731, purporting to be a declaration made by Khissalooddeen in the presence of, and reduced to writing by, a Cazee.

The plaintiff's next documents are intended to show that this property, Mouzah Mukdoompore Hubeeb, was dealt with by Bhola and his successors as wholly their own and free from any claim on the part of the heirs of Khissalooddeen.

First, there is a conveyance in lieu of dower dated 27th March 1764, by Shaikh Taiboollah to his wife Bebee Fahmeedah of the whole of this village (which it will be convenient to call by its shorter name Kowaree) with other properties.

Next, there is a deed of gift by Bebee Fahmeedah dated 6th February 1782 to her two daughters-in-law, Bebee Kureemun (or Kuroowun) and Bebee Hingun, by which she gave them a half of one-half of Mouzah Kowaree and other properties. In this document Fahmeedah describes herself as holding the whole of certain lands in Bagh Tej Khan, &c., and a moiety of Mouzah Kowaree under a gift made by Taiboollah.

The next exhibit is a deed of gift by the same Fahmeedah to her grandson Taleb Ali, dated 16th December 1784, of one-half of Mouzah Kowaree and other lands. In this document Fahmeedah speaks of herself as holding under the conveyance of 24th March 1764, in lieu of dower, executed by her husband Taiboollah, and again recites that, up to date of execution of the deed, she was in possession of the entire lands of Bagh

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Tej Khan and of one moiety of the aymah estate Makowaree.

Both these deeds bearing Fahmeedah's name are to some extent inconsistent with the conveyance by Taiboollah, and the second deed is inconsistent with and entirely ignores the first. It is not possible to explain the discrepancy by showing that, as Fahmeedah took 16 annas of Mouzah Kowaree from Taiboollah, she might have described herself in each deed as owner of so much as she was then dealing with—for this is not what she has done; at least if, as is possible, she has done so in the second case (the gift to Taleb Ali), she certainly did not do so in the first (the gift to the daughters-in-law). There appears to be no reason why there should be any variation in the mode of description adopted in the two deeds, and it is difficult to conceive why, if she was really proprietor of the entire Mouzah Kowaree, she should not have said so in the first deed and have given a fourth part of the whole, instead of describing herself as proprietor of the half, and giving a half of that half. But, looking at the other gifts contained in these deeds, it is evident that Fahmeedah was not merely describing herself with reference to what she was then dealing with, although she might actually be owner of a larger share; but that she was setting out her whole title. If we can explain her speaking of herself in 1784 as proprietor of half of Kowaree, notwithstanding the gift of 1782 and the recital in that deed, we cannot possibly do so in the case of Bagh Tej Khan. To hold her to have been proprietor of anything in this village in 1784, we must hold that the first gift of 1782 had never taken effect; but plaintiff relies upon it as having taken effect, and there is not even a suggestion that one part was operative, and the rest inoperative. So that, finding that Fahmeedah still describes herself as proprietor in Bagh Tej Khan of that which she had given away in its entirety, it seems to us that we must take it that she had no intention of describing herself as proprietor in Kowaree of anything less than the maximum share which she had ever held. This description, no doubt, is inconsistent with the terms of the conveyance of 1764 by Taiboollah, but the result is, in our opinion, that we ought rather to hold that Taiboollah professed to convey more than he had (and remembering that this was a transaction between husband and wife, which is frequently a mere blind for third parties, this would be by no means surprising), or that between 1764 and 1782 Fahmeedah had allowed a portion to go out of her hands, than hold that she actually held double the quantity that she mentioned in the two deeds.

Next, we come to a document which purports to record the sale, or, as it is styled, the gift for a consideration, of the 2 annas share which Bebee Hingun took under Fahmeedah's gift of 1782, by the said Hingun, to Taleb Ali. This is dated 5th January 1791.

The preceding deeds are not proved by any direct evidence. Plaintiff relies on their antiquity, and on the fact that they were certainly produced before the resumption officer in 1834, if not before.

The plaintiff has thus far shown his title to 10 annas of the estate: he then claims for Taleb Ali's 2 annas by inheritance from his mother Kureemun, to whom Fahmeedah had given 2 annas in 1782. It may be remarked in passing that Kureemun had two sons and two daughters, as shown by the pedigrees put in on either side, and it is not stated how the whole 2 annas could have come to the one son to the exclusion of the other three children.

This accounts for 12 annas, but the other 4 annas is not yet accounted for. The plaint sets out that "on the 2nd Suffur 1198 H. "(1784), Mussamut Fahmeedah executed "a deed of gift bestowing 8 annas of the "aforesaid mouzah upon her grandson, "Shaikh Taleb Ali, son of Shah Ushruff "Zuman, and made over 2 annas to Mussamut "Kureemun-nissa, *alias* Kuroowun, widow of "Shah Ushruff Zuman, her son, and 2 annas "to Mussamut Hingun, widow of Noor Ali, "her son, and 14 beegahs to each of her "four daughters, Bebee Sundul, Bebee Hyatee, "Bebee Peerun, and Bebee Dhoobun." Now, passing over the fact that the gifts to Kureemun and Hingun preceded the gift to Taleb Ali by very nearly two years, and that there is nothing to show the time and manner of the gifts of 14 beegahs to each daughter, although all these transactions are here brought together as if they were contemporaneous, we wish to call attention to a peculiarity in the language used. Kureemun and Hingun are described as the *widows* of Fahmeedah's two sons, to whom she made the gifts of 2 annas each: thus clearly the two sons died before their mother, but the plaint immediately goes on to speak of them as surviving her, in the following words:—"The remaining land of the 4 annas share "(*i. e.*, after deducting 4 × 14=56 beegahs) "*devolved by right of inheritance* upon

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"Shah Ushruff Zuman and Noor Ali, her "sons, and in genealogical succession passed "to the vendor Shaikh Usghur Ali."

Here we have a statement which is not only wholly inconsistent with that which immediately precedes it, but we have further an entire failure to attempt to account for the exclusion from inheritance of the four daughters of Fahmeedah.

At this point it will be convenient to refer to the allotments of 14 beegahs each said to have been made by Fahmeedah to her daughters. As already observed, there is no written instrument of gift, and it is asserted by the present appellants that there never was such a gift, but that the four daughters took by inheritance 1 anna each out of the 8 annas, which formed the estate of their mother. On this point, we have the evidence of a petition filed on 12th September 1834 by Taleb Ali in the Resumption Officer's Court, in which he distinctly says that Fahmeedah gave 1 anna to each of her four daughters. This petition was put in by the plaintiff in this case, and appears to us to be evidence of the strongest character, and to show beyond a doubt that plaintiff's claim must be limited to 12 annas at the utmost, if he can get even that. It will also be observed that, in another place, *viz.*, Taleb Ali's petition of 29th May 1829 referred to another document put in by the plaintiff, we find him describing the 4 annas share of Mussamuts Kureemun and Hingun as a specific quantity of 56 beegahs, and, further that, in the plaint, no boundaries of the excluded lands are given; and that it would be impossible, on the evidence, to frame a decree capable of execution, as no one can say where these 56 beegahs are to be taken.

The decree of the Principal Sudder Ameen of Sarun, dated 17th August 1852 (confirmed by the Sudder Court on 27th April 1854), in Imam Buksh's suit against Fuzul Ali and Usghur Ali, for 4 gundahs of Mouzah Kowaree by purchase from Waris Ali, has been relied on as showing that Bebee Hyatee, one of the daughters of Fahmeedah, held a share in the estate, and not a specified number of beegahs. It by itself is hardly sufficient to do this, but it is consistent with the case which appears to be established by the other evidence.

This finding, that what each of the daughters of Fahmeedah took was not a defined allotment of 14 beegahs, but a share of 1 anna in the entire village, is very important.

If Fahmeedah held 8 annas of Mouzah Kowaree and died, leaving surviving her two sons and four daughters, the shares of these daughters under the Mahomedan law would have been 1 anna each, and the sons would have taken 2 annas each. We do not know positively whether any, and which, of these six children survived their mother; but as all except Noor Ali left descendants, there is no particular reason to conjecture that they died in her lieftime; but even supposing that some of them did die in the mother's lifetime, if she chose to make a distribution by gift before her death, it is by no means improbable that she should have observed in that distribution that scale which the law would have prescribed had they all survived; or, in other words, that she should have treated each child's representatives as justly entitled to what that child would have taken had he survived his mother.

Thus the gift of 2 annas to the family of each son, and 1 anna to that of each daughter, was a most natural arrangement if the whole estate consisted of 8 annas, and furnishes a not unimportant indication of what the estate really comprised. We know that there was never any doubt as to Taiboollah's right to 8 annas, and we find that although, in 1764, Taiboollah professed to give or sell the whole 16 annas to Fahmeedah, yet, in 1782 and 1784, Fahmeedah speaks of herself as in possession of 8 annas by virtue of that transfer. Then we also know that the original grant in 1724 was to Khissalooddeen and Taiboollah jointly, and although a statement in writing by Khissalooddeen dated in 1731, by which he disclaims all interest in Mouzah Kowaree, is produced, we do not think it is altogether established that the claim was abandoned.

In 1867, Usghur Ali put forward in another suit a very singular document, which professes to be a declaration by Bahadoor Ali, grandson of Khissalooddeen, dated the 25th April 1828, made before a Cazee. He again puts it in in evidence in this suit. We know nothing whatever of the history of this document, nor has any explanation of its never having been brought forward in any litigation for 39 years been given. We are not told under what circumstances it was drawn up, or what induced Bahadoor Ali at that particular time to come forward and volunteer such a statement, nor do we know in whose custody it was. I think I may say that we have good reason to suppose it was *not* made over to Taleb Ali at the date on which it professes to have been

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written, for if Taleb Ali held this important document in his hands in 1834, he would assuredly have backed the declaration of Khissalooddeen, which he then produced to show his title in Mouzah Kowaree, by the production of this document, more especially when we find that in those very resumption proceedings, Bahadoor Ali was named in the statements prepared in the Collector's office as one of the owners in possession. When this paper reached Taleb Ali, or his son Usghur Ali, and so passed on to the hands of the plaintiff we do not know, but at last we find it produced in a Criminal Court, and not only have we no direct evidence to establish its genuineness, but we really have no satisfactory voucher for its antiquity; for the signature and seal of a Cazee is unfortunately evidence of very little weight by itself. But although we do not think the plaintiff's case in any way strengthened by this document, it is worth looking at for the purpose of getting a little more light thrown on the early history of this property. In the first place, the plaintiff by this paper explains how it came about that the grants of the two villages of Kowaree and Kêlee, one lying in what is now the district of Sarun, and the other in Tirhoot, came to be drawn up in the joint names of Khissalooddeen and Bhola. We find that they were first cousins, their fathers having been brothers. Then we learn that in 1139 Fuslee, corresponding to 1731-32 A.D., Mouzah Kêlee was lost to the grantees, who appear to have been unable to hold it against the wishes of the local authorities; but turning back to Khissalooddeen's declaration, we see that this loss followed almost immediately on the abandonment by him of any claim to Mouzah Kowaree, that abandonment being dated in 1731. Under these circumstances, it is not to be wondered at if Khissalooddeen made a struggle to get back into Kowaree. It is to be noted that in the disclaimer of 1731 the two properties are described as coming from the maternal grandmothers of each of the two cousins, who would thus appear to take no interest in each other's properties; and that they are spoken of as being only general managers for the various parties respectively entitled to share in the two estates. The *owners* of Mouzah Kêlee disputed and opposed these proceedings, stating:—"We "have executed a razeenamah for the pur-"pose of obtaining an imperial firman "owing to our near relationship to you. "What interest has Shah Bhola in our "estate? And the *owners* of Mukdoom-"pore also similarly opposed." Yet we hear no more of Taiboollah's co-sharers, Nujamutoollah, Sulamutoollah, Usumtoollah, and Buddiooz-zuman, who are named in the document, but in 1764 Taiboollah is found professing to deal with the whole of it as his own, and in 1782 and 1784 Fahmeedah is dealing with the half of it.

At or about the dates abovementioned (1782 and 1784), the names of the grandsons of Khissalooddeen had again turned up as parties interested in the village. In the proceeding of the Deputy Collector of Sarun dated 31st March 1835, we find a report by the record-keeper dated 18th December 1834, which recites that in 1202 Fuslee (1795 A.D.), a statement was filed under the signature of Roostum Ali, son of Bebee Dhoopun, purporting to be on behalf of Sadoollah and Bahadoor Ali (grandsons of Khissalooddeen) and Choolhai, Taleb Ali, Bebee Dhoopun, Bebee Peerun, Saheb Alum, Imam Buksh, and Enayet Ali (descendants of Bhola), in answer to a proclamation under Section 25 Regulation XIX of 1793. Now, although this paper does not purport to be signed directly by Taleb Ali, yet it is, as far as we know, the only answer that was ever put in to the call made by the Government under the Regulation, and it must be borne in mind that, under Section 27 of the Regulation, the grant, if unregistered within the prescribed time, became invalid as far as regarded exemption from payment of revenue, unless specially admitted under Section 26. So that it is in effect the answer to the proclamation made by, or on behalf of, the grantees then in possession.

That Section gives the form of proclamation to be issued by every Collector requiring all persons in possession of lakheraj land of any description to come in and register their grants. Among other information required from the occupant was the name of the present possessor, "and if he be not the original grantee, his relationship to him, and whether he succeeded to the land hereditarily, or by purchase, or what other mode." The report goes on to state that the reporter (the record-keeper) was unable to submit any information as to the authenticity of the deeds of grant, as they had not been produced; but he refers to the papers of the canoongoes of the pergunnah for the year in question (1202 F. S.), and states that these papers contain, among the names of the parties then in possession, the names of Bahadoor Ali and Sadoollah (grandsons of Khissalooddeen). Another register of

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lakheraj estates of the same year is also mentioned, which contains similar information. The report then goes on to state that a register of lakheraj properties prepared in 1208 Fuslee (1801) includes the village which is the subject of this suit, and that it gives the name of Taleb Ali as possessor of one-half, and of Choolhai, Hingun, Saheb Ali, Ruheem Ali, brother of Roostum Ali, and Imam Buksh as possessors of the other half.

The report next refers to a copy of a register of Nawab Hoshyar Jung Bahadoor for the year 1180 F. S. (1773 A.D.), which contains an entry to the effect that this village was held by Taiboollah, the brother of the Cazee, from previous to the time of Nawab Sooraj-ood-dowlah in 1165 F. S. (1758 A. D.)

Then comes a reference to a triennial register, which shows this village to have been then recognized as ayma, and contains a memorandum relating to it to the effect that the old records of the years

1168 / 1761	1169 / 1762	1171 / 1764	1173 / 1766
1175 / 1768	1176 / 1769	1178 / 1771	1195 / 1788

exhibit this village as Ayma Mudud Mash standing in the name of Khissalooddeen and Shaikh Bhola, at present owned by Taleb Ali, grandson (son's son) of Bhola, Saheb Alum, Ahmed Ali, Ruheem Buksh, and Waris Ali, grandsons (daughter's sons), and Bahadoor Ali, heir of Shaikh Khissalooddeen.

It may be that the papers of all these years do not contain the names of Bahadoor Ali, but this is not of much importance; for if the papers of only one year contain this name, it shows that, at a time long subsequent to the alleged surrender by Khissalooddeen, his grandson's name was found on the public accounts as a party interested in the estate.

When the resumption proceedings were pending, Taleb Ali alone, of the members of the families of Khissalooddeen and Taiboollah, came forward to contest the right of the Government to assess the village, as far as appears on the record before us; but the matter is not very distinctly shown. The proceeding of the Deputy Collector refers to three petitions put in on the 29th May 1829. Whether this reference is part of the report of the record-keeper above referred to or an independent statement, we cannot say. Only two of these petitions are set out, one by Taleb Ali, and one by Mussamut Soliman, claiming by purchase from Shaikh Choolhai.

It is then said that, "on the said date" (this reads as if it meant on 29th May 1829, but from the last words of the Collector's serishtadar's report of 15th July 1832, it would seem to be some later date, probably 11th July 1834), a proceeding was recorded under Section 15 Regulation II of 1819, and on this Taleb Ali on 7th February 1835 put in an answer, and on the 11th idem Golam Moortuzza and others put in a petition and asked to be made defendants; but in the end the enquiry seems to have been conducted only in the presence of Taleb Ali, and the claim of the Government to assess the estate was dismissed. But though this was the case, we see from Taleb Ali's petition of 29th May 1829, that at that time he had absolutely (supposing all the transactions to be *bonâ fide* ones) no interest whatever in Mouzah Kowaree, for he therein says he had conveyed by a "bye-mokasa" all his interest in the estate to his wife Bebee Peerun, and had put her in possession. The mere fact of his being the only person who attended to defend the title against the claim of the Government is therefore not very material, when we find the Collector carrying on the enquiry in the presence of one who, by his own showing, had no immediate concern in the matter.

From 1835 to 1848 we know nothing of the estate. It is true that the plaintiff puts in a copy of the deposition of Bishen Dyal, putwaree in 1843, and an extract from some register of the Collector's office, dated 30th November 1843, containing a return by the Thakbust Ameen, and that, on the other hand, the defendant has put in a proceeding at the time of the survey, dated 10th May 1844, in which Imam Buksh alone conducted the proceedings in a claim for rectification of boundaries between Kowaree and Sunsepoora; but these papers are of no value in this suit.

In 1848, we find that proceedings under Act IV of 1840 were taken in the Magistrate's Court. One Sultan Ali, alleging himself to be sub-lessee of Sulabut Hossein, to whom Monowar Jehan (a daughter of Usghur Ali) had nominally leased the entire 16 annas of Mouzah Kowaree, though she was in actual possession of only 8 annas, the other 8 annas being the share of Shaikh Fuzl Ali, brother of Usghur Ali, appeared on one side, and Monowar Jehan came forward on the other, asserting that she held the entire 16 annas under a deed styled a

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deed of "roo-munaie" from her grandmother Peerun, and admitted having taken possession of the village, but asserted that she was legally entitled to do so.

Usghur Ali and Fuzl Ali, and Zynub, the wife of the latter, all of whom appear to have been made parties to the proceedings, did not appear before the Magistrate. The Magistrate found that Monowar Jehan was entitled to retain possession of 8 annas. Both parties appealed to the Judge, who declared the proceedings to have been fraudulently instituted by the lessees in furtherance of the claims of Usghur and his daughter Monowar against Fuzl and his wife Zynub. For the purposes of the present appeal, these proceedings of the Magistrate and Judge are not of importance, but they introduce two statements made before the Magistrate on the 29th February 1848 by Sulamut Ali, defendant No. 9, now an appellant, and Sukhawut Ali, ancestor of defendants 12 to 16, also appellants. Sukhawut Ali's statement is no more than this, that Sulabut Hossein obtained a lease of Monowar Jehan's *share* in Kowaree, and collected one year's rent from the tenants. He says nothing whatever as to the nature and extent of Monowar Jehan's interest.

Sulamut Ali also says that Sulabut Hossein took a lease from Monowar Jehan of her *share*, and held it for one year, but in the following year fell into arrears, and he (Sulamut) was appointed suzawal to collect the rents of her *share* in the said mouzah.

The Subordinate Judge seems to be in error when he says Sulamut Ali, in giving his evidence, *stated in the clearest terms that he had no interest in Mouzah Mukdoompore.*

There is a passage in the Magistrate's decision which has been relied on, namely, "the statements of Imam Buksh, Sulamut "Ali, and Sukhawut Ali, as contained in their "petition and examination, support the state-"ment of Monowar Jehan, and referred to "other particulars;" but it would be very unsafe to place any reliance on this brief note, which may have been all that was necessary to set out for the purposes of that judgment, but which appears to be hardly accurate; for the statements in the examinations distinctly refer to a "share," whereas Monowar Jehan's statement as given by the Magistrate refers to the entire village, and one can hardly suppose that, if Sulamut Ali was supporting Monowar Jehan's claim to the entire village, he would have used the word "share." The whole of these proceedings under Act IV of 1840 bear evident marks of being, what the Sessions Judge described them to be, fraudulent, and only show that there was a dispute in the family in which the lessee of Monowar had gone over to Zynub, while those who had, or now, put forward claims inconsistent with Monowar's were found on her side. What led to this dispute is, as usual, kept in the dark.

We then come to a quantity of infructuous litigation respecting malikana land and lands situated in Bagh Tej Khan, in the shape of rent-suits, in which various attempts were made to get the question of title decided incidentally, but no one would take the straightforward course of coming into Court with a suit directly framed for the purpose of having titles declared.

Meanwhile, on 21st September 1859, Zynub, who claimed under a "bye-mokasa" from her husband Fuzl Ali, dated 29th July 1844, is said to have executed a will in favor of Usghur Ali, the wording of which is peculiar, and is calculated to lead to the inference that the alleged "bye-mokasa" was a mere paper transaction; and accordingly, very shortly afterwards, on the death of Zynub, we find Usghur Ali as a party to a proceeding under Act XIX of 1841, setting up his title by inheritance from his brother Fuzl Ali, and at the same time claiming under the will, while his son Gowhur Ali was claiming adversely to him under the deed of "roo-munaie," executed by his grandmother in 1824.

In 1853, in the suit of Imam Buksh *versus* Mungnee Gope, a declaration purporting to have been made by Saheb Alum on 27th March 1795 was brought forward. Saheb Alum is the ancestor of the appellants, through whom they claim Bahadoor Ali's share, on the ground that Bahadoor Ali, who was sole surviving representative of Khissaldoodeen, married Saheb Alum's daughter, Shah Bebee, and died leaving her as his sole heir, and that she then died leaving her father her only heir, and thus the 8 annas of Khissalooddeen came into the family of the appellants. In this document Saheb Alum appears to declare that one-half of Mouzah Kowaree was given by Fahmeedah to Taleb Ali; that Taleb Ali's mother, Kureemun, for fear of her elder son, Choolhai, had given this in trust to him (Saheb Alum) to be surrendered to Taleb Ali on his coming of age; and that this event having occurred, Taleb Ali had received the property and examined and passed the accounts.

He then goes on to say that the remaining 8 annas was divided into eight portions, four

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of which belong to Kureemun and Hingun, and one of the remaining four, being equivalent to 14 beegahs, to himself, and a similar portion to three sons (named) of the other three daughters of Fahmeedah. He then winds up with a declaration that nothing but the aforesaid 14 beegahs belong to him.

Granting that Taleb Ali might have exacted from Saheb Alum a declaration that the possession held by him was only as trustee, so as to bind him for the future and prevent his setting up any claim to these 8 annas, there was no occasion to bring in the further details. One would also have been inclined to think that there would have been some notice of a release in writing by Taleb Ali to his trustee. We know nothing of the history of this document from the date of its execution until it turned up in this suit 58 years later.

The defendant attempts to show by production of a mortgage deed, dated 22nd August 1795, by Saheb Alum, to Chutter Lall Singh, that, immediately after the date of this declaration, Saheb Alum was claiming to deal with a share of the village considerably larger than 8 annas; and, on the other hand, the plaintiff puts in a lease by Taleb Ali to Beni Geer, in which he describes himself as owner of the entire 16 annas of Mouzah Kowaree, dated 23rd February 1795.

The first of these was brought into Court in 1858, and the second in 1870. Both are of equally little value; indeed both are open to the suspicion of being spurious. No reliance is, we think, to be placed on the declaration of Bahadoor Ali of 25th April 1828 to show that he was then alive, but there is the statement in 1202 in answer to the proclamation under Regulation XIX of 1793, which shows that both he and his brother Sadoollah were then living, so that it is impossible to account for Saheb Alum having possession at that time of an 8-anna share, besides what he inherited from his mother; and, on the other hand, plaintiff, who puts in the statement of Saheb Alum of the 27th March 1795, by which the distribution of the 16 annas between Taleb Ali and Taleb Ali's mother and Mussamut Hingun and himself (Saheb Alum) and the sons of the other daughters of Fahmeedah, cannot at the same time show that, on the 23rd February of the same year, Taleb Ali held the entire 16 annas.

But a few years later we come to something which is at least not open to the suspicion of being a fabricated document. This is the decision of the Civil Court of Sarun, dated 16th December 1812. This sets out that the plaintiff Taleb Ali alleged himself to be owner of one-half of Mouzah Kowaree, which he conditionally sold to Chutter Lall Singh in 1212 (1805), giving him an agreement in writing; and that Chutter Lall Singh had subsequently, in 1807, taken a mortgage from Saheb Alum (surrendering to him this agreement) as security for certain outstanding debts to which the sum paid on the conditional sale was added, whereas he (Saheb Alum) had *no interest* in the said half of the ayma mouzah, except as lessee in his own name of one-third, and his son Imam Buksh's name of two-thirds; and he prayed that the agreement of conditional sale might be restored to him on his paying the amount received from the purchaser. This suit was instituted in 1809, and remained on the file till the end of 1812 when it was dismissed on default, after notice that the plaintiff had withdrawn his claim; but without any deed of compromise being filed. This document shows this at least, that in 1809 Saheb Alum was setting up a claim utterly inconsistent with the declaration of 27th March 1795, and that at that time, if not earlier, there were dissensions in the family, and the setting up of fraudulent documents had, or was alleged to have, begun. If this declaration by Saheb Alum in 1795 had existed in 1809, we can hardly suppose it possible that we should have heard nothing of it in the suit in 1812, or again in 1834.

The "bye-mokasa" by Taleb Ali to his wife Peerun is frequently alluded to, and it is asserted that Peerun got the whole mouzah, less the daughter's share, under it. It is not with the record, and we do not find that its date is anywhere mentioned, except in the declaration of Bahadoor Ali, where it is given as 24th Mohurrum 1230 H. (A. D. 1815.) This transaction is alluded to in a statement of Taleb Ali of 15th May 1829, and in the Deputy Collector's proceeding of 31st March 1835, in which the substance of a petition by Taleb Ali dated 29th May 1829 is set out. In the one he speaks of her being "in possession of the mouzah aforesaid," and from the body of the statement this would appear to be the entire mouzah, less 26½ beegahs, the share of Saheb Alum, and parts of the shares of Hyatee and Dhoopun; in the other, he says that "he "put his wife Peerun in possession of the "said mouzah, exclusive of 112 beegahs "possessed by the heirs of the above named "Mussamuts," namely, Kureemun, Hingun,

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and the four daughters,—in other words, he put her in possession of one-half.

On examination of the materials on the record, very little information as to the state of the families and the enjoyment of the property is obtained. In the long gap from 1732, when Kêlee was lost, to 1764, there is not a spark of light; from 1764 to 1784, we find that the documents filed leave us in uncertainty as to the extent of Fahmeedah's interest, while other documents referring to the same period, not before us, but quoted in the Deputy Collector's proceeding of 1835, tend to increase the doubt whether Khissalooddeen's abandonment of interest in Mouzah Kowaree was actually carried out, assuming the document to be genuine. Then, we come to a merely nominal proceeding of 1791 in Hingun's gift to Taleb Ali; next to the return to the Collector's proclamation and other papers of 1795 distincly setting forth the names of Khissalooddeen's heirs as part owners of the village, and to some very doubtful proceedings by both parties in the same year, and then to some steps taken in 1807 by Saheb Alum inconsistent with Taleb Ali's alleged rights. Then, there is a gap again till 1829, into which is interpolated a declaration by Bahadoor Ali in 1828, and the "roo-numaie" deed of 16th June 1824. In 1829, some proceedings connected with the resumption of the lakheraj are found, in which Taleb Ali does not appear to be quite clear as to the position to be taken up; then, in 1835, the claim of the Government to declare the grant invalid is dismissed, Taleb Ali only (who by his own showing was not a party directly interested) appearing before the Collector to support the grant. Next, in 1843 and 1844, we find Usghur and Fuzl's names given in some papers as proprietors, and on the other hand Imam Buksh contending as a proprietor with the proprietor of an adjoining estate for rectification of boundaries.

Again, in 1844-45 and 1847-48, we find the deed of "bye-mokasa" by Fuzl and Zynub put forward, immediately followed by a dispute between Monowar Jehan and Zynub, which in 1848-49 took the form of an Act IV proceeding, in which Usghur is shown to have been backing his daughter. Then we come to various rent-suits extending from 1851 to 1859 by Sukhawut Ali and Imam Buksh, and the lessee of Gowhur Ali, in all of which various questions of title were raised but left undecided. There was also an attempt in 1856 to get an adjudication of title which failed either from a disagreement between the co-plaintiffs, or because, as alleged, Monowar Jehan's name had been used without authority. Then we come to the proceedings under Act XIX of 1841 in 1860, when Usghur in effect repudiates the "bye-mokasa" by Fuzl to Zynub, and also in a measure Zynub's will in his own favor, and Gowhur repudiates his father's title *in toto*, and sets up the deed of "roo-numaie."

Then, in 1866, we find Usghur leasing the whole estate to Doorgapershad, who wholly failed when he tried to obtain rents by a suit under Act X; and in 1867 the present plaintiff professes to have purchased Usghur's title, notwithstanding the law-suits which were manifestly in prospect for the large sum of Rs. 38,500.

It seems to us simply impossible to say with certainty what was the real state of the titles and enjoyment of the property at any one time in the whole course of the last 140 years, unless the year 1795 (1202 F.S.) be taken as a point at which it is determined. But if we hold that there is some certainty about it in this year, the plaintiff's title falls to the ground. The case is in no way mended by the oral evidence, for although the plaintiff has called and examined a very large number of witnesses, there is a sameness about their evidence which makes it of no value—one set of witnesses go back and give the whole history of the property to a time long before they could have any personal knowledge; the others who do not go back beyond Usghur Ali's lifetime really prove nothing satisfactorily as to Usghur's occupation and enjoyment of the rents, and one and all fall into the mistake about the rent-suit of Doorgapershad, which they describe as gained in the District Court but lost in the High Court, whereas, though he got a decree from the Deputy Collector, it was reversed in the Zillah Court, and the High Court confirmed the Zillah Court's decree by dismissing the special appeal. If this be called only an inaccuracy, it is a singular fact that every witness should have compressed his answer into the same form of words, and that an inaccurate one, and raise a suspicion that they had all learnt this lesson in the same class.

The result of this examination of the evidence is that the case of the plaintiff rests entirely upon documents bearing very ancient dates, but which were not produced until 1834, or possibly in 1812, and were not then proved in any way. There is no evidence in the case of the existence of these documents at the times when they bear date, nor

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is there evidence of possession in accordance with them.

Such evidence as there is of possession, is not only not consistent with them, but is in some respects inconsistent, and that alone would throw considerable suspicion upon them.

With regard to documents of this nature, the rule of English law has been adopted in this country that, where a document is more than 30 years old, if it is free from suspicion of dishonesty, it may be admitted as evidence without proof of the execution or writing. But when we see the reason which is given for the adoption of this rule in the English Courts, it becomes necessary to be extremely careful in the application of it in this country. Mr. Taylor, whose work is so frequently quoted here, says :—"No "doubt, this species of proof deserves to be "scrutinized with care." "Still," he goes on to say, "as forgery and fraud are, com- "paratively speaking, of rare occurrence, "and as a fabricated deed will, generally, "from some anachronism or other inconsist- "ency, afford internal evidence of its real "character, the danger of admitting these "documents is less than might be supposed." We feel obliged to say that this reason has not the same weight in this country as it is supposed to have in England, and here less credit should be given to ancient documents which are unsupported by any evidence that might free them from a suspicion of being false or fabricated. Even in England, this evidence, when unsupported, is of very little weight. The leading authors on the law of evidence there, Mr. Phillips and Mr. Taylor, both state this. Mr. Phillips, indeed, goes further than Mr. Taylor. The latter says (Section 599),—the mere production of an ancient document, unless supported by some corroborative evidence of acting under it, or of modern possession, would be entitled to little, if any, weight.

Acting upon this rule, it is impossible for us to say that a case supported merely by documents of this character, with nothing but the dates which they purport to bear to show that they were executed at the times they purport to be, and with evidence, as we have said, which is in many respects inconsistent with the title which the documents profess to create, can prevail. We are, therefore, of opinion that the plaintiff has failed to make out his title, and that the decision of this Court in this appeal must be accordingly.

Then we have to deal with the appeal No. 75 of 1871, by Mussamut Luteefoonissa. She claims under Gowhur Ali, her case being that there was a valid gift to Gowhur Ali, and it conferred a title which has passed to her.

Mr. Gregory, who appeared for her, relied upon various portions of the evidence which the plaintiff had put in, and sought by treating them as admissions by the plaintiff to show the making of this gift.

On the other hand, it was contended that the gift was not really made to Monowar Jehan, but was for the purpose of giving an appearance of ownership of the property, and probably of protecting it from creditors.

Some portion of the evidence, which Mr. Gregory referred to in support of his contention, was in the petition of the 1st of February 1861, page 352 of the paper book, and he also referred to the order made upon it and to the decision thereon, but he referred also to evidence as supporting his case which shows what the real nature of the transaction was.

There was the deposition of Shiyoo Sunker, which was in the proceedings, in which he said :—"Monowar Jehan was the grand- "daughter (son's daughter) of Taleb Ali, but "Usghur Ali was in possession. Usghur Ali "had the name of Monowar Jehan enrolled "for fear of the mohajuns, but she was "never in possession. After the death of "Monowar Jehan, her son, Gowhur Ali, did "not obtain possession." Again at page 135 is a piece of evidence which Mr. Gregory also called our attention to, being the deposition of another witness, who said :—"I do not "recollect the dates on which Fuzl Ali and "his wife died, but his wife may perhaps "have died three or four years after him. "Usghur Ali used the name of the wife of "Fuzl Ali merely to protect his property "from liabilities, but Fuzl Ali was never in "possession. I do not know whether Sula- "mut Ali obtained a decree against him. "The name of Monowar Jehan, the grand- "daughter of Taleb Ali, was used to protect "the property, but she was not in pos- "session. Gowhur Ali also was never in "possession."

Now that and some other evidence which was referred to show that, although Usghur Ali may have executed some instrument of gift to Monowar Jehan, yet it was really a colorable transaction, as one of the witnesses says, on account of the mohajuns; and the only question is, whether the party against whom an admission of a gift of this

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kind is made use of as showing that the land became the property of Monowar Jehan, and through her of Gowhur Ali, is at liberty to show that in fact the transaction was only a colorable one, and that the property was not intended to pass, and really did not pass.

That is a question which has been decided by the Judicial Committee of the Privy Council in the case to which we are going to refer. In Ram Surun Singh *vs.* Mussamut Pran Peary,* reported in XIII Moore's Indian Appeals, page 551, their Lordships held that two of the defendants in a suit having in their answer made a statement, which was false, in respect of an alleged mortgage transaction, with the object of defeating the plaintiff's claim, it was competent, in a foreclosure suit afterwards brought by one of them against the other, founded on the alleged mortgage, for the defendant to show that the statement in their joint answer in the former suit was false, and intended as a fraud on a third party, and that the admission in the answer did not amount to an estoppel as between them. Their Lordships said there was nothing whatever to prevent the defendant from showing the real truth of the transaction.

There is no question of estoppel here, because what is done in this case is that the appellant Luteefoonissa seeks to make use of various statements which had been put in evidence in the suit, and to treat them as admissions by the plaintiff who put them in, and, according to this decision, it is competent for the plaintiff to show the real nature of the transaction and to get rid of the effect of the apparent admission.

The position of the plaintiff was somewhat peculiar in this case, because Luteefoonissa was brought into the suit after its commencement, and, after some portion, if not the whole, of this evidence had been taken. Possibly the plaintiff would have been more guarded as to what documents he put in as evidence if she had been originally a party to the suit. It simply comes to this, that a party against whom the admission of a deed of gift or conveyance of land is sought to be used, may explain the matter and show the real nature of the transaction; and the evidence in this case shows that, whatever appearance there might be of a gift to Monowar Jehan and of title in her, it was really only an apparent and not a real title, and the land was still the property of Usghur Ali.

* 15 W. R., P. C. 14.

This appeal, therefore, must be dismissed with costs.

In the appeal No. 75, the decree will be that the decree of the Lower Court be modified, and the suit be dismissed as to so much of the land as is claimed by the defendants. As to the residue, the decree for the plaintiff will remain.

The 21st September 1872.

Present:

The Hon'ble W. Markby, *Judge.*

Review—Re-hearing—Under-valuation—Appeal to Privy Council—Stamp Duty—Fraud.

In the matter of

Lekhraj Roy and others, *Petitioners,*

versus

Kanhya Singh and others, *Opposite Party.*

Mr. R. E. Twidale for Petitioners.

Mr. J. T. Woodroffe for Opposite Party.

One of the Judges of a Division Bench, which gave a decision in special appeal in favor of plaintiff, having left the Court, the remaining Judge heard an application for the admission of a review. The review having been admitted, the case was re-heard before the Judge last mentioned and another Judge, and a conclusion was arrived at contrary to the former decision. An application was made by the plaintiff for a review of this judgment, and notice was issued to the defendant, who came in thereupon, and judgment was then delivered at considerable length, in which the Judge delivering it said that no sufficient ground had been made out for the admission of a review, and that he dismissed the appeal.

HELD, that the last judgment was a re-hearing, and that it dismissed, not the application for the admission of the review, but the case itself on the merits.

As this was a suit in which the stamp originally paid was upon an amount very much less than Rs. 10,000, and the whole course of the litigation and the stamps paid throughout had reference to that valuation, though the property was really of the value of Rs. 10,000, the Court, upon the strength of a former decision in the Privy Council Department, refused the application for leave to appeal to Her Majesty in Council.

Quære.—Can the mere payment of a stamp calculated on an under-valuation with reference to the rule in Act XXVI of 1867, Schedule, Art. 11th, Note A, be treated as of itself a fraud which *ipso facto* deprives a party of his right of appeal?

Markby, J.—IN the case of the petition of Lekhraj Roy and others, who applied for leave to appeal to Her Majesty in Counsel, it appears that they were plaintiffs in a suit, the main object of which was that the lease of a certain property under which the defendants or their predecessors had come into possession was not hereditary. That suit was brought on such a value that it came up to this Court only on special appeal: and on the 29th August 1870, a decision was

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given that the lease was not hereditary as regards so much of the property to which this application relates. That decision had the effect of reversing the decision of the Court below, which had held the lease to be hereditary.

Two points appear to have been considered in that case :—

First.—The construction of the lease, whether it was not conterminous with the interest of the grantor ; and

Secondly.—The devolution of the estate, which, the defendants contended, indicated that the property was hereditary.

Both those points were ruled in favor of the plaintiffs. That case is reported in XIV Weekly Reporter, page 262.

Subsequently, one of the Judges who delivered that decision, Sir Charles Hobhouse, having left the Court, Mr. Justice Loch, sitting alone, heard an application for the admission of a review. He admitted the review apparently in order to re-consider both the points which had been made on the previous occasion, but from a somewhat different aspect. Then the review having been admitted on the 23rd June 1871, the case was re-heard, and then it was held, on the authority of the case of Dhunput Singh* in the Privy Council, that the lease was hereditary. That case had been referred to on the first occasion, and the learned Judges then considered that it would be quite impossible to apply that decision to the facts of this case. On review, however, they thought that that case was applicable, and they applied it and held, contrary to their former decision, that the lease was hereditary. The case was re-heard before Mr. Justice Loch and Mr. Justice Bayley.

On the 6th March 1872, an application was made by the plaintiff before the same two Judges for a review of this judgment, and upon that application notice was issued to the defendant. The defendant came in upon that notice in April 1872 or about that time, and on the 4th April 1872 judgment was delivered.

Mr. Justice Loch delivered his judgment at considerable length, and he says at the commencement that the application was made by the plaintiffs, and that after serving notice on the opposite party, "we had the question re-argued at length." Then he discusses certain objections which did not appear to have been considered before. Then he states that the Court had been very strongly pressed indeed by the defendant with the argument that his subordinate tenure cannot fail so long as his superior landlord's holding is in existence. It must be recollected that this point had been pressed on the Court in the first argument, and had not been given effect to, and then having adverted to that the Court goes on to consider the conduct of the parties, and to see how far they could apply the decision of the Privy Council in Dhunput Singh's case which they had in their last judgment considered to be almost on all fours with the present. They now, however, took a different view, and thought the circumstances of the two cases were not on an equal footing. They, therefore, again take up the consideration of the argument based upon the construction of the lease, and reversing the first decision given in this Court hold that the lease "has the effect of being hereditary." This was what the two Lower Courts had held, which decisions this Court had reversed on special appeal. It is, therefore, as I understand the judgment, on this construction of the lease, which had never been put upon it before by this Court, that Mr. Justice Loch says that they think, on a further full consideration of the lease, that, though the lease contains no word importing an hereditary character, yet it has the effect of being hereditary, for the period of its continuance is not dependent on the life of any party whether lessor or lessee, but on the continuance of the superior tenure. And therefore, a sufficient ground for the admission of a review has not been made out, and "*we dismiss the appeal.*"

Now the true view of that judgment is of very considerable importance in this case, because it would depend upon that whether or no this application comes within time. The state of the law, as was represented to me upon the arguments on both sides, and as I believe to be correct, is this, that, if that was a re-hearing, then there is an appeal against that order : but if that was only a dismissal of the application for a review, then the last appealable judgment was the judgment then under review ; and that judgment having been delivered in June 1871, it cannot now be appealed against. Now, if I had to dispose of this case upon that point, I should certainly be very strongly inclined to say that this was a re-hearing, and not merely a refusal to admit a review. No doubt, if the procedure laid down by the Code were strictly followed, there would be

* 9 W. R., P. C., 3.

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three distinct applications, and three distinct stages in the proceedings on review; first, the application *ex parte;* then, if the Court thought fit, the notice to come in and show cause why a review should not be granted; and, lastly, the re-hearing as a totally distinct proceeding. But no doubt those three separate stages are not always as a matter of fact kept distinct, and it is obvious that they have considerable tendency to run one into the other. We have very often at once issued the notice, and I believe it is the practice with some of the Benches always to allow the notice to issue at once without any previous application, thus combining the first and second operations together. So also I certainly recollect one case (although I have not been able to find it out) in which Sir Barnes Peacock and myself sitting together did what it is extremely likely Judges would do when the case had been fully argued upon the application for admission of a review and the points for consideration had been fully argued,—that is to say, we dealt with the matter at once as upon a re-hearing. In the case to which I allude, it was no doubt expressly stated before giving judgment that we were about to do so, inasmuch as we were going to alter the decree originally made. But in this case, where the Judges, though they determined the case on different grounds, nevertheless did not intend to disturb the old decree, it was very likely not thought necessary especially to notice that the review, strictly speaking, was admitted, and then the case re-heard. If we look into the judgment, I think it difficult to say that it is not a re-hearing. It is true that the Judges upheld their former decree, but it seems to me that they give different grounds for their decision, and Mr. Justice Loch, when he concludes his judgment, says two things,—first, that no sufficient ground has been made for the admission of a review, and then he dismisses the appeal.

Mr. Woodroffe very fairly admitted that those words,—"we dismiss the appeal,"—were not conclusive upon the matter. But I think that they are of importance, when we find looking into the judgment, that it dismisses not the admission of the review, but the case itself on the merits. It will appear from what I have to say on another point in this case that this matter will probably have to go further, and it is not therefore necessary for me to give a final opinion on the point. It does appear, however, that there are very good and strong grounds for saying that this was a re-hearing, and that the application is within time.

But then there is another objection: it is objected that this was a suit in which the stamp originally paid was upon an amount very much less than Rs. 10,000; that the whole course of the litigation and the stamps paid throughout were upon the supposition that the property is of a value considerably less than Rs. 10,000; and that the plaintiff, who seeks to appeal, cannot now be heard to allege that the property is of greater value than he had himself assessed it at for the purpose of paying the various fees for institution and for appeal. Now, as a matter of fact, I am satisfied, and indeed, I do not think it is very seriously contested, that the property is of the value of Rs. 10,000. But what was represented to me was (and that also I understand to be admitted) that the plaintiff valued his property at ten times the revenue payable to the Government. This is done in accordance with the note A. in the 11th Article of the Schedule of Act XXVI of 1867, which says that, "in suits "for immoveable property, whether paying "or not paying revenue to Government, the "amount of stamp duty payable shall be "computed according to the market value "of the property in suit. In suits for "immoveable property paying revenue to "Government, where the settlement is tempo-"rary, eight times the revenue so payable, "and where the settlement is permanent, ten "times the revenue so payable; and in suits "for immoveable property not paying revenue "to Government, twenty times the annual "net profits of such property shall be taken "to be the market value thereof, unless and "until the contrary shall be proved."

Now, in a case which is not precisely similar to this, but which I cannot distinguish upon any substantial ground, Mr. Justice Louis Jackson has held that if a party who has paid institution fees takes advantage of that provision of the law, and values the property at a less sum than he knows to be the real value of it, that is a fraud upon the Government, and that he cannot be allowed to come in afterwards and allege the contrary of what he had once alleged to be the value by paying the institution fee on that amount.

Now I confess that I should have very great difficulty in coming to that conclusion. I think it is quite open to argument that the intention of the Act was that parties should, as between the Government and themselves, be allowed to adopt the rule laid down as the

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value of their property, leaving it open to Government to show that the property was of a greater value. Acts of the Legislature which impose duties of this kind are always construed in favor of the tax-payer. But be that as it may, I am at any rate not prepared to say that the mere payment of a stamp so calculated can be treated as in itself a fraud which *ipso facto* deprives a party of his right of appeal; and if there were no other mode of bringing the matter to a determination, I should feel very great hesitation in following the case relied on. I should feel inclined to accept the plaintiff's explanation that he thought the Act authorized the principle of calculation which he has adopted, and even if he were wrong, his misunderstanding the Act would not be a fraud. It seems to me, however, that it is very undesirable, especially in this department, that the law should be left in the unsatisfactory state in which it would be if I were to decide in conflict with the express decision of the Judge who sat previously in this department. I think as there is another remedy open to the parties, and as they have the means of going to the superior tribunal and getting a decision on this point, before the costs are incurred in translating, printing, and otherwise preparing the case, it is better for me upon the strength of that decision to refuse the leave to appeal, in order that the parties may apply to the Privy Council, and thereby enable us to have an authoritative decision under which future Judges can act.

I simply, for the purposes of enabling the parties to make their application before the Privy Council, refuse the application for leave to appeal to Her Majesty in Council.

The 18th November 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Decree-holder and Judgment-debtor—Agreement —Construction—Limitation—Waiver.

Case No. 238 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Purneah, dated the 29th July 1872.

Roy Luchmeeput Singh Bahadoor (Decree-holder) *Appellant*,

versus

Moonshee Jowahur Ali (Judgment-debtor) *Respondent*.

Mr. R. T. Allan for Appellant.

Mr. C. Gregory for Respondent.

Certain property was handed over by a judgment-debtor to the decree-holder for the purpose of satisfying the decree, and an arrangement was made between them under which it was stipulated that if, within a given interval, there should hereafter be found to be a defect in the title of the judgment-debtor, and the decree-holder should be dispossessed, then, whatever the unrealized portion of the amount of the decree, the decree-holder should be at liberty to realize it by execution of the decree.

HELD, that the reasonable construction to be put upon this agreement was that, if there appeared to be a defect of title to any portion of the property handed over, and the decree-holder should be dispossessed of it by reason of such defect, then the transaction was to be put an end to, and he was to revert to his original right.

As a part of the agreement, the judgment-debtor was held to have waived the benefit of the law of limitation if the event should happen upon which the decree-holder was entitled to fall back upon and execute his decree.

Couch, C.J.—IN the arrangement which the parties made, it was stipulated that, if within the said interval, there should hereafter be found to be a defect in the title of the respondent, the judgment-debtor, and the decree-holder should be dispossessed, then whatever was the unrealized portion of Rs. 40,390, the amount of the decree, the decree-holder should be at liberty to realize it from the judgment-debtor personally, or from his mortgaged and unmortgaged properties, by executing the decree against him. The reasonable construction of that stipulation is that, if there appeared to be a defect of title to any portion of the property which was handed over to the decree-holder for the purpose of satisfying his decree, and he should be dispossessed of it by reason of such defect, he should be entitled to revert to his original position and to execute his decree. It is true that there is not inserted in the contract the words "any portion," but when we consider what would be the consequence of the construction that the Subordinate Judge has put upon it, there can be no question that the reasonable construction is that, if the decree-holder lost a portion of what was handed over to him to satisfy his decree, then the transaction was to be put an end to, and he was to revert to his original right. It would be most unreasonable to say that, supposing he were dispossessed of nineteen-twentieths of this property, which might

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have happened, or of even more than that, he should only be at liberty to look to the remainder of it, or to take the curious remedy which the Subordinate Judge proposed of bringing some action for a breach of the contract. I think that the Subordinate Judge has put an improper construction upon this agreement, and that, in the event which has happened, the decree-holder is entitled to execute his decree for so much as shall appear upon taking an account to be unsatisfied.

Then it is said that he cannot now execute his decree by reason of the law of limitation; that, inasmuch as more than three years have elapsed since the application to execute it upon which this arrangement was made, his remedy is now gone. Certainly, it appeared to me an extraordinary proposition that a party consenting to this mode of having his decree satisfied, and doing in effect by agreement beween the parties that which the Court could itself have done by appointing a manager, and directing the profits to be paid over, should, when the event happened upon which it was stipulated the arrangement should cease to have effect, find that the law of limitation had deprived him of all his rights under the decree.

The decision of the Full Bench* to which we have been referred is not applicable to the present case. That decision was that the decree-holder, by agreeing to receive the amount of his decree by instalments, could not extend the period of limitation which the law allowed to him, and instead of counting the three years from the passing of the decree, count them from the time fixed for the payment of the first instalment. But this is a different case; here what the judgment-debtor in effect does is, he agrees that if, by reason of a defect of title and consequent dispossession, the decree-holder cannot get the benefit of the agreement, the decree may then be executed in the same way as if no such arrangement had been made, excepting of course that the debtor would have the benefit of any money that had been received by the decree-holder. It is he who waives as part of this agreement the benefit of the law of limitation, if the event should happen; and I know of no rule of law which prevents such an arrangement as that being made: he, in fact, precludes himself from setting up the law of limitation, if the event should happen upon which the decree-holder is entitled to fall back upon and execute his decree. It would be most inequitable and contrary in fact to the intention of the parties, and would prevent such arrangements being entered into, if we were to hold that now the right to execute the decree having revived, the law of limitation shall be applied, and he shall not be allowed to execute it.

I think that the order of the Subordinate Judge must be set aside, and the decree must now be executed, the decree-holder, before any steps are taken to execute it, restoring the possession of such portion of the property as he still holds, and also accounting for what money he has received during the time he has held the property, so that the true balance now to be levied under the decree may be ascertained. And the appellant must have the costs of this appeal, pleader's fees being fixed at 5 gold mohurs.

Glover, J.—I am of the same opinion, and for the reasons given by the Chief Justice.

The 18th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Partition—Convenience.

Case No. 199 of 1872.

Miscellaneous Regular Appeal from an order passed by the Additional Judge of Tirhoot, dated the 8th and 25th April 1872.

Summun Jha and others (Decree-holders) *Appellants,*

versus

Bhooput Jha and another (Judgment-debtors) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Chunder Madhub Ghose* for Appellants.

Baboos Doorga Mohun Doss and *Boodh Sen Singh* for Respondents.

Where a party concerned objects, in appeal, to a partition of land fairly allotted according to value, as not having consulted convenience, it is not enough to show that appellant's own convenience would have been better consulted by a different arrangement. He is bound to show some arrangement which would better satisfy all parties, and be more equitable for all.

Phear, J.—We think that we must dismiss this appeal. Substantially, the learned pleaders who addressed us on behalf of the

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13 W. R., F. B., 44.

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appellant admit that, so far as the value of the plots allotted is concerned, there is no such inequality as they can complain of: but they put it that the principle which bound the Judge to consult, as far as possible, the convenience of all the parties to this partition has not been duly followed, and that their client has to some extent received detriment from this cause, and is entitled in this regular appeal to have that matter set right. I need not say that it would be extremely difficult for us here, if all the parties to the suit were before us, to judge better of their relative convenience than the Court below on the spot can do. But we have not even that advantage of situation. Two only of the parties are here. The appellant certainly has not shown us, as I understand the argument, that, in the Court below, the balance has been unevenly held with regard to the convenience of *all* the parties. It is merely pointed out to us that the appellant's own convenience would have been much better consulted if a different arrangement had been effected between him and the respondent. I think before he can ask us to disturb the decision of the Court below, he ought to show us some arrangement which would better satisfy all parties, or would be more equitable for all parties, than the arrangement which has been come to by the Judge. I can conceive very good reasons why the Judge should have allotted ground which in the map is contiguous to the petitioner's land to the respondent, and yet on the whole should by so doing have best consulted the interest of *all* parties to the partition.

I think the appellant, in order to succeed here, ought to have shown us that the allotment which the Judge has made is unfair, and to point out to us that another arrangement would have been better and more fair. He has not endeavored to show this latter point. I have not the smallest material before me at the present moment upon which I can say that any other division of the property would be more convenient to all parties than the present one, even if I come to the conclusion that the convenience of the appellant has been apparently somewhat neglected as between him and the respondent. For this reason, I think the appellant cannot succeed before us, and the appeal should be dismissed with costs.

Ainslie, J.—I concur.

The 19th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Special Appeal—Evidence—Error in Law.

Case No. 237 of 1872.

Special Appeal from a decision passed by the Judge of Patna, dated the 10*th July* 1871, *reversing a decision of the Subordinate Judge of that district, dated the* 11*th April* 1871.

Mohur Matoon and another (Defendants) *Appellants,*

versus

Bibee Umatum (Plaintiff) *Respondent.*

Mr. A. F. Lingham and *Baboo Chunder Madhub Ghose* for Appellants.

Messrs. R. E. Twidale and *C. Gregory* and *Moonshee Mahomed Yusoof* for Respondent.

Whether or not a Lower Appellate Court commits such an error in dealing with a case on the evidence before him as would make his conclusion on the facts bad in law, if he does not treat the evidence otherwise than reasonably, he gives no room for special appeal.

Phear, J.—At first it seemed to me that the judgment of the Lower Appellate Court was somewhat obscure, and I have felt some little difficulty in entirely apprehending the course of the Judge's reasoning. The discussion which the learned Counsel has given us of the judgment and of the portion of the evidence has, however, sufficed to dispel my difficulty on that head, and I now think that we cannot rightly disturb the judgment of the Lower Appellate Court on special appeal.

The plaintiff sues upon a kubooleut which is unquestionably genuine. The defendant says that the kubooleut was not given over to the plaintiff unconditionally: it was given by him to be held by a third party, Raza Hossein, until certain conditions were performed by the plaintiff, namely, until she had paid off a person who was a prior incumbrancer upon the rents which he was to take in farm; and he objects that he is not liable upon this kubooleut, because that condition has never yet been fulfilled by the plaintiff. But the Judge finds upon the evidence before him, specially upon the evidence of Raza Hossein himself, that the defendant's story does not give the true version of the condition upon which the kubooleut was handed over to Raza Hossein. He says, it appears from Raza

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Hossein's testimony that the kubooleut was handed over to Raza Hossein to be kept by him, together with a sum of Rs. 400, paid by the defendant for a period of one month, in order that the defendant might, within that time, obtain, by payment of proper fees and expenses, from the plaintiff's serishtah, a pottah, in exchange for the kubooleut, and that the kubooleut should not be operative for that time. The month expired without the defendant's doing this, and Raza Hossein then handed over the kubooleut and the Rs. 400 to the plaintiff. The Judge says he believes this to be a true story: that the plaintiff has thus rightly got the kubooleut, and acted upon the document signed by the defendant, and that it gives her *primâ facie* right to sue him.

Then, as to the further objection raised by the defendant that he in fact had no possession whatever, and was unable to obtain it (that means, I suppose, was unable to collect any of the rents leased to him), the Judge says upon the evidence that the case of the defendant in that respect has entirely broken down. He says, as I understand him, that at the time when this kubooleut was given, the defendant and his step-brother, Bahadoor Matoon, were farming these very rents and collections under a ticca from the plaintiff and her shareholders: that Bahadoor Matoon's evidence as to his sole possession is not to be believed, and that there is no doubt that the plaintiff who must have had the very best possible means of knowing whether he would be able to get possession or not when he gave the kubooleut would never have allowed three years to pass without action or complaint after he paid Rs. 400 to the plaintiff, if he had not in fact the possession with respect to which the kubooleut was given.

If appears to me upon the consideration we have been able to give to the case, that the foregoing is substantially the view of the case which the Judge formed and upon which he based his decision. Raza Hossein's evidence was read to us *in extenso*, and it appears to me that it thoroughly bears out this view, and is in no way inconsistent with it. I am unable to accept the argument of Mr. Lingham. I understand him to argue that there has been such a perversion of the evidence in the estimate of it given by the Judge, as makes his judgment bad in law. We ought not here, sitting on special appeal, to go into the evidence in detail, or endeavor to hold the balance between statements of witnesses made on one side and on the other, or between themselves of inferences deducible in favor of the one side and of the other. We can only say whether or not the Judge has committed such an error in the mode of dealing with the case on the evidence before him as would make his conclusion on the facts bad in law; it does not appear to be in this case that the Judge has treated the evidence otherwise than reasonably, and I think therefore this appeal must be dismissed with costs.

Ainslie, J.— I concur.

The 20th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Acquiescence—Admissions.

Case No. 213 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 31st August 1871, reversing a decision of the Moonsiff of that district, dated the 27th March 1871.

Mussamut Jan Koonwar (Plaintiff) *Appellant,*

versus

Ram Ruttun Neogy and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Gopal Chunder Mookerjee* for Appellant.

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Respondents.

One R. P., who was entitled to possession of 8 annas of a certain property, assigned 1 anna to her granddaughter Z, who about 23 years afterwards granted plaintiff a mokururee pottah under which he sought possession, but found defendants standing between him and the rent-payers as mokururedars, or representatives of such, through one W. A., to whom they said R. P. had given a mokururee pottah before she made the assignment to Z. The Lower Appellate Court found that Z had had no other enjoyment of the property than through mokururedars, or middlemen, ever since she obtained her assignment, and that defendants, or those through whom they claimed, had, during all that time, or at any rate since 1859, been setting up the mokururee title of W. A., and that about 11 or 12 years ago in a suit for possession brought by a ticcadar (G) against Z, the latter had alleged that W. A. and the defendants through him were holding under a mokururee pottah of considerably antecedent date.

HELD that, after the long period of lawful holding on the part of defendants to the knowledge of Z, and without any serious attempt on her part to disturb it, and her admission in the suit by G, the suit was properly dismissed.

Phear, J.—To state this case very shortly, —the plaintiff alleges that one Ranee Pheekun,

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being entitled to possession of 8 annas of the property, part of which is the subject of the suit, assigned 1 anna share of the property in the suit to her granddaughter Zumeerun Begum (I believe this was about the year 1847), and that Zumeerun about two years ago granted him, the plaintiff, a mokururee pottah under which he endeavored to obtain enjoyment of the subject granted to him; but that upon his doing so, he found the defendants standing between him and the rent-payers upon the ground that they were mokururedars or representatives of the interest of mokururedars by a title through one Waris Ali, to whom, as they said, Pheekun Ranee had given a mokururee pottah of the whole 8 annas before she made an assignment of 1 anna of her own interest to Zumeerun.

On these allegations of fact, the defendants set up that they had a title prior to that of the plaintiff, and they also pleaded that the present suit was barred by the Act of limitation.

The Lower Appellate Court has upheld the plea of limitation, and the present appeal, specially made to this Court, is mainly brought to question the legality of the finding of the Court below on the plea of limitation.

The case has been very fully and very well argued before us on both sides, and speaking for myself only, I am not by any means sure that the Subordinate Judge did not fall into error in his application of the law of limitation to this case. But, however this may be, it appears to me that he has dealt very completely with the merits, and that he has come to a decision upon the facts before him which we ought not on special appeal to disturb. He has found in discussing the matter of limitation that Zumeerun has had no other enjoyment of this property than through mokururedars or middlemen, ever since she obtained her assignment of 1 anna share at a time so far back as 1847, that is, three and twenty years before the bringing of the suit. He has also found, and I think it is almost beyond contest on the part of the other side, that the defendants or persons through whom they profess to claim have been, during the whole of this time, or at any rate certainly since 1859, setting up the mokururee title of Waris Ali: further, that about 11 or 12 years ago, Zumeerun granted a ticca pottah to one Goodree Singh of the very subject of the present suit, and Goodree, finding or alleging that he could not get the enjoyment of his ticca pottah, brought a suit against Zumeerun and the present defendants amongst others; that, in that suit, Zumeerun filed a written statement in which she expressly said that Waris Ali, and through him, the defendants were holding, as they alleged, under a mokururee pottah of a considerably antecedent date granted by Pheekun Ranee, her assignor, and that that was the reason why the plaintiff in that suit could not get possession, and she could not give it. Whether rightly or wrongly, the Court in that case gave a decree in favor of Goodree Singh against Zumeerun. But the Court below finds that Goodree, notwithstanding he got this decree in his favor, never put it in force, or made effective his ticca pottah, either then or at any other time; consequently the present suit is scarcely more than a repetition of the attempt which was then made unsuccessfully 11 years ago, and ought to fail, because in fact Zumeerun has not been in any other enjoyment (as I have already said) than through the mokururedars, represented by the defendants, for a period considerably greater than the period of limitation. He has also gone even further than this, and he has found that, whether or not the documents which the defendants put in to show their holding under Waris Ali have been sufficiently proved or not, they appear to have been duly registered, and accord with the facts of the actual holding as established by the defendants.

Now, without saying that the Subordinate Judge is right on this ground in holding that the plaintiff's suit is barred by the operation of the Act of Limitation, I think he is quite right in dismissing that suit. It appears to me that, after the long period of beneficial holding which has occurred on the part of Waris Ali and those who claim through him to the knowledge of Zumeerun, and without any serious attempt on her part at disturbing it (even supposing that Goodree did really represent her), that after this she ought not to be allowed to say that she had not taken the assignment of 1 anna share subject to the mokururee rights, which the defendants set up, and which they have certainly proved that they have so long enjoyed. In this view, I think in this special appeal we ought not to interfere with the judgment which is manifestly right on the merits.

I am this moment told that there is a portion of the subject-matter in dispute which is not covered by Waris Ali's mokururee title. I do not think I ought at this stage to go into

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the facts by which the case with regard to this may differ from the facts upon which I have just now based my opinion, as neither in the grounds of appeal nor in the argument before us, nor apparently in the Court below, was there any distinction made in the situation of the two properties. It is too late now, after both sides have been fully heard and the judgment of the Court has been delivered, to enquire whether the facts of acquiescence are materially different with respect to this second portion from those with which the Court has just now been dealing, and upon which it has based its decision. This is a special appeal, not a regular appeal, and the Court below has determined the question of enjoyment during the period of limitation against the plaintiff for all portions of the property alike.

The appeal will therefore be dismissed with costs.

Ainslie, J.—I do not think it is necessary for me in this case to re-consider the opinion expressed by me in the judgment, reported in XV Weekly Reporter, 232, which has been cited in the course of the argument, as to whether limitation can apply in any suit between landlord and tenant; for, whether limitation has been properly applied by the Lower Appellate Court in this suit or not, it seems to me that on the findings of fact the suit was properly dismissed.

The Subordinate Judge having found that Mussamut Zumeerun had never since 1859 enjoyed this property, except through the intervention of a third party, that third party being a representative of Waris Ali, the alleged mokururedar; and the mokururee lease of Waris Ali having been distinctly alleged in the year 1859 in the suit of Goodree, if not earlier; and there being in that suit an admission by Mussamut Zumeerun which carries back her knowledge of that lease without any apparent limit of time, I think it may be fairly inferred that she meant to express her knowledge of it from the time that she derived her own title. Then, from the time of those suits up to the present time, Mussamut Zumeerun appears to have taken no steps whatever to question that mokururee title; and taking her silence now with her admission then, even if the law of limitation do not properly apply to this suit, there has been such an acquiescence in the title put forward on behalf of Waris Ali, that Zumeerun or those deriving title from her cannot now dispute it. Therefore the suit was properly dismissed.

The 21st November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Documentary Evidence—Consent of Parties.

Case No. 333 of 1872.

Special Appeal from a decision passed by the Judge of Sarun, dated the 23rd September 1871, *reversing a decision of the Moonsiff of Chuprah, dated the 23rd May* 1871.

Rash Beharee Lall (one of the Defendants) *Appellant,*

versus

Ram Prosunno Misser (Plaintiff) *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Sreenath Doss and *Nullit Chunder Sen,* and *Moonshee Mahomed Yusoof* for Respondent.

Where two sets of jumma-bundee papers put in by parties to a suit are such that either would be inadmissible if objected to by the opposite party, each party by insisting on his own papers bars himself from objecting to those of his adversary.

Phear, J.—There does not appear to be anything erroneous in law in the decision of the Lower Appellate Court. In this case it seems to be beyond question that both sets of jumma-bundee papers have been, by the conduct of the parties themselves, made evidence between them. The first Court was of opinion that the testimony as to possession of one set of witnesses, corroborated as it was by one set of jumma-bundee papers, ought to prevail over the other set of witnesses corroborated by the other jumma-bundee papers. The Judge has taken an opposite view: he thinks that the corroboration of the plaintiff's witnesses which is afforded by the jumma-bundee papers put in by him is more effectual than the corroboration of the defendant's witnesses by the jumma-bundee papers put in by him. The Judge has not perhaps been very happy in the use of his terms, for he has said that the jumma-bundee papers put forward by the defendant were *no* evidence, while those put forward by the plaintiff were *better* evidence. There can be no doubt that both of these two papers would have been inadmissible as evidence in this suit had the opposite parties objected to

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them when they were first attempted to be used by their respective adversaries. But each party in this case by insisting on his own jumma-bundee papers has barred himself from objecting to the jumma-bundee papers of his adversary, for there seems to be no difference between the two as to character: the only difference which exists is a difference as to value, and we think that the Judge was right in saying that the plaintiff's jumma-bundee papers were more to be relied on than the defendant's, for they appear to have been papers kept in the ordinary course of business in the landlord's serishtah, and not papers prepared for a special occasion. At the same time we must say we think it is unfortunate that the Appellate Court should have reversed the finding of the Court below simply upon evidence of this character, without having gone somewhat into a discussion of the corresponding merits of the conflicting parol testimony. Nevertheless, we cannot say that the Judge has committed any such error as obliges us to interfere with his judgment on special appeal. The appeal will be dismissed with costs.

The 22nd November 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Money-decree—Attachment of Property—Execution-sale—Payment by third Party.

Case No. 526 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 20th December 1871, affirming a decision of the Subordinate Judge of Pubna, dated the 28th November 1870.

Omrito Lall Sircar (Plaintiff) *Appellant,*

versus

Ramdhun Chakee and another (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondents.

In decreeing a claim founded on a simple money-bond, a Court has no authority to direct the realization of the money out of any named property, and thus make it a charge upon such property.

In such a case, if the decree does this, and the property is sold before attachment, the title conveyed by the sale is not affected (as there is no charge upon the property befoe it is attached), and the decree-holder's remedy lies against the judgment-debtor.

A payment of money to prevent a sale about to be effected in execution of a decree, cannot be called a voluntary payment, whether it is made by the judgment-debtor, or by a third party claiming the property.

Couch, C.J.—In the judgment of the Subordinate Judge, the case for the plaintiff is stated to be, that he had purchased a one-anna share and was in possession of it; that the defendant caused an attachment of the share to be made; and that the plaintiff raised objections to the attachment, which being rejected, he, on the 14th of June 1865, paid the amount of the execution, namely, Rs. 950-14-6, to save the property from sale, and he instituted the suit to establish his right to the one-anna share and to get back the money which he had so paid.

It also appears from this judgment that the defendant set up a great variety of grounds of defence. The ingenuity, we suppose, of the pleader who appeared for him, must have been severely taxed to discover all these various grounds; but amongst them he set up this that, by the decree which was given in favor of the defendant, the sum of money which had been decreed was directed to be realized out of this property.

It appears that the suit in which that decree was made was upon a simple money-bond. The Court in such a suit should order the money to be realized out of the property left by the deceased person. Unless the bond created a charge upon the property, the Court would have no authority, by directing the realization of the money out of any named property, to make it a charge upon it,—to make a different decree from that which is directed by the Code of Procedure.

The Subordinate Judge in his judgment held that the plaintiff had shown that he was entitled to the one-anna share, and made a decree in his favor as regards it, but he refused to give him a decree for the money which he had paid to stop the sale, because he says he considered that it was a voluntary payment. He has referred to the decision of the Privy Council quoted to us, and he says that he did not consider it was applicable. The reason, apparently, for his saying that he did not think it was applicable is that in that case it was the judgment-debtor who paid the money to prevent the sale, and in this case it was a third person. It does not seem to have occurred to him that, as regards the payment being voluntary, it did not matter whether it was the judgment-debtor or a third person who claimed to be entitled

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to the property which was going to be sold. The material fact was that a payment was made by a person claiming to be entitled to the property, and who now appears to be entitled to it, and who, if he had not paid the money, would have seen his property sold. How it can be said that a payment which a man makes when his property is going to be sold in execution of decree by the officers of a Court of Justice to prevent the sale is a voluntary payment, is somewhat difficult to see. We think the first Court was wrong in saying that the principle of the decision of the Privy Council did not apply to this case, and that the payment cannot be regarded as a voluntary payment.

The case then comes by way of appeal to the District Judge. He came to the same conclusion as the Subordinate Judge with regard to the right to the one-anna share, but did not agree with him with regard to the payment being voluntary. But he also, for a different reason, holds that the plaintiff cannot recover the money which he paid, his reason being that the debt which had been decreed to the defendant was a charge upon the property in the hands of the first respondent, and that the purchaser from him was in the same position.

There he appears to have been wrong, because the state of things was this, that the decree authorized the decree-holder to realize his debt out of the property of the deceased in the hands of the defendant; but, until he had attached it, there was no charge upon the property, and if it was in the meantime sold by the person against whom the decree was obtained, the sale would confer a good title on the purchaser, the remedy of the decree-holder being against the judgment-debtor who had sold it, and who would be liable to make good the debt out of his own property, or out of the money he had obtained for it. This part of the judgment of the District Judge could only be supported by its being shown by the respondent, the defendant in this case, that the suit in which the decree was obtained was a suit to enforce a charge upon the property, and that the decree was one giving effect to the charge. That does not appear; that ought to have been shown; the defendant put forward that defence originally, and it may be presumed that, if there were any means of proving it, he would have done so.

Therefore, the decrees of both the Lower Courts are wrong with regard to recovering back the money. They have decided on different grounds, but both are wrong. Both decrees must be reversed, and the plaintiff must have judgment for the amount which he claims as having paid to stop the sale. The decree must be amended by declaring the plaintiff to be entitled to the money which he claimed in his plaint, with interest at 6 per cent. from the date on which it was paid until the judgment is satisfied.

The appellant must have the costs of the appeal from the second respondent, and we think that the respondent who did not pay his debt should have no costs.

The 22nd November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Registration—Act XX of 1866 *s.* 49—*Fraud—Remedies—Right of Suit.*

Special Appeals from a decision passed by the Subordinate Judge of Gya, dated the 28*th September* 1871, *reversing a decision of the Moonsiff of Nowabad, dated the* 24*th June* 1871.

Case No. 273 of 1872.

Meer Shumshare Ali (Defendant) *Appellant,*

versus

Syud Lutafut Kureem (Plaintiff) *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

Case No. 280 of 1872.

Lalla Thakoor Sahoy (Plaintiff) *Appellant,*

versus

Syud Mahomed Lootfoollah (one of the Defendants) *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

On the expiration of a zur-i-peshgee ticca granted to plaintiff by defendant, the latter executed a kobala of the property forming the subject of this suit for a consideration. The kobala was drawn up, signed by defendant, and delivered to plaintiff's servants to be registered with his consent, but the defendant subsequently got it away from them and never went to the Registry office, and the deed could not be registered. The defendant denied these facts, and pleaded that he had given a mokururee lease to a third party six days after the date of the alleged execution of the kobala. The Lower Appellate Court found the plaintiff's case established, and ordered

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defendant to restore the deed of sale for the purposes of registration and use, and declared the sale good and valid, plaintiff having already obtained possession.

HELD that plaintiff had a right to the remedy sought, and that his suit was not barred by the Registration Act.

HELD that the application of defendant's mokurureedar to be made a party to this suit ought to have been acceded to, so that plaintiff might in one suit have had a decree binding on those also who claimed through defendant.

HELD that, under the circumstances, the mokururee lease, though registered, could not prevail against the kobala, and that even if the mokurureedar's suit had been separately tried (which it was not), the Court might properly have allowed time for the registration of the kobala, in order to its being admitted as evidence.

Phear, J.—THIS case presents some striking features. One Syud Lootfoollah is the plaintiff. He alleges that he held a zur-i-peshgee ticca granted to him by Shumshare Ali, the defendant, for a certain period, namely, from 1266 to 1277. After this, upon an arrangement, I suppose, being come to for the re-payment of the money due under the zur-i-peshgee and other moneys, the plaintiff says that the defendant executed in his favor a kobala of the property which forms the subject of this suit, for a consideration of Rs. 1,000 which was to be applied, part to the payment of the zur-i-peshgee debt, another part to the re-payment of other debts due from the defendant to the plaintiff under certain decrees, another part again to the discharge of arrears of rent for other lands, and the remainder being a sum of Rs. 86 and odd annas was to be paid down in cash to the defendant. The plaintiff says that the defendant did take Rs. 5 in cash as earnest-money, and that the kobala was actually drawn up, signed by the defendant, and handed over to the plaintiff's servants to be taken by them to the Registry office, and there to be registered with the consent of the defendant. After this, the defendant managed to get the deed away from the plaintiff's servants, and then absented himself altogether, and never went to the Registry office. Consequently, the plaintiff was unable to get the deed registered. He was unable even to present it himself to the Registrar, and so to get the Registrar to take any action upon it, in the absence of the other party.

The defence of the defendant is that this is altogether a false story. He says that he had granted a mokururee lease of the same property to a third person, Thakoor Sahoy, on the 12th Aughun 1278, that is, about six days after the date when the plaintiff alleges that his kobala was executed.

The Lower Appellate Court has found that the story of the plaintiff is established, and that the defendant has committed a great fraud upon the plaintiff, and has kept back the kobala in order that he may defeat the plaintiff's right to have it registered. On this finding of fact, the Subordinate Judge orders that the defendant shall deliver over to the plaintiff the deed of sale for the purpose of being registered and applied to the use of the plaintiff; and he also declared that the sale was valid and passed a good title, the plaintiff having already obtained possession of the property which was the subject of the kobala.

It is objected to this decree in special appeal that the proceeding in the Court below is entirely misconceived, and that the plaintiff ought to have proceeded under Section 84 of the Registration Act, inasmuch as Section 84 and other subsequent Sections of the Registration Act provide what is to be done in the event of the Registrar's refusing to register. But inasmuch as it appears from the finding of the Judge that the plaintiff has been deprived of all opportunity of getting even a refusal to register from the Registrar by reasons of the fraud of the defendant, I confess it seems to me very difficult to understand the nature of this objection now made by the special appellant. It certainly cannot be allowed to prevail. For purposes of considering its weight, we must take it that the principal facts upon which the Judge has founded his judgment are correct; and then it follows that the plaintiff has been deprived of his deed of sale by the deliberate fraud of the defendant, and he has been unable, in consequence of that fraud, to do anything to put in force the provisions of the Registration Act; and if he is to be debarred from the alternative of access to the Civil Court for the purpose of seeking a remedy for the result of this fraud, he is utterly without any remedy whatever. There is nothing that I am aware of in the Registration Act to bar a suitor's right of coming into the Civil Court to complain of a wrong. He cannot obtain, of course, any order of Court to be made upon the Registrar for the registration of a document, except in the manner which is provided by the latter Sections of the Registration Act; but he assuredly may come into Court to get such remedy against the defendant as the justice of the case, under the circumstances which can be proved, certainly gives him a right to get. That is nothing more nor less than this, *viz.*, to make the defendant do that which he ought to have done according to the terms of his contract, and undo as far as possible the effect

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of his fraud. It seems to me beyond doubt that the plaintiff certainly can come into Court to compel the defendant to give back the document which he has retained, to make him go to the Registry office, and register it.

The Lower Appellate Court has dealt very fully and completely with the matter in the suit between the two parties upon its merits: and not a suggestion has been made here that there is any ground to dispute the facts found by the Judge for the reasons which can be urged in special appeal.

It is unfortunate that the application which, we are told, was made by the mokurureedar of the defendant under the transaction of the 12th Aughun 1278, to become a party to the suit, was not acceded to by the Court below; because it is much to be desired that the plaintiff should in one suit get a decree which should be binding, not only between him and the defendant, but between him and every one claiming under or through the defendant. I am not sure that he has not got such a decree, even as the record now stands, irrespective of the fate of the so-called intervenor's application; but this would have been beyond question if the mokururreedar had actually been a party to the suit. Certainly, I do not see any reason for disturbing the decision of the Lower Appellate Court in special appeal No. 273.

The second suit out of which the appeal No. 280 has arisen was brought by the mokururreedar against both his vendor, the defendant, and Lootfoollah, the plaintiff in the first suit. I suppose the same evidence was, by consent of parties, probably, taken in both cases; the Judge has disposed of both by one judgment; and the facts which I have already mentioned as having been found by him in the first suit were the facts which he found in the second suit.

It is now urged before us very forcibly that in this suit there is nothing to show that the plaintiff was not perfectly innocent of the fraud of Shumshare Ali against Lootfoollah; and if that be so, he has a title by the document of the 12th Aughun 1278, which was registered on the very day when it was made; a title which must therefore prevail against the previous title, whatever it may be, of Lootfoollah, which certainly by the nature of the case was not in fact registered at the time when the second suit was brought. The plaintiff's pleader takes his stand upon the literal words of Section 49 of the Indian Registration Act XX of 1866, which says that "no instrument required by Section 17 "to be registered shall be received in evidence "in any civil proceeding in any Court, or "shall be acted on by any public servant as "defined in the Indian Penal Code, or shall "affect any property comprised therein, un-"less it shall have been registered in accord-"ance with the provisions of this Act." The argument upon this is that Lootfoollah's kobala could not be used as evidence of title against the plaintiff in this suit, because it was not in fact registered. It is quite clear to my mind that this is really nothing more than a legal quibble which we ought not to allow to prevail. If the plaintiff in this second suit had really been made a defendant in the first suit, which he ought to have been, then no objection of this kind could possibly have been made, and in fact the second suit could not have been brought. I have already said that, in my judgment under the circumstances which were actually found, this second plaintiff ought to have been made a defendant by the Court in the first case. But whether he were so or not, it is quite certain that the two suits were substantially treated as one suit: there is but one judgment given in them; it does not appear that separate trials were had; the present plaintiff has made no objection at all, but sought himself to be made a party to the first suit; and he cannot, I think, in this state of things, righteously claim any relief in consequence of the Judge's decision in the first suit. If his case had been tried separately, then he could have made the present objection when the defendant attempted first to use Shumshare Ali's kobala to Lootfoollah as evidence, and then the Court could unquestionably, and would no doubt, have said that, although it is not in fact registered, it has been ordered to be registered, and it has been declared as between the parties to the first suit in which the defendant was the present plaintiff's vendor, that it ought to have been registered long ago, and, if necessary, I will give time to have it registered in order that it may become admissible as evidence. It seems to me that the proceedings would not have been irregular if they had taken some such shape as that, and then again this objection would have failed. We are now here upon special appeal asked to disturb a very equitable judgment of the Court below, simply upon an objection which bears the character I have attempted to describe. It seems to me that we ought not to accede to a request of this kind so far as this objection is concerned. Certainly, justice and equity has been done by the Court below, and it would be only

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mischievous if we disturb the judgment upon any such frivolous ground as that now put forward by the appellant.

Upon the whole, it appears to me that we must dismiss both these appeals with costs.

Ainslie, J.—I concur.

The 23rd November 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Over-claims—Appeals—Costs—Issues.

Case No. 527 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 19*th December* 1871, *modifying a decision of the Subordinate Judge of that district, dated the* 27*th March* 1871.

Kishen Chunder Sandyal (one of the Defendants) *Appellant,*

versus

Kaleenath Gangolly (Plaintiff) and another (Defendant) *Respondents.*

Baboo Nil Madhub Sen for Appellant.

Baboos Nullit Chunder Sen and *Kalee Mohun Doss* for Respondents.

Where a party suing for the whole of a property, as well as for *khas* possession and mesne profits, fails to prove more than a proprietary right to a small portion (*e. g.*, one-fourth), his entire claim ought to be dismissed.

Where a defendant appeals objecting on the question of costs only, the Appellate Court ought to confine itself to that issue.

Glover, J.—After hearing the argument in this case, we think the proper order to pass under the circumstances would be to restore the decision of the Court of first instance, plaintiff paying all the costs of the litigation and likewise the costs of the appellant in this Court; of course that leaves the costs of the defendant respondent in this Court to be borne by himself.

The plaintiff's suit, as it was brought, ought, we think, to have been dismissed, inasmuch as he sued for the whole 16 annas share of the property, and likewise to obtain *khas* possession and mesne profits; whereas it is found as a fact by the first Court, against which there was no appeal on the part of the plaintiff, that in reality his interest amounted to 4 annas only, and that he was not entitled to get *khas* possession, but only to the proprietary right. Parties bringing a suit, as the plaintiff did, and failing, as he did, ought, we think, to have had their entire claim dismissed.

The plaintiff did not appeal, but the defendants did, their objection being on the question of costs only. The Judge, however, instead of confining himself to that issue, went into the question as to whether the estate was a joint one, or whether it had been divided into shares, and without finding ultimately whether the estate was joint or not, ordered that a joint decree should be given against all the defendants. It is clear that, on the appeal as it was laid before him, he was not justified in going into this question.

We must reverse the decision of the Judge as being under the circumstances *ultra vires*, and restore that of the Court of first instance, making that alteration in the order for costs that we have alluded to in the beginning of this judgment.

Mitter, J.—I concur. It has been found as a fact by the first Court that the plaintiff has failed to establish that he is entitled to either of the reliefs sought for in the plaint. The plaintiff did not question the soundness of this finding, and the Judge's decision is therefore illegal.

The 23rd November 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Sale of Rights of Occupancy—Registration in zemindaree sherishtah.

Case No. 529 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 22*nd December* 1872, *reversing a decision of the Moonsiff of Arareah, dated the* 30*th June* 1871.

Mussamut Shumkurputtee Thakoorain (Plaintiff) *Appellant,*

versus

Mirza Saifoollah Khan and another (Defendants) *Respondents.*

Baboos Tarucknath Dutt and *Tarucknath Sen* for Appellant.

Mr. C. Gregory for Respondents.

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The purchaser of a right-of-occupancy in certain land, suing a zemindar who has refused to register his name in the zeminadaree sherishtah for the amount of land claimed and at a specified rent, is bound to show that the tenure was one which could be transferred, and that the sale did not involve any re-distribution of the rent.

Glover, J.—THERE is no ground for this special appeal. The plaintiff says that he purchased 44 beegahs out of 254 beegahs of land from certain persons, and applied to the zemindar to have his name registered in the zemindaree sherishtah for that amount of land at a certain specified rent; that the zemindar refused to do so, and therefore he brings this suit.

There are, we think, two fatal objections to the claim. In the first place, before the plaintiff could come under Section 26, Act VI of 1862, B. C., he would have to show that the tenure was a "permanent transferable one," and no attempt has been made to show this. It is true that no issue was fixed on this point in the Court of the Moonsiff, but it was for the plaintiff to show that the tenure was one which could be transferred. It has been held by this Court that a right-of-occupancy is only saleable by particular custom, and the plaintiff has made no attempt to show such custom. If there were no other objection to the plaintiff's suit, this would be fatal.

The next objection is that before a person can insist upon the zemindar's registering a purchase of this sort, it must be shown that the sale did not involve any re-distribution of the rent. Unless the zemindar chooses to agree to such a change, he is not bound to register a sale which gives effect to a division and distribution of the rent. In this case, the plaintiff asked for a certain specified portion of land to be transferred to his name, and also that the land should be declared liable to pay only a certain amount of rent.

The appeal is dismissed with costs.

Mitter, J.—I concur in dismissing this appeal. The plaintiff has no right to compel the landlord defendant to recognize a division of the jumma payable on account of the tenure in question, and his suit as brought must fail.

The 25th November 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Sale of Share—Notice to Lessee—Apportionment of Jumma.

Case No. 271 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 29th August 1871.

Tara Monee Dossee and others (Defendants) *Appellants,*

versus

Punchanun Bose and another (Plaintiffs) *Respondents.*

Baboos Sreenath Doss and *Bungshee Dhur Sen* for Appellants.

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Respondents.

Plaintiffs, after purchasing from S a moiety of a talook which had been previously let in ijara upon a lump jumma to T, brought a suit under Act X of 1859 against the lessee to recover that portion of the lump rental properly accruing upon the talook purchased. That suit was dismissed on the ground, amongst others, that the ijara kubooleut did not specify the proportion of rent due upon the talook. Plaintiffs subsequently brought a suit against S as well as T and her sureties, for a declaration of title and for rent from the time of the purchase.

HELD (*by Jackson, J.*) that as the lessee had no explicit notice of the purchase, and as no apportionment had been made with her consent of the rent payable on the share sold, she would be justified in continuing to pay the rental as a whole to the original lessor.

HELD (by both Judges) that as defendant had already paid the rent to the original lessor, she was under the circumstances not liable to pay it again to plaintiffs.

Jackson, J.—THE plaintiffs in this case are Punchanun Bose and Issur Chunder Bose, who allege themselves to have purchased from Soorjo Coomar Dutt, the defendant No. 4, one-half share of a talook consisting of Mouzahs Bhomebhang and others. This moiety of a talook forms a portion of certain immoveable property which had been previously let in ijara to the defendant No. 1, Tara Monee Dossee, for whom the defendants Nos. 2 and 3, Bissessur Dutt and Chunder Coomar Dutt, were sureties. The property was let in ijara upon a lump jumma, no specific rent being attached to the several portions of the property which went to make up the whole. On acquiring this talook by purchase, the plaintiffs, it appears, brought a suit in the Revenue Court under the provisions of Act X of 1859, against the lessee to recover from her that portion of the lump rental which they claimed as being the portion properly accruing upon the talook so purchased. The Revenue Court, it seems, on this ground, amongst others, that the ijara kubooleut did not specify the precise amount of the whole rent which was due upon the talook in question, dismissed the suit, and the order

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of dismissal was finally affirmed by the High Court on special appeal. The plaintiffs consequently brought the present suit in the Subordinate Judge's Court for a declaration of their title, and for the amount of rent which they claim from the time of their purchase down to the month of Kartick 1277, which, as I understand, is very nearly the period of determination of the ijara.

The defendant Tara Monee resisted the suit on various grounds, one of which was that she was not liable to pay to the plaintiffs any rent, inasmuch as she had not entered into any contract with them, and she also alleged that she had paid the whole of the rents as they became due to her lessor, Soorjo Coomar Dutt. She denied that she had any notice of the purchase by the plaintiffs, and repudiated any liability to pay rent to them.

Soorjo Coomar, the plaintiff's vendor, was also made a defendant, but it is material to observe that the plaintiffs did not ask the Court for any decree against him for any amount of rent, but only made him a party in the suit in order to the final adjudication of their title by purchase in his presence. Soorjo Coomar denied altogether the allegation of sale to the plaintiffs. He alleged that they were in collusion with the lessee, Tara Monee, and other parties, and that their suit was fraudulent. He also stated and admitted that he had received the ijara profits from the farmer from 1269 to 1276.

The suit was heard by Baboo Gunga Churn Sircar, the Subordinate Judge of Jessore. Besides other issues which are not material now, there were,—one in bar—"Have "the plaintiffs no right to sue the ijaradar "for the arrears of rent claimed in this "suit?" then on facts—"Did the plaintiffs in "Aughran 1270 purchase of the defendant "Soorjo Coomar Dutt his 8 annas share in "Talook Bhomebhang, &c., and was the "ijaradar, Tara Monee, made aware of this "purchase?" and nextly—"Has the ijaradar "defendant paid to Soorjo Coomar the rents "due from her on account of the said 8 annas "of the Talook for the period for which the "plaintiffs claim rent in the suit?"

Upon these issues the Lower Court found that the plaintiffs had a right to sue the ijaradar. This the Subordinate Judge finds without entering much into the question, but he simply observes—"With respect to the "talook purchased by them, the plaintiffs "stand in place of the original proprietor, "Soorjo Coomar Dutt, and are therefore "entitled to receive from the lessee the "arrears of rent due on that talook. The "objection on the part of the lessee, Tara "Monee, that the plaintiffs have no right to "receive rents from her, is altogether futile, "and I therefore set it aside."

Now, upon this question I am not prepared to say that we should be inclined to agree in the view taken by the Subordinate Judge. No doubt, if the plaintiffs had purchased the whole tenure leased to the ijaradar, and had given her notice of that purchase, she might have found it difficult to resist the claim for rent on the part of the purchasers, even if she had shown that she had paid it to the original lessor. But this is not the case here. What the plaintiffs purchased was not the whole of the property leased to the ijaradar, but only a part of it to which no specific portion of rent was assigned; and although it is no doubt proved that the lessee did come to know as a fact the purchase made by plaintiffs, she certainly had no explicit notice of it, nor was any apportionment made with her consent of any specific amount of rent to the share of the talook which formed the subject of sale to the present plaintiffs. That being so, I think it is clear that she would be justified in continuing to pay the rental, which was agreed upon as a whole, to her original lessor. Not only that, but she was prevented by the decision of the Revenue Court from making the payment to any other party, for the effect of that decision was that the rent was payable not to the plaintiffs, but to the original lessor. Then comes the question which, although not absolutely necessary as an answer to the plaintiffs' suit, is one which has been enquired into, and which I think the Court should have enquired into, *viz.*, whether the ijaradar defendant did pay to Soorjo Coomar the whole amount of rent as alleged by her.

On this point, I think the decision of the Lower Court cannot stand. Soorjo Coomar in his written statement declares himself to have received the whole amount. He was also summoned and examined as a witness in the case, and he declared on oath that he had received the whole of the rents, and he acknowledged the receipts which the ijaradar defendant had produced as having been granted by him upon payment of such rents. There is really no evidence on the other side as to this point, but the Court below finding that Soorjo Coomar had made on some other points statements which were unquestionably untrue, and, therefore considering him not entitled to credit, disbelieved his statements and came to the conclusion that they were made

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in collusion with the ijaradar defendant, in order to defraud plaintiffs of their just claim. Now, in the first place, there is, though not strong, at least some corroboration of Soorjo Coomar's statements by the witness Chunder Coomar. He states that he knew, from what he had heard, that the farmers paid their rents down to the present time to Soorjo Coomar. Besides, the evidence of another witness, Anund Chunder, who swore to the receipts, directly bears out his assertion. In addition to that, the statement of Soorjo Coomar on this point is one made against his own interests, for, on the one hand, by that statement he admitted having received a large sum of money for which he might quite possibly have to account to the purchasers, and, on the other hand, he by that admission debarred himself from any further proceedings to recover that sum of money from the lessee. Moreover, the probabilities are all in favor of the supposition that he did receive the rent. He was the lessor and also the person who obtained the decree in the Revenue Court, notwithstanding that his title to rent was disputed on the ground of the sale to the plaintiffs. He is further admitted to have been in needy circumstances, and would have urgent need of the money. Every thing, therefore, is in favor of the supposition that Soorjo Coomar was in receipt of the rent. It does not follow that because a man has made a false statement on one point, therefore every other statement that he makes is likewise false. Where a statement is made against interest, and is supported, not only by evidence, but by strong probabilities, it is not for the Court to reject that statement where it is uncontroverted, and adopt a gratuitous suspicion of fraud. That being the case, the defendant ijaradar having once paid the money to her lessor, and being declared liable under a decree of Court to pay the same to him, and not having received any proper notice to pay it to anybody else, I do not think she ought to be made liable to pay it over again to the purchasers from the lessor. I think, therefore, that the Court below was not justified in giving the plaintiffs a decree as against the defendants 1, 2, and 3.

A question, indeed, occurred to my mind during the argument, whether under the circumstances of the case we should be at liberty to make a decree for the amount of these rents in favor of the plaintiffs against Soorjo Coomar, he having by his own admission received the money which undoubtedly the plaintiffs were equitably entitled to receive. Possibly, Soorjo Coomar ought to be made liable to the plaintiffs, but it is quite clear that the plaintiffs did not bring this suit for the purpose of recovering the amount from Soorjo Coomar, nor is that made an objection to the judgment of the Lower Court. The aim and intention of the plaintiffs was to recover the amount from the lessee and her sureties, from whom, as I have already stated, the amount having been once taken ought not to be taken over again. But in addition to that, we should not at present be in a condition to make any order contrary to the decree of the Lower Court, unless it be upon an objection taken by the respondent under Section 348. The matter was suggested to the vakeel for the respondent, and he, for reasons which no doubt are sufficient and valid, did not think it fit to press the objection. We do not, therefore, think it necessary to go into that question.

The result, then, of our decision is that the judgment of the Lower Court be reversed, and the plaintiffs' suit, so far as it relates to rent claimed from defendants 1, 2, and 3, dismissed; but under the circumstances of the case, looking to the conduct of all the parties —looking to the allegations which the several defendants have set up, and to the peculiar position of several defendants whose interests are not identical—appearing before us through a single pleader, we direct that each party do bear his own costs in all the Courts.

Markby, J.—I am of the same opinion. I fully share in the doubts expressed by my learned brother with reference to the question whether, even supposing that the rents had not been paid to the original lessor, the plaintiffs could recover in this suit the amount of rent they claim without showing that any specific amount of rent was, with the consent of parties, assigned to the share of the talook which passed under the purchase. As far as I can discover, there was no proposition for an apportionment made either to the original lessors or to the defendants before the present suit for rent was brought, and no authority has been shown to us by which the Court, independently of any agreement of the parties, could apportion a specific rent for a fractional share of a talook out of a gross rental which was agreed between the parties to be the rent for the whole talook. But under the circumstances I think it is not necessary to express any opinion on that point, because it is admitted that if the defendants have already paid rent to their original lessors they are discharged, and I agree in the conclusion that

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there is nothing which would entitle us to disbelieve the uncontradicted statement of the lessor, Soorjo Coomar, that he had received the whole rent.

The 27th November 1872.

Present :

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Order before Decree—Act VIII of 1859 *ss.* 129 *and* 363 *—Charter Act s.* 15.

In the matter of

H. C. Erskine and others, *Petitioners.*

The Advocate-General and *Mr. R. T. Allan* for Petitioners.

The High Court refused to interfere under s. 15 of the Charter Act to set aside an order rejecting a document, made by a Court under Act VIII of 1859 s. 129, an appeal from such order being barred by s. 363.

Jackson, J.—We think this application is not admissible. I entirely adhere to what I said as to the powers of this Court in the case which the learned Advocate-General has referred to in Bengal Law Reports, Volume VII, page 146.* That the act complained of, *viz.*, the rejection of the document in question was an act entirely within the authority of the Court below, is manifest from the terms of Section 129, Act VIII of 1859. That Section says :—"All exhibits produced by "the parties shall be received and inspected "by the Court; but it shall be *competent* "to the Court, after inspection, to reject any "exhibit which it may consider irrelevant or "otherwise inadmissible, recording the "grounds of such rejection." It is manifest that the order was made under this Section, and being an order made in the course of a suit, and relating thereto prior to the decree, an appeal is expressly barred under the provisions of Section 363 of the Civil Procedure Code. Now, we do not think that, in the exercise of our extraordinary powers, we ought to do that which we are restricted from doing on appeal. The proper time for making the present objection will be when a judgment has been given in the cause and that judgment is against him, and when consequently he has occasion to appeal against the decree.

The learned Advocate-General stated that the principal ground upon which he wished to put the application was that, if this document be not admitted, the plaintiff would be compelled to resort to a circuitous mode of proof for the establishment of his claim, and that therefore it would be expedient for this Court to interfere. Now, we think it would be most inconvenient, and we may say almost disastrous, if parties were encouraged to come up to this Court and invoke its aid under Section 15 in every case of miscarriage in the course of an enquiry in a suit.

The application must be rejected.

* 11 W. R., Civil, 402.

The 28th November 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Execution-sale—Notification.

Case No. 227 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Jessore, dated the 29th June 1872.

Bama Soonduree Chowdhrain (Judgment-debtor) *Appellant,*

versus

Saroda Soonduree Dossee and another (Decree-holders) *Respondents.*

Baboos Sreenath Dass and *Bhugobutty Churn Ghose* for Appellant.

Baboos Kalee Mohun Doss, Doorga Mohun Doss, and *Kashee Kant Sen* for Respondents.

Where an execution-sale is postponed at the instance of the judgment-debtor, or with his consent, the omission to publish a fresh notification is not a material irregularity.

Jackson, J.—In disposing of this appeal, it seems to us only necessary to say that the sale having been postponed not once, but repeatedly, at the instance of the judgment-debtor, and upon the last occasion with his express consent that it should not be necessary to publish a fresh notification, it is not open to him now to complain of the omission to publish a fresh notification as a material irregularity, and to ask the Court to set aside the sale by reason thereof.

The appeal is dismissed with costs, two gold mohurs.

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The 28th November 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Indian Registration Act, ss. 53 and 55—Act XIV of 1859, s. 22.

Case No. 195 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 28th March 1872, affirming an order of the Moonsiff of that district, dated the 29th July 1871.

Hurnath Chatterjee (Decree-holder) *Appellant,*

versus

Futtick Chunder Sumaddar and others (Judgment-debtors) *Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Gopal Chunder Mookerjee for Respondents.

In cases in which the Indian Registration Act, s. 55 bars appeal, it does so equally in matters of execution as in respect of the decree passed.

Quære.—Whether a decree passed under s. 53 of the Indian Registration Act is or is not a summary decree within the meaning of Act XIV of 1859, s. 22.

Jackson, J.—UPON the preliminary objection taken in this case, as to which it is said that Section 55 of the Indian Registration Act bars any appeal in a case like this, I quite adhere to the opinion that I expressed in the case of Rash Behary Baboo,* petitioner, and I think that the appeal is taken away equally in matters of execution as in respect of the decree passed; and although the same Section would bar an appeal to the Zillah Court, it happens in this case that the Zillah Court has merely affirmed the order of the Court below. It is not necessary, therefore, that we should take any action in respect of the order passed by the Lower Appellate Court. Inasmuch, therefore, as no appeal lies, I do not think it necessary to express any opinion as to the point raised, *viz.*, whether a decree passed under Section 53 of the Indian Registration Act is or is not a summary decree within the meaning of Section 22, Act XIV of 1859.

Markby, J.—I am of the same opinion.

* 7 W. R., 130.

The 28th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Time for Appeal—Act VIII of 1859, s. 333.

In the matter of

Chowdhry Mohendro Narain Roy, *Petitioner.*

Mr. C. Gregory and *Baboo Boodh Sen Singh* for Petitioner.

In calculating the 90 days allowed for an appeal by Act VIII of 1859 s. 333, the period between the date on which judgment was pronounced and that on which the decree was signed by the Judge was allowed to be deducted, as coming within the words "exclusive of such time as may be requisite for obtaining a copy of the decree" in that Section.

Phear, J.—SECTION 333 says that a party desirous of appealing shall do so within 90 days, exclusive of such time as may be requisite for obtaining a copy of the decree appealed against. In this case the decree was not signed by the Judge until the 3rd September, although the judgment was apparently pronounced on the 24th July. But until the decree was signed by the Judge, it is clear that the party appealing was unable to obtain a copy of the decree appealed against. It seems to follow that Mr. Gregory's client must be allowed in this case all the time which had elapsed up to the 3rd September. That being so, he was within time when he presented the petition of appeal to this Court. We, therefore, direct that the appeal be admitted.

The 28th November 1872.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Decree—Execution.

Case No. 99 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 1st March 1872, modifying an order of the Sudder Moonsiff of that district, dated the 21st February 1871.

Huruck Chand Golecha (Judgment-debtor) *Appellant,*

versus

Tilock Chand Singh (Decree-holder) *Respondent.*

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Messrs. Branson and *Jackson*, and *Baboos Sreenath Dass*, *Ashootosh Dhur*, and *Jadub Chunder Seal* for Appellant.

Mr. Woodroffe and *Baboos Rash Beharee Ghose* and *Tarucknath Paleet* for Respondent.

Where a decree shows clearly the intention of the Court which makes it, but leaves something undetermined until further inquiry, such inquiry must be held as intended to be made by the Court to which the decree is sent to be carried into effect.

Markby, J.—THE question in this case relates to the execution of a certain decree whereby the defendant is directed to remove certain obstructions which he had placed upon a public road to the injury of the plaintiff.

The decree is one which has been affirmed by this Court on special appeal, and must, therefore, now conclusively be considered as a proper and legal decree; but it is objected that the decree "being uncertain execution cannot be given after taking evidence in the execution department for the purpose of determining what was decided."

In substance the objection is that in order to execute the decree, it is necessary to inquire what obstructions have been placed upon the road by the defendant, and that under the law no such inquiry can take place.

We are not prepared to assent to this as a universal proposition. No authority was quoted in support of it, and it is by no means unfrequent to find decrees which expressly leave something to be inquired into on a future occasion.

It was, however, contended that this decree should then have contained an express direction to the Court of first instance as to what further inquiry should take place.

Probably this would have been more regular, and we do not altogether approve of the form of this decree; but we are not prepared to say that it cannot be executed. In all probability there is no real doubt whatever what obstructions are intended to be removed, and that is why the decree was not more specifically drawn. We must presume, however, that the Court of appeal intended its decree to be effectively carried out, and if on the face of it it clearly shows what the intention of the Court was, but leaves something undetermined until further inquiry, it is only reasonable to suppose that it was intended that this inquiry should be made by the Court to which the decree is sent to be carried into effect.

We, therefore, think that the objection fails, and that the special appeal which we are strongly inclined to think is merely vexatious must be dismissed with costs.

The 28th November 1872.

Present :

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Attachment—Proceeding not bonâ fide—Law point—Merits.

Case No. 231 of 1872.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Jessore, dated the 9th May 1872.

Radhika Chowdhrain (Decree-holder) *Appellant,*

versus

Luckhee Chunder Ghose and others (Judgment-debtors) *Respondents.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboos Mohinee Mohun Roy and *Bungshee Dhur Sein* for Respondents.

As a matter of strict law, an attachment must be held to be in force down to the date on which the execution proceedings are struck off the file; but where a case comes up before the High Court in regular appeal, it is not bound to deal with it strictly and exclusively on the question of law, but is entitled to express an opinion on the merits and say what it thinks right as to the conduct of the decree-holder, *e.g.*, that such an attachment was not a proceeding instituted *bonâ fide* to enforce the decree.

Jackson, J.—THIS appeal is against the order of the Subordinate Judge of Jessore, who holds that the plaintiff's decree which was obtained so long ago as 1857 cannot now be executed, having become barred previous to the date of an application to execute on the 1st July 1865. It appears, so far as the proceedings immediately before that period are concerned, that some property of one of the judgment-debtors was attached in the month of March 1862; that on the 28th July of that year the case was called on in the presence of the decree-holder's pleader; and it then appeared that although the debtor's property had been, as just stated, attached in the month of March, the decree-holder had not, up to that time, taken any steps towards the sale of the property or towards levying in any other way the amount of his decree, and therefore the Court

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ordered that the execution proceedings be removed from the file. In view of these proceedings, the Subordinate Judge has now held that at the date of the application made on the 1st July 1865 the execution was already barred.

It is contended in appeal that in point of fact there was down to the date on which the proceedings were struck off, that is, down to the 28th July 1862, an attachment actually in force; and we are referred to a case in V Weekly Reporter, page 43, Miscellaneous Rulings, in which a Division Bench of this Court observed that the decree-holder could not well take more effectual steps for enforcing his decree than attaching the property of his judgment-debtor.

Now, as a matter of strict law, it might be we should be compelled to say that there was an attachment in force within three years of the application for execution dated the 1st July 1865, and the decree-holder may on that ground rely on the authority cited; but this case comes before us on regular appeal, where we are not bound to deal with it strictly and exclusively on the question of law, but are bound to look to the merits of the case. We find on the admission of Mr. Allan, the Vakeel for the appellant, that, not only on the occasion referred to, but repeatedly from the making of the decree down to the present time, attachments of the judgment-debtor's property have been effected, which have not, on one single occasion, been followed out by sale of the property. No explanation, however, is afforded of the omission to proceed from attachment to sale. Under these circumstances, as we are entitled to express an opinion on the merits of the case and to say what we think right as to the conduct of the decree-holder, we think we ought to say, and are bound to say, that the attachment which was in force in July 1862 was not a proceeding instituted *bonâ fide* to enforce the decree, but was, like so many other proceedings brought before us, merely a colorable proceeding. That being so, I think we are not called upon to make an order in favor of the decree-holder, and we therefore dismiss the appeal with costs.

Markby, J.—I am of the same opinion. If the case had to be dealt with simply on the question of law, there might be some doubt as to whether we should concur in the view taken by the Judge below, supposing, as Mr. Allan contends, that the attachment was in force down to July 1862; but I think in dealing with this case as a regular appeal, we ought not to restrict ourselves to the question of law raised, but are also bound to go into the merits and see whether the appellant is right in saying that the decree is not barred. I think upon such information as the execution-creditor has chosen to place before us, and for the reasons stated by my brother Jackson, we ought to hold as a matter of fact that the decree is barred.

The 4th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act XL of 1858—*Act XXVII of* 1860—*Proceedings as Evidence—Admissions.*

Case No. 631 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Dinagepore, dated the 30*th December* 1871, *affirming a decision of the Moonsiff of Thakoorgaon, dated the* 19*th June* 1871.

Kashee Kant Doss (one of the Defendants) *Appellant,*

versus

Brojonath Doss and another (Plaintiffs) *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Mr. M. L. Sandel for Respondents.

Though proceedings under Act XL of 1858 and Act XXVII of 1860 are not conclusive evidence, they are some evidence in corroboration where they involve an admission on the part of the opposite party.

Kemp, J.—THE plaintiffs in this case sued, alleging that they and the defendant Kashee Kant Doss, the special appellant, were the sons of Kristo Churn Doss, a Suddra, and that the plaintiffs were entitled to one-half and the defendant to the other half of the property left by Kristo Churn. The plaintiffs allege that certain buffaloes which were ancestral property, and an elephant purchased with the joint funds when the family were living in commensality, had been sold away by the defendant Kashee Kant Doss. They, therefore, sue for the recovery of the animals or their value.

The defence set up by the defendant was that the plaintiffs were not the legitimate sons of Kristo Churn, and that there was no custom amongst men of the caste of the plaintiffs and defendant's father to make "nika" marriages. *2ndly*, that the property in dispute was not ancestral or joint, but purchased by the defendant Kashee Kant Doss

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alone with his own funds, and that he has sold the property, namely, the buffaloes and elephant, to a third party who has been made a defendant.

The first Court, in a very elaborate and careful judgment, found that Kristo Churn did marry a widow; that the plaintiff was the son of that marriage; that a ceremony of marriage was performed according to the usage of the district; that there was cohabitation between Kristo Churn and the mother of the plaintiff; and that the plaintiff is the son of Kristo Churn. The first Court also found that the property, namely, the buffaloes, were ancestral property, but that they were not thirteen in number as claimed by the plaintiffs, but only nine, and that the elephant was acquired by the joint funds of the family, and not by the separate funds of the defendant Kashee Kant, and therefore gave the plaintiff a decree. This decision was appealed from to the Subordinate Judge, and he also found for the plaintiff and saw no reason for interfering with the judgment of the first Court. It is true that the judgment of the second Court is but a short one; but considering the elaborate nature of the first Court's decision, which is affirmed by the Appellate Court, we think that there has been a sufficient finding that the mother of the plaintiff was the wife of Kristo Churn, and that the plaintiff was the son of that marriage.

It is contended in special appeal that the onus has been thrown on the wrong party. We do not think that this is the case. It is true that the Subordinate Judge says that the defendant before him has not given any proof against the right of the plaintiffs, but at the same time he also says that he sees no reason to interfere with the decision of the first Court which had thrown the onus on the plaintiffs.

Then it is said that there has been no finding as to the marriage. We think this is not correct, as the second Court agrees with the finding of the first Court upon that point.

It is also said that the proceedings under Act XL of 1858 and Act XXVII of 1860 are not admissible in evidence. They certainly are not conclusive evidence, but they are some evidence in corroboration of the fact of the plaintiff being the son of Kristo Churn, inasmuch as we find that the defendant in proceedings under those Acts admitted that the plaintiff was the son of Kristo Churn.

We dismiss the appeal with costs.

The 5th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Documents produced after Time.

Case No. 598 of 1872.

Special Appeal from a decree passed by the Judge of Dinagepore, dated the 29th November 1871, *affirming a decision of the Moonsiff of Sahibgunge, dated the 30th June* 1871.

Amur Chand Lohata (Plaintiff) *Appellant,*

versus

Ram Ruttun Roy and another (Defendants) *Respondents.*

Baboos Ashootosh Dhur, Rash Beharee Ghose, and *Jadub Chunder Seal* for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where khusrah papers which formed the very essence of the action were not filed or produced by the plaintiff within the time prescribed by law, the Court of first instance was held to have been justified in rejecting them when subsequently tendered as evidence.

Kemp, J.—THIS special appeal has been limited by the learned Judges who admitted it to the 6th ground, and to that ground alone; the 6th ground being "that the Courts below "are in error in rejecting the khusrah papers "on the ground of their not having been "filed with the plaint, the said khusrah "papers having been filed before the hearing "of the suit." The Moonsiff states that these khusrah papers were put in at a very late stage of the case; they were not filed with the plaint, and they were not produced or in readiness at the first hearing of the suit. The issues were fixed on the 9th of February 1871. A day was then fixed for the hearing of the case, and the parties were directed to produce their proofs on that day; but the khusrah papers were not put in until the 20th of March, or very shortly before the decision of the case. Now, it is very clear that the plaintiff's claim is based upon these khusrah papers. The defendant was sued upon an account drawn up by the plaintiff, who seeks to make the defendant liable for a sum of Rupees 987-15-6, namely, cash balance Rupees 235-8 and certain items spent by the defendant without, as alleged, the authority of the

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plaintiff. The plaint admits that these accounts were drawn up from the khusrahs supplied by the defendant, and therefore the account is based upon these khusrah papers. The khusrahs, therefore, formed the every essence of the action, and it was necessary that these documents should have been produced either at the time of filing the plaint, or at the time of the first hearing of the case, or, at all events, on the day fixed by the Court for the production of the proofs "relied upon by the parties." The plaintiff not having filed or produced these khusrahs within the time prescribed by law, the special appeal must be dismissed with costs.

The 9th December 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Charles Pontifex, *Judge*.

Plaint—Libel—Ironical Expressions.

Appeal from an order passed by the Hon'ble A. G. Macpherson, exercising the ordinary original civil jurisdiction of the High Court.

F. F. Wyman (Plaintiff) *Appellant*,

versus

A. Banks (Defendant) *Respondent*.

Mr. Woodroffe for the Appellant.

In an action for libel, it is a question for the Court whether the words which are complained of constitute a ground of action. and the words alleged to be libellous must be set out in the declaration or plaint. If the words so set out are not a libel, the plaintiff cannot, by alleging that the defendant printed and published them "intending to injure the plaintiff, and to bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected and believed that the plaintiff was a dishonest person, and had been actuated by sinister and fraudulent motives," make them one; nor can the plaintiff by alleging that words are spoken ironically make them libellous, if they do not appear to the Court to be so.

THIS was an appeal from an order dated the 23rd day of August 1872, rejecting the plaint on the ground that the plaint disclosed no cause of action. The plaintiff sought to recover the sum of Rs. 5,000 as damages from the defendant, who is the printer of the *Englishman Saturday Evening Journal*, for what was alleged to be a libel published in that journal of the 13th of July 1872.

It was stated in the plaint that, before and at the time of the publication of the alleged libel, the plaintiff was "a person of good name, credit, and reputation, a member of the council of His Honor the Lieutenant-Governor of Bengal, an Honorary Magistrate and Justice of the Peace of the town of Calcutta, and carried on business as a publisher, bookseller, and stationer, under the name and style" of Wyman and Company. The plaint then went on to state that the plaintiff was a shareholder and director of the Calcutta Central Press Company, Limited; that the working of this Company having been unfavorable during the year ending 30th April 1872, the plaintiff had in good faith, at the close of that year, proposed on behalf of himself and his firm to his co-directors in the said Company, to guarantee to the shareholders of the said Company a profit of at least 5 per cent. per annum on the paid-up capital of the said Company for the period of one year, on condition that he should be made the managing director of the said Company for that year. This proposal which was accepted by the directors of the Company and set out in their report, was made by the plaintiff in the belief that the unfavorable working of the Company arose from divided management, and that his experience would enable him, if he had the complete control over the business of the said Company, to work the business with more favorable results. The plaint then stated that "the defendant well knowing the premises, and contriving and intending to injure the plaintiff, and to bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected and believed that the plaintiff was a dishonest person, and had been actuated by sinister and fraudulent motives in making the aforesaid guarantee on condition of being made the managing director of the Calcutta Central Press Company, and that he had undertaken to act as such managing director from unworthy motives, and by his said proposal had rendered himself a fit subject for contempt and ridicule, falsely and maliciously printed and published in Calcutta on the 30th day of July 1872 in the aforesaid weekly newspaper of and concerning the plaintiff, and of and concerning his conduct as a shareholder and director" of the Company relating to the accepted guarantee "the following ironical, false, and malicious libel, that is to say:—

"While walking along Wellesley Place, I saw approaching me an ancient-looking

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man, walking painfully, and, I thought, pensively, with the aid of a hardly less ancient-looking stick. The long, lank locks reaching down on either side to a somewhat snuffy coat collar,—the peculiar air of respectability, combined with pauperism, that marked the old man's gait could hardly be mistaken. Surely it must—no, it cannot ;—yes, it is—yet how can it be ?—the very image ; but then I never knew him to go without—it is, by Pollux, it is, indeed, my old friend Diogenes! But he was without his lantern. There was the familiar, placid smile, a little sadder, perhaps, than was his wont ; his eyes were fixed, as usual, on the ground ; and, as usual, he was muttering inwardly ; but there was no lantern. He would have passed me had I not grasped his arm :—

'My good Diogenes,' I said, 'I hope no accident has happened to your—

'Gone ! gone !' he replied, 'gone for ever !'

'What ! the lantern ?'

'The lantern ? Ah ! much more than the lantern ! Diogenes' occupation's gone, gone for ever.'

'Good Heavens,' said I, 'you don't mean to say'—

'Ah !' said he, 'let me die in peace ; I've found an honest man !'—

'An honest man,' said I, 'I feel faint ; you look faint ; come into the Great Eastern, and let us have'—

'Never more,' said he, 'never more,' and handing me the following paper, which he told me, would explain all, went on towards the river.

It occurred to me afterwards that he might have contemplated suicide ; but I was so overcome at the time, partly by surprise at the absence of the lantern, and still more so by the shock his explanation caused me, that, I grieve to say, I neglected to take any measures for his safety. As soon as I had somewhat recovered any breath, I opened the paper he had given me ; and here it is for the benefit of your readers."

Then followed the report of the directors of the Calcutta Central Press Company, already referred to, announcing their acceptance of Mr. Wyman's offer to guarantee 5 per cent., on condition that he was appointed managing director. After this the article went on :—

"To comment upon this would be to paint the lily ; to gild refined gold. I would congratulate the citizens of Calcutta, but that I fear their singular good fortune is coupled with the loss of my dear old friend.

"In order fully to appreciate the remarkable character of Mr. Wyman's offer, it should be understood that the Company had suffered, in the last two years, a cash loss of Rs. 4,000 ; and that, during the last twelve months, its business had fallen off to the extent of upwards of Rs. 12,000. After this I would suggest that, when he brings in his bill to reform the municipality by the introduction of the elective principle, some member of the council should propose as an amendment that the entire control of our municipal affairs should be vested in Mr. Wyman."

The learned Judge endorsed the following order on the plaint :—"I reject this plaint on the ground that, upon the face of it, it appears to me that the subject-matter of the plaint does not constitute a cause of action."

It is from this order that the plaintiff appealed on the following grounds :—

"*Firstly.*—For that the publication in the said plaint set out, and therein complained of, was of a libellous and defamatory character, and did constitute a cause of action such as to enable the appellant to maintain his said suit.

Secondly.—For that the said learned Judge ought to have admitted the said plaint, and called upon the defendant to appear and answer to the matter therein alleged."

Mr. Woodroffe, for the appellant, contended that, although this publication may have contained no ill thing of the plaintiff, yet, as it was alleged in the plaint to have been made ironically and maliciously, it was for the jury to decide whether it was so or not, and the learned Judge ought not to have rejected the plaint. It is so laid down in the case of The Queen *vs.* Dr. Browne (Holt's Rep., p. 425). [*Couch, C.J.*—If you charge in a plaint that a certain publication is ironical, do you say that that is sufficient to constitute a cause of action ?] The whole publication is put forth as a satire, and the suggestion is that the singular good fortune of the people of Calcutta in possessing an honest man, is no good fortune at all, inasmuch as they do not possess an honest man, and that Diogenes' occupation is not gone ; and if that is the suggestion, and that would be a matter for the jury to decide, the publication is clearly libellous. [*Pontifex, J.*—Your argument goes to this, that it is for the jury to decide whether the words are or are not used ironically. In these Courts the Judge and jury are the same]. The duty of a Judge, when a plaint is presented to him, is to see if sufficient appears on the face of the plaint to raise a fair question of claim or right for trial between the parties. If it had been a motion to take the plaint off the file, the argument would

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have been by way of demurrer. The allegation in the plaint being that the words were used ironically, that would have been a fact for the Judge to have decided at the hearing of the suit when the evidence was given, as representing the jury. In Jenner & another *vs.* A'Beckett (7, L. R., Q. B., 11), the declaration stated that the plaintiffs were manufacturers of bags, and manufactured a bag which they called the "bag of bags," and the defendant printed and published of and concerning the plaintiffs in their business the words following:—"As we have not seen the 'bag of bags,' we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the public *ad nauseam.*" The defendant demurred and issue joined thereon. It was "held on demurrer by Mellor and Hannen, J.J., that it was a question for the jury whether the words did not convey an imputation of the plaintiffs' conduct in their business, and whether the language went beyond the limits of fair criticism." [*Couch, C.J.*—There being no juries in these Courts, had not the Judge the power to deal with the plaint as he did, and not be bound by so strict a rule as you contend for?] The Judge could not have decided whether the words were or were not false, malicious, and ironical until he had the evidence before him. [*Pontifex, J.*—If you want to show malice by antecedent facts, ought you not to set out those facts in your plaint?] That would be pleading evidence. Section 26 of Act VIII of 1859 directs what should be set out in the plaint. Section 29 of the same Act points out the practice if the plaint does not contain the several particulars prescribed in Section 26; and Section 32 provides for the rejection of the plaint if it discloses no cause of action. In the case of Lacshmi Ammal *vs.* Sekaram Sovaji (1 Mad. H. C. Rep., 420), the Court said:—"It does not, we think, appear that the subject-matter of the plaint does not constitute a cause of action. Whether there appears to be a cause of action that is likely to succeed is not the question. It is enough, we think, if it appears that the subject-matter alleged raises a fair question of claim or right for trial and determination between the plaintiff and the party made defendant." All that it is necessary to set out in this plaint are the words of which the plaintiff complains. Whether they are libellous is a question of fact to be decided on the final hearing; and the only question now is whether the plaint, on the face of it, discloses a claim for trial and determination. The imputation contained in the words is that the plaintiff is a dishonest man,—that by the offer he made, he hoped to benefit himself and his firm. [*Pontifex, J.*—The plaintiff does not guarantee 5 per cent., but not less than 5 per cent. on the paid-up capital, and all the profits beyond that would be for the benefit of the shareholders, and the plaintiff would gain nothing by his offer.] What is meant by introducing Diogenes here, but that the plaintiff was not an honest man? The plaint alleges that the publication is ironical. In Boydell *vs.* Jones (4 M. & W., 446), where the declaration stated that the plaintiff was an attorney, and that the defendant had published of him the following ironical and libellous matter:—"An honest lawyer (thereby meaning to represent that he was not an honest lawyer), Parke, B., says:—'How would you frame the declaration in that view of the case? It states that the defendant composed and published an *ironical* libel of the plaintiff, and that he called him 'an honest lawyer,' thereby meaning that he was *not* an honest lawyer. Is that not enough?" [*Pontifex, J.*—In the present case, the writer, after saying that the plaintiff is honest, goes on to show that he cannot be dishonest; that he cannot make any gain in the matter]. Then the writer meant to say of the plaintiff that he was a fool, and that is surely libellous since it affects his reputation as a business man. [*Pontifex, J.*—The publication deals with the plaintiff in his capacity of member of council.] [*Couch, C.J.*—You have to satisfy us that a writer in a newspaper may not fairly comment on the character of a public man, and question his ability to prepare a bill for the council]. The question then would have been whether it was a fair and honest criticism, and that could have been determined on the evidence only; and in rejecting the plaint, the learned Judge must have considered that the words were not libellous, notwithstanding the allegation that they were used ironically. The innuendo contained in the words was for the jury to decide. It was so held in Fray *vs.* Fray, (17 C. B., N. S., 603.) The learned Judge was hardly in a position to judge whether the words were libellous or not. In the case of Barnett *vs.* Allen (3 H. & N., 376; 27 L. J., Ex., 412), which was an action for slander, the declaration stated that the defendant had said of the plaintiff "he is a blackleg,"

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thereby meaning that he was a fraudulent gambler and a person who cheated at play. It was there held that the question had been rightly left to the jury whether the word "blackleg" was used as a mere term of abuse, or whether it conveyed the imputation that the plaintiff was a fraudulent gambler. [*Couch, C.J.*—This is a comment in a newspaper on the conduct of a public man.] The case of Campbell *vs.* Spottiswoode (3 B. & S., 769) shows that that is no shield to protect a writer when he imputes wicked and corrupt motives to a public man any more than if the words had been written of a private person. The question to be now decided is whether or not the subject-matter of this plaint raises a fair claim or right for trial and determination.

The Court took time to consider. The following judgment was delivered on the 9th of December 1872 by—

Couch, C.J.—This is an appeal from the decision of Mr. Justice Macpherson rejecting a plaint in an action brought by the plaintiff, Mr. Wyman, for a libel which he alleged had been published concerning him in a newspaper, called the *Englishman Saturday Evening Journal.* Some allusion was made by Mr. Woodroffe, who appeared for the appellant, to the plaint having been rejected by the learned Judge without hearing the argument of Counsel. We understand that no application was made to the learned Judge to hear Counsel. If any such application had been made, Counsel would have been heard. We have had the advantage of hearing Counsel with regard to the plaint being admitted, and we are able to form our judgment after the matter has been argued. The alleged libel is set out in the plaint, and there are also allegations which show that Mr. Wyman is a gentleman filling a public capacity and that the facts which are commented on in the newspaper are true. The question is whether the plaint shows a cause of action. Now, in an action for libel, it is a question for the Court whether the words which are complained of constitute a ground of action, and for that reason the words alleged to be libellous are required to be set out in the declaration or plaint. That is the law in the Courts in England, and the same law must prevail here although the procedure is somewhat different. The Judges in the case of Wright *vs.* Clements, (3 Barnewall & Alderson, 506,) clearly state this. Lord Tenterden says :—"In actions for libel the law requires the very words of the libel to be set out in the declaration, in order that the Court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading,"—and Mr. Justice Holroyd says:—"Where a charge, either civil or criminal, is brought against a defendant arising out of the publication of a written instrument, as is the case in forgery or libel, the invariable rule is that the instrument itself must be set out in the declaration or indictment, and the reason of that is that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the Court whether the facts stated amount to a cause of action, or a crime. For it is clear that when it can be shown distinctly what the instrument is upon which the whole charge depends, that instrument must be shown to the Court in order that they may form their judgment. A defendant is not bound to put the question as a combined matter of law and fact to the Jury, but has a right to put it as a mere question of law to the Court." Another English case in which this rule is recognised is Blagg *vs.* Sturt (10 Q. B. Reports, 899.) That is an answer to the argument of Mr. Woodroffe that, at all events, this question must be submitted to a Judge of this Court acting both as Judge and Jury, and ought not to be determined on the question whether the plaint should be admitted. If the words which are set out in the plaint or declaration are not a libel, the plaintiff cannot, by alleging, as he has done in the present plaint, that the defendant printed and published them "intending to injure the plaintiff, and to bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected and believed that the plaintiff was a dishonest person, and had been actuated by sinister and fraudulent motives," make them one; nor can the plaintiff by alleging that words are spoken ironically make them libellous, if they do not appear to the Court to be so. The rule that the plaintiff cannot thus extend the meaning of words beyond their natural import is clearly shown by the case of Wheeler *vs.* Haynes, 9 Adolphus & Ellis, 286. This Court sitting now in appeal from the decision of Mr. Justice Macpherson has to do what Mr. Justice Macpherson had to do,—to see whether the alleged libellous matter which is set out in the plaint is really libellous. If it is not, there is no ground of action and the plaint ought not to be admitted. In determining whether the word

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honest is used ironically, and it is meant that the plaintiff was dishonest, we must look at the whole article. We must look at the context, as well as the words which are said to be ironical. Looking at the whole article, it appears to me that the first part about Diogenes cannot be understood to mean that Mr. Wyman was a dishonest man. I do not think it can at all fairly be understood to bear that meaning; and with regard to the latter part of the article, where the writer says :—" In order fully to appreciate the remarkable character of Mr. Wyman's offer, it should be understood that the Company has suffered in the last two years a cash loss of Rs. 4,000, and that, during the last twelve months, its business had fallen off to the extent of upwards of Rs. 12,000. After this I would suggest that, when he brings in his bill to reform the Municipality by the introduction of the elective principle, some member of the Council should propose as an amendment that the entire control of our Municipal affairs should be vested in Mr. Wyman," —that is nothing more than a comment which the writer might fairly make on the facts which he had stated. I can see nothing in this article which goes beyond a fair comment on the acts of Mr. Wyman as a public man; and the first part about Diogenes is merely an attempt by the writer to make a little fun at the expense of Mr. Wyman. I cannot look upon this as a libellous article, and think that the decision of Mr. Justice Macpherson was right. The appeal must be dismissed.

Pontifex, J.—I concur.

The 21st September 1872.

Present:

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Act VIII of 1859, *s.* 206—*Decrees—Tender of Payment—Mode of Satisfaction.*

Case No. 3 of 1872.

Miscellaneous Appeal from an order passed by the Additional Subordinate Judge of Mymensingh, dated the 30*th September* 1871.

Raj Luckhee Chowdhrain (Judgment-debtor) *Appellant,*

versus

Shib Dyal Tewaree Chowdhry and another (Decree-holders) *Respondents.*

Baboo Sreenath Banerjee for Appellant.

Baboo Nullit Chunder Sein for Respondents.

Under the Code of Civil Procedure, s. 206, a debtor under a money-decree can *at any time* bring the amount of his debt into Court to be paid to the judgment-creditor; and by analogy any other person against whom a decree is made for the delivery of moveable or immoveable property, has an equal right to relieve himself from further vexation by making satisfaction with the knowledge of the Court in such mode as the circumstances of the special case admit of.

By the same Section all adjustments of decrees, whatever be the nature of the subject of those decrees, must be made with the knowledge of the Court.

Quære (*by Markby, J.*)—Where a party simply acts in obedience to a decree, is he debarred from showing that he has done so by the words "no adjustment of a decree, in part or in whole, shall be recognized by the Court, unless such adjustment be made through the Court, or be certified to the Court by the person in whose favor the decree has been made, or to whom it has been transferred?"

Ainslie, J.—THE respondent obtained a decree on the 28th January 1868 for possession with mesne profits from date of ouster to date of recovery of possession.

On the 22nd December 1868, this decree was affirmed with a modification by which the mesne profits were limited to those accruing from date of institution of the suit, which was the 11th April 1867.

On the 16th August 1870, the decree-holder got formal possession through the Court in execution of decree. But in the meanwhile, the defendant had come into Court on 13th September 1869, alleging that she had surrendered possession from the 1st Bysack 1276, corresponding to 12th April 1869, and asking for a notice to be served on the plaintiff to show cause why she should not be held discharged of the decree to this extent, and a notice was accordingly served on the 26th September 1869.

The judgment-debtor now claims the benefit of that notice, and to be released from any demand for the mesne profits accruing since 12th April 1869, or at least for those accruing since the 26th September 1869.

The Subordinate Judge holds that there is no provision in the Code of Civil Procedure by which a defendant can come in and demand that the plaintiff, decree-holder, shall take over from him possession of the property for which a decree may be given, and that the defendant is bound to go on collecting the rents and accounting for them to the plaintiff as long as the latter chooses to abstain from taking possession (subject of course to the provisions of the law of limitation.)

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The 206th Section of Act VIII of 1859 is in the following words :—

" All moneys payable under a decree shall " be paid into the Court whose duty it is " to execute the decree, unless such Court, " or the Court which passed the decree, " shall otherwise direct. No adjustment of " a decree in part or in whole shall be re- " cognized by the Court, unless such adjust- " ment be made through the Court, or be " certified to the Court by the person in " whose favor the decree has been made, or " to whom it has been transferred."

The first part of the Section refers expressly to money-decrees, but the latter part is more general. The words " adjustment of a decree" are wide enough to include anything done in satisfaction of any decree, whether for money, moveable, or immoveable property.

It certainly could not be contended that a decree-holder, who should come into Court and certify that he had received possession from the defendant of immoveable property decreed to him, could afterwards ask for delivery of possession in execution of his decree, and urge that Section 206 applies only to money-decrees and that there is no provision in the Code for the satisfaction of decrees for immoveable property, except by the direct action of the Court under Section 223, or some of the following Sections.

Whatever may be the nature of the property which forms the subject of the decree, the requirement of the Court is the same. Any satisfaction pleaded in bar of execution must be made with the knowledge of the Court. This seems to me to be all that Section 206 *requires*. But I am further of opinion that, when this Section says, " all moneys payable under a decree shall be paid into the Court, *whose duty it is* to execute the decree," it gives the judgment-debtor *a right* to bring the amount of the decree into Court, and to lodge it there at any time for the benefit of the creditor. Probably he is bound to give him notice of his having done so, but this point is immaterial at present. The words are not " into the Court *executing* the decree," but " into the Court, *whose duty it is* to execute the decree." Looking to the words of the Section, I hold that they plainly imply this right, and there seems to be no reason why a debtor, who is willing to pay his debt and who cannot do so safely except through the Court, should be compelled to wait the pleasure of his creditor and incur the risk of paying heavy interest for a long time until the latter shall choose to put his decree into execution. It is, I think, doubtful at the least whether a Court executing a decree could take into consideration any equity in favor of the judgment-debtor arising from his having privately tendered payment to the judgment-creditor, and so relieve him from the charge for interest; and if this is so, I think it is clear that the debtor is entitled to make his tender through the Court, although the decree-holder may not, at the time, be taking steps to enforce his decree.

Consequently I find in Section 206 these two provisions: 1st, that a debtor under a money-decree can *at any time* bring the amount of his debt into Court to be paid to the judgment-creditor; and, 2nd, that all adjustments of decrees, whatever be the nature of the subject of those decrees, must be made with the knowledge of the Court.

It is evident that the provision for bringing the subject of the decree into Court is only directly applicable in the case of decrees for money or moveables. Immoveables, by their nature, cannot be brought into Court, and even moveables frequently would be such that the Court could not properly be asked to accept their custody as depository on behalf of the decree-holder. But it does not follow that the defendant in a suit for money is to have an exceptional privilege. On the contrary, I hold that by analogy any other person against whom a decree is made for the delivery of moveable or immoveable property has an equal right to relieve himself from further vexation by making satisfaction, with the knowledge of the Court, in such mode as the circumstances of the special case admit of. This case is distinguishable from that cited from VIII Weekly Reporter, 319, inasmuch as here we have a proceeding by the defendant before issue of execution asking the aid of the Court, whereas in that case the judgment-debtor after issue of execution alleged a previous satisfaction made without the knowledge of the Court. This case, however, it may be observed, is authority for the construction of the words " no adjustment of a decree" above adopted.

Then the question remains whether in this case the defendant did make such satisfaction. So far as his allegation of private surrender from the 12th April 1869 goes, I am of opinion that he did not. The surrender at this time was neither made through the Court nor certified to the Court by the decree-holder ;—but from the date when the Court served notice of surrender on the plaintiff,

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viz., the 26th September 1869, the case is otherwise. This was in effect a tender in satisfaction of so much of the decree as awarded possession to the plaintiff made with the knowledge and sanction of the Court. Neither the Court nor the defendant could in fact force the plaintiff to accept the surrender then and there, and from the nature of the case the defendant could not bring the subject of the decree into Court, but it would be highly inequitable to say that a defendant, *who honestly does all he can to obey the decree of the Court*, under the sanction of the Court, shall suffer because his adversary will not accept his offer, but chooses to keep the decree hanging over his head. A decree is an instrument for securing the rights of the person in whose favor it is made, not an instrument of torture to be applied at the pleasure of the holder to the party against whom it is made.

I say 'who honestly does all he can to obey the decree of the Court', and in this case I am prepared to find that the defendant did so. I conceive that we are bound to give him credit for good intentions, and that the Subordinate Judge was not justified in saying that "the allegation as to giving up possession is quite illegal and appears to be nothing more than a mere precautionary step for raising a false objection." The defendant came into Court with a prayer, which was substantially that the plaintiff might be compelled to take over the property decreed from his hands. He caused a notice to be served on the plaintiff, calling on him to show cause why this prayer should not be granted. The plaintiff never appeared to show cause. The Court took evidence as to the due service of the notice, and no doubt on this point seems to have been entertained by it either then or afterwards; but having gone so far, the Subordinate Judge, instead of making a declaration of satisfaction of the decree so far as surrender of possession was concerned, suddenly drew back and, without any warning to the defendant that he considered the steps already taken were not warranted by law, left the matter in abeyance, and eventually disallowed all that had been done, not because he found as a fact on evidence that the surrender and notice were mere shams, but because, as he says, "the objector wishes to introduce a new practice: such objection is therefore inadmissible." I do not mean to say that the Subordinate Judge was not justified in declining to enter up satisfaction "pro tanto" if on further consideration he was of opinion that there had been an error in law in his proceedings, but I hold that there was no error in law. And on the question of fact, that is, the *bonâ fide* character of the surrender and notice, he has not adjudicated.

The steps taken by the defendant were taken openly with the aid of the Court. The officer to whom the service of the notice on the plaintiff was entrusted was examined, and there was nothing to lead to a suspicion of unfair dealing. Under such circumstances, it was for the plaintiff to establish that in fact there had not been a *bonâ fide* surrender, and this he has failed to do. Although the serving officer was examined in the absence of the plaintiff, his evidence is not to be summarily excluded. The plaintiff is in the position of a defendant seeking a re-opening of his case under Section 119 of the Code, against whom a decree has been made in his absence on *primâ facie* proof of due service of summons. He has, therefore, to establish his case to the satisfaction of this Court, before which the case has come in regular appeal, by evidence sufficient to rebut the evidence already on the record, and properly recorded in his absence. The opposite party is not to be put to his proof again until good cause has been shown for doubting the evidence already taken. I certainly see no reason to suppose that the notice in this case was not duly served, or that there has been anything but an honest attempt by the defendant to put an end to the responsibility imposed on him by the decree by complying with its requirements.

I would, therefore, decree the appeal so far as to declare that the appellant is not liable to account to the respondent for any mesne profits accruing after the 26th September 1869, and allow the appellant his costs of this appeal, with 3 gold mohurs as pleader's fee.

Markby, J.—Although I do not differ from this judgment, which so far as the result is concerned, I desire, should have the effect of the judgment of this Court, yet I wish to say that, had it not been for the decision in VIII Weekly Reporter to which Mr. Justice Ainslie has referred, I should have had some doubt whether this was a case to which Section 206 was applicable at all. I have some doubt whether, where a party simply acts in obedience to a decree, he is debarred from showing that he has done so, by the words which say that "no adjustment of a decree in part or in whole shall be recognized by the Court, unless such adjustment be made through the Court, or be certified to the Court by the person in

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"whose favor the decree has been made, or "to whom it has been transferred." The only result, however, of that construction would be that possibly the defendant would be exempted from mesne profits for a few months earlier than she is exempted under the judgment of Mr. Justice Ainslie. Therefore, I think it would hardly be the interest of the parties that this matter should be litigated further; and upon the authority of that decision I consent that the order should be drawn up in the way in which Mr. Justice Ainslie proposes, *viz.*, that the appellant should be exempted from mesne profits from the 26th September 1869.

The 5th November 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Witnesses—Credibility—False Case—Real Issue.

*On appeal from the High Court of Judicature at Fort William in Bengal.**

Khajah Habeeb Oollah and others

versus

Khajah Gouhur Ally Khan.

Where witnesses who were not merely giving an opinion upon an isolated fact in the cause, but came into Court to prove the whole case made by the plaintiffs, and that a very special case, are shown to have come to prove a case false in its material features, much reliance cannot be placed on their evidence as to any particular questions in the cause.

Where, in the last stage of appeal, a case is made which is hardly consistent with the false case originally set up, and which was never made the real issue between the parties in any previous stage of the litigation, it cannot be relied on in any degree so far as it affects the case made by the other side.

THE single question raised by this appeal is whether the respondent was the son of Wazeer Jan, by which their Lordships understand, either his legitimate son in the strictest sense of the term, or a son capable of inheriting from him under the Mahomedan law.

The case made by the appellants, who were plaintiffs in the suit, was that he was not in any sense the son of Wazeer Jan, who, they alleged, was incapable of procreating children, that he was a stranger brought in by means of a conspiracy to defeat their rights to the succession of Mahomed Ibrahim, the elder brother of Wazeer Jan, and in fact the original plaint appears to have gone so far as to allege who the real and natural father of the respondent was.

Now it is admitted that that case has entirely broken down. The effect of the findings of the two Courts upon the remand appears to be what is thus stated in the judgment of the High Court now under appeal:—"The case has again been tried by "the present Judge, Mr. Ainslie, who has "arrived at the conclusion that Gouhur Ally "is really the son of Wazeer Jan and Allah-"rukkee, but that he is not legitimate, and "that though his father and mother did "cohabit, the cohabitation was not that of "man and wife."

The only qualification which their Lordships think might be put upon this summary of the Judge's finding is this that the Judge has rather found, after ascertaining the paternity of Wazeer Jan, that the respondent was not *proved* to be legitimate, and that although his father and mother did cohabit, the cohabitation was not *proved* to be that of man and wife.

Upon appeal from the decision of the Zillah Judge, the High Court came to the conclusion that, upon the evidence, the respondent must be taken to have been legitimate, and that conclusion their Lordships are disposed to think was the only correct conclusion which they could draw from the evidence, considering the manner in which the case was presented before them.

It has been very fairly admitted at the bar that it is hardly open for the appellants here, both Courts having concurred in the finding upon that fact, to dispute any longer the paternity of the respondent. It is admitted that he must be taken to be the natural son, at all events, of Wazeer Jan. It will have no doubt to be considered what is the effect of that conclusive finding as to the paternity, not only in reference to the consequences immediately to be deduced from it, but also in reference to the credibility of the witnesses for the appellants, in so far as they attempt to prove, not merely that the respondent was in no sense the son of Wazeer Jan, but that in fact there never was a marriage between Wazeer Jan and the mother of the respondent.

It was argued by the learned Counsel for the appellants, particularly by Mr. Doyne, that it did not by any means follow that, because many of those witnesses had expressed an opinion as to the incapacity of

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* From the judgment of Loch and Seton-Karr, JJ., in Regular Appeal No. 401 of 1864, decided 16th January 1865, 2 W. R., *Civil*, 52.

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Wazeer Jan for the procreation of children, a fact which is now conclusively found against him, they were not to be believed on the other part of the case. Their Lordships, however, deem it right to observe that those witnesses were not merely giving an opinion upon an isolated fact in the cause, but they came into Court to prove a case—the whole case made by the plaintiffs; and that that case was, as I have before stated, a very special case, referring to the introduction of this boy into the family to a conspiracy, and undertaking to prove that it was impossible that he should be the son of Wazeer Jan, and that he was the son of somebody else. It, therefore, seems to their Lordships very difficult to say that, if those witnesses have been conclusively shown to have come to prove a false case—a case false in its material features—much reliance can be placed upon their evidence as to any particular questions in the cause.

Another consequence of the manner in which the appellants have presented their case in the Courts below, is, that the question which has been chiefly argued to-day at the bar seems never to have been fairly put into a course of trial. They say:—"True, we must admit now that the respondent was the natural son of Wazeer Jan; but the evidence for the respondent,—the direct evidence as to the marriage between Wazeer Jan and Allahrukkee,—is not to be believed, and all the other facts proved in the case, the continuous cohabitation between them—including the birth of other children—are all consistent with the supposition that the respondent was an illegitimate son, and was never recognized by his father, and was at last put forward, as we say, in consequence of this conspiracy to defeat the rights of the claimants."

Upon the case thus made, it is to be observed that, if it were the true case, the plaintiffs would hardly have set up that which must now be taken to have been a false case; and further, that the case now relied upon not having been made the real issue between the parties either when the case was first launched or at any time during the long period through which this litigation has lasted, we have not that evidence which might have been given as to the state of the family, as to the manner in which the child was treated in the family, as to the circumstances of the birth, and possibly as to the recognition, by Wazeer Jan, of the respondent as his son.

It appears, therefore, to their Lordships that it is extremely difficult to place any reliance upon the case made by the appellants, so far as it affects the case made by the other side; and the only remaining question is whether there was sufficient evidence on the part of the respondent, from which the High Court was justified in inferring that the legitimacy was made out. And in considering this question, their Lordships will assume that the appellants had made a case sufficient to cast upon the respondent the burden of giving some proof of the marriage between his parents.

Their Lordships think it is a very strong circumstance that, upon or immediately after the death of Nawab Jan, *alias* Mahomed Ibrahim, this boy was produced and placed upon the *guddee* by Fatima. That is a fact which, as the High Court has observed, admits of no doubt. Fatima seems then to have been the head of the family. She was an old lady, and, as the event proved, near the end of her life. It is difficult to see what interest she could have had in putting a spurious child, or even an illegitimate child of her son, in that position, and treating him as the heir of the family; because the effect of recognizing him as a legitimate grandson was to introduce him as one of her own heirs, and therefore to affect the interests of her own brothers and sisters, her own relations for whom she might be supposed to care more than for the illegitimate child of her son.

But however that may be, the fact is sought to be met by the suggestion that this was not the act of Fatima, but the act of Ismael Khan (a person who certainly does not appear upon this record in a manner which entitles him to any respect or credit, since he seems to have sided first with one party, and then with the other); and that it was a contrivance on his part to avoid being called upon to render his accounts as manager of the estate. But there is really no evidence to show that Fatima in what she did was not a free agent. The suggestion seems to be mere speculation, founded upon the proved bad character of this man, and the circumstance that he was steward of the estate.

It is supported by no evidence to which a Court of Justice can give credit.

Then, how does the case stand? There is a considerable body of direct evidence as to the fact of the marriage, though it may not be of the highest character. There is the evidence of the barber who had performed the rite of circumcision when the child was treated as a child born in the house of Wazeer Jan and

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the Begum. There is the evidence of various persons, the respectability of some of whom is admitted, as to the fact of this boy having been seen in the house, and having been recognized, not only by Wazeer Jan as his son, but by Mahomed Ibrahim as his nephew.

It is said that all these witnesses were not credited by Mr. Ainslie, the Judge in the Court below. They appear to have been credited by the Court above, and to some extent, no doubt, they were credited by the Court below. That being so, the evidence, if not so strong as one could desire upon such a question, is at least fortified by those presumptions which the Mahomedan law draws in favor of legitimacy and against bastardy.

The law is stated, and very strongly stated, by Dr. Lushington in the case which has been cited from the 3rd Vol. of Moore's Indian Appeals*; and although in the case in 8 Moore†, the Court did not think the legitimacy of the claimant was made out, yet the language of their Lordships shows that their Lordships were careful to avoid throwing any doubt upon the doctrine as to the principles of the Mahomedan law which had been laid down in the former case.

Under these circumstances, considering that the case originally made by the appellants must be taken to have entirely broken down, and considering that there is evidence as to the legitimacy of this child, credible in itself, and fortified by the presumptions of Mahomedan law, their Lordships are of opinion that they would not be justified in disturbing the judgment of the High Court.

They will, therefore, humbly advise Her Majesty to dismiss this appeal with costs.

The 29th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Water-courses—Rights—Embankments.

Case No. 372 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 27th November 1871, *affirming a decision of the Subordinate Judge of that district, dated the* 13*th July* 1871.

Baboo Chumroo Singh and others (Plaintiffs) *Appellants,*

versus

Mullick Khyrut Ahmed and others (Defendants) *Respondents.*

* Khajah Idayut-oollah *v.* Rai Jan Khanum. 8 W. R., P. C., 37.

Baboos Mohesh Chunder Chowdhry and *Nil Madhub Sen* for Appellants.

Baboos Chunder Madhub Ghose and *Luckhee Churn Bose* for Respondents.

Where water flows in its natural course from somewhere outside A's land, through it, and onwards to other people's land, A is not entitled to stop the flow by an embankment across it, unless he can make out some special right to do so.

Such course is a part of the natural condition of the land, and the flow of the water over it, when it occurs, is a natural incident.

Phear, J.—It appears to us that the appellant has failed to make out a good ground of appeal in this case. As far as we can understand the facts of the case gathered from the judgments of the Lower Appellate Court and the Court of first instance, and passing from these facts to the meaning of the Judge in the judgment which is before us, we think he means to find distinctly that there is a natural flow of water in a defined course caused by the overflow at times of the stream at Bowree Bridge, a place outside the plaintiff's land, that this water flows in a defined course through the plaintiff's land to the defendant's land; and upon that finding, the Judge has said that the plaintiff is not entitled to stop the flow of that water in this defined course by maintaining an embankment across it, unless he can make out some special right to do so; that the plaintiff has failed to make out any such right, and, therefore, the Judge has dismissed his suit.

It appears to us that, on the facts which we thus suppose he has found, the Judge's determination is correct. It may be no doubt that in a sense this flow of water is casual, and that the course which the water pursues may, at other times of the year, be used for agricultural purposes, well enough probably for the growth of the paddy. But if the flow of water is a natural flow of water in a defined course from somewhere outside the plaintiff's land, through his land, and onwards to other people's land, he must allow it to pass on: he can only enjoy just the same right in it as all other persons similarly situated, namely, the right to make a reasonable use of that water as it passes. What is a reasonable use of the water as it passes, is no doubt often a very difficult question indeed to answer. But that question is not now before us. The decree of the Court below only goes to the extent of saying that the plaintiff is not entitled to stop the course of the water and take the whole of it into his own land.

Baboo Mohesh Chunder very ingeniously

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argued that the effect of the judgment was to give the defendant a right of easement over the plaintiff's land. But that, we think, is not the case if we interpret the judgment and the findings of the Court below rightly. If the course of the flow of water in this case is the natural course of the water, it constitutes a part of the natural condition of the plaintiff's land ; and the flow of the water over it at times, when it occurs, is not a burden put upon that land for the benefit of the defendant, it is a natural incident to the land in the condition in which it is. The case which is reported in the XIII Weekly Reporter, page 144, has been cited in support of the appellant's contention. We desire to say that we entirely concur in that judgment and the reasons upon which it is founded. But it appears to us that it has no immediate application to the present case. The essence of the decision then given by this Court is that the plaintiff was entitled to use the water falling on his own land and to erect a bund in such a way as to make use of it. Here the water which is the subject of contest is not water which had first fallen on the plaintiff's own land, but water which had collected together and assumed a defined course before it came to his land.

For these reasons we think the appeal must be dismissed with costs.

The 29th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Benamee Purchase—Rent Suits—Intervention.

Case No. 441 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 30th November 1871, reversing a decision of the Moonsiff of Sewan, dated the 10th July 1871.

William Smith (Plaintiff) *Appellant,*

versus

Mokhum Mahtoon and another (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Debendro Narain Bose* for Appellant.

Mr. M. L. Sandel and *Baboo Rughcobuns Sahoy* for Respondents.

Parties who choose to buy property in another person's name, and allow that person the opportunity of dealing with it as his own, cannot be allowed in equity to intervene in a suit brought by him for the rent of such property.

Phear, J.—We have much difficulty in understanding how the Subordinate Judge came to the conclusion that the whole suit ought to be dismissed. It seems to be beyond contest as regards the rent for 14 annas odd that the decree of the Lower Court was at any rate right, and the plaintiff was entitled to the rent which he claimed. With regard to the remaining 1 anna 6 pie odd, it seems that two intervenors, Hakeem Chand and Ramyad, had set up that Gunessee Kooer, whose ticcadar the plaintiff alleged he was in respect of this share, was only another name for themselves, or, in other words, they had bought the property in her name, and she could consequently give no right to the plaintiff. It is not the case, as the Subordinate Judge seems to put it, that the plaintiff was a co-sharer with somebody else in respect of this portion of the property, and was unable to prove the amount of his share. He would either get the whole of it by virtue of Gunessee Kooer's ticca, or he would get none of it, and the claim of the two intervenors was correct. But we think the mode in which the first Court disposed of this objection was the right one. It appears to have been the fact that Gunessee Kooer, who, the intervenors admitted, was the nominal owner of this portion of the property, had in fact given a ticca to the plaintiff. If the intervenors have chosen to buy the property in another person's name, and allow that person the opportunity of dealing with it as his own, they cannot be allowed in equity to intervene in a suit of this kind. Their remedy must be against Gunessee Kooer herself ; and the plaintiff, who appears to hold *bonâ fide* a ticca from her, is entitled as between him and the ryots to obtain rent under that ticca. On the whole, it seems to us that the Subordinate Judge has altogether erred in the decision which he has passed. We think the judgment of the Lower Appellate Court must be reversed with costs.

The 3rd December 1872.

Present:

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges.*

Decree for Possession—Identification of Boundaries—Onus probandi—Execution—Demolition of Buildings.

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Case No. 221 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 15th April 1872, affirming an order of the Moonsiff of that district, dated the 30th December 1871.

Radha Gobind Shaha (Decree-holder) *Appellant,*

versus

Brijendro Coomar Roy Chowdhry (Judgment-debtor) *Respondent.*

Mr. R. T. Allan and *Baboo Lall Mohun Doss* for Appellant.

Baboos Sreenath Doss and *Doorga Mohun Doss* for Respondent.

Plaintiff having obtained a decree in a suit for possession found difficulty in executing it owing to judgment-debtor having taken every precaution to prevent identification of the land decreed. Notwithstanding this, the Court refused to throw the onus of showing the boundaries upon the debtor, as plaintiff might by timely action have prevented the confusion, and as the onus of proving his claim clearly belonged to the plaintiff.

If in executing a decree for khas possession it is necessary to remove any of the defendants from the land covered by the decree, the Court, on application, is authorized under Act VIII of 1859 s. 223 to remove such person; but if the decree is silent as to a building situated on the land, it is not within the province of the Court which executes to direct that the building be pulled down.

Ainslie, J.—THIS was a suit brought in 1863 for possession of certain lands. The quantity was not stated in the plaint, but the subject of suit was described by boundaries as follows :—On the west by the lane called that of Najeer Meearjan ; on the south by the land of Netye Soonder and the main road ; on the east by Monaka Dhobee's house ; and on the north by the thoroughfare used by the ryots. A decree was obtained by the plaintiff, and in execution of this decree considerable difficulties seem to have arisen. The northern and western boundaries are lands about the position of which there can be no doubt. The eastern boundary formerly occupied by the house of Monaka Dhobee has since been built upon by the defendant ; and that portion of the southern boundary which consists of Netye Soonder's land cannot be traced at all, and therefore it is impossible to say to what extent his land formed any portion of the southern boundary.

In executing this decree, the Moonsiff himself visited the spot and prepared a sketch of it ; and it appears from his judgment, and also from that of the Lower Appellate Court, that it is impossible in any way now to define what was the original extent of Monaka Dhobee's land, or at what distance from the western limit of the land in dispute it commenced, except by a reference to the miras-pottah by virtue of which the defendant professed to hold these lands under Asmutoonissa Bibee. That pottah shows that the miras-land bounded on the east by Monaka Dhobee's land extended from the road on the west for seven and twenty yards eastwards up to that boundary. It also shows that the miras-land is 12½ yards in width, north and south. But we do not find that that pottah gave any means of identifying Netye Soonder's house. The Moonsiff, in default of any other means of determining what the eastern and southern boundaries specified in the plaint were, has used this miras-pottah for the purpose, and the Judge in the Appellate Court has approved of his doing so and has confirmed his order accordingly.

It has been contended by Mr. Allan that the onus of proving where the boundaries were ought to be thrown on the defendant in consequence of the conduct which has been attributed to him in the judgment of the Lower Appellate Court. The Judge says :—"It is very clear that the debtor has "taken every possible precaution to pre-"vent the decree-holder from establishing "the identity of the land decreed to him." It may be that the defendant has obliterated the boundaries which existed at the time of the institution of the suit, either whilst the suit was pending or subsequently to the passing of the decree. In either case, the plaintiff could have prevented the confusion which has arisen—in the first instance by application to the Court to get the existing state of things properly defined, so as to prevent any future dispute ; and in the second case, by at once executing his decree so as to take away the opportunity for making any change in the features of the land. Besides this, we cannot throw upon the defendant the burden of proving what is clearly for the plaintiff to prove,—the extent of his own claim. If this miras-pottah be taken away out of the suit, the plaintiff really will have shown nothing whatever by which the land he claims can be identified. It is not that he shows certain boundaries with *primâ facie* reasons for supposing them to be the boundaries of the land as originally intended in the plaint. As far as we understand, he shows no defined boundaries at all. He does not point out the particular line those boundaries ought to take and the reasons for their taking that particular line,

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and he himself filed this miras-pottah to use against the defendant.

The defendant has also taken objection to the use of that miras-pottah. But seeing that it is a deed under which he himself professed to hold the land, and that that deed sets out the existence and position of Monaka Dhobee's house, we think that it can be fairly and properly used against him. The finding of the Court below is purely one of fact, and is to the effect that from the angle on the north-western corner of the land in dispute formed by the intersection of two lines, the land covered by the decree extends for 27 yards to the east with a width of 12½ yards, north and south. The question was simply one of fact, and no point of law arises in it. and we cannot interfere with that finding in special appeal.

Then there is the question whether the defendant's coach-house, which admittedly falls within the land decreed, should be removed or not. The Courts below have refused to remove it upon the ground that there is no order in the decree which provided for pulling down the coach-house, and that its demolition consequently cannot be ordered in execution of the decree. The decree certainly is silent in the matter. But it is distinctly a decree for khas possession by the plaintiff of the land in suit; and if it be necessary for the purpose of executing this decree to remove any of the defendants against whom the decree was made, who may refuse to vacate the land covered by the decree, the Court, on the application of the decree-holder, is authorized under Section 223 of the Code of Civil Procedure to remove any such person, and to deliver actual possession of the land to the plaintiff. In our opinion, it is hardly within the province of the Court executing the decree to direct that the building should be pulled down: that is a matter for the decree-holder to consider after he has obtained possession. Any opposition or resistance being removed out of the way by proceedings under Section 223, it will remain open to him to do what he thinks proper in the matter. At the same time, and with the consent of Mr. Allan, pleader for the appellant, we think it is desirable that the defendant should be allowed time to remove the materials of the building and to clear the land. It is not quite certain from the map that has been prepared by the Moonsiff, whether the plot of land included within the strip 27 yards long and 12½ yards wide will include some portion of the portico or the building erected by the defendant towards the eastern limit of that land or not. From the map, apparently, there would be some small portion of the portico included; but from the note appended to it, we are inclined to think that this may not be the case. Be this as it may, this is a matter which can only be determined on the spot. If it should be found that that corner of the land in dispute which has been marked ✱ by the Moonsiff in his map is covered by any building, the same order must apply to it as to the coach-house.

The order of the Court below will be so far modified that it will be declared that the decree-holder is entitled to enter into actual possession and occupation of the whole of the land covered by the decree as defined in this execution-suit, and to apply to the Court, if necessary, to remove any person thereon who refuses to vacate the same under Section 223. But the defendant is to be allowed two months' time from this date, within which, if he so pleases, he may vacate the land decreed and carry away the materials of any buildings thereon.

Costs of this appeal will be borne by the parties respectively.

The 4th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A Glover, *Judges.*

Enhancement of Rent—Intermediate Tenures—Act X of 1859 *s.* 17—*Effect of Butwarrah.*

Case No. 675 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 28*th December* 1871, *reversing a decision of the Additional Moonsiff of Madargunge, dated the* 31*st May* 1871.

Hurish Chunder Chowdhry (Plaintiff) *Appellant,*

versus

Ram Chunder Chowdhry (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Appellant.

Baboo Sreenath Doss for Respondent.

A suit for enhancement of rent, which had been decreed by the first Court, was dismissed by the Lower Appellate Court, although it found that the defendant had no talooka rights and that the notice under Act X of 1859 s. 17 was good and valid. HELD that this last finding was

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equivalent to a finding that defendant had only a right of occupancy, and that the Lower Appellate Court should have accepted the finding of the first Court as to the rate of rent, and decided the case accordingly.

HELD that even if the defendant held an intermediate position, and was not liable for the rates of rent paid by simple occupant ryots, he would still be amenable to s. 17.

The fact of a butwarrah having taken place would in no way prevent a co-sharer from enhancing the rent of a ryot on his particular share, notwithstanding that the original arrangement of the jumma had been made on the understanding that the tenant paid such and such a rent at the time of the partition.

Glover, J.—THIS appeal is against the same judgment of the Subordinate Judge of Mymensingh which we have just now been considering in the special appeal No. 632 of 1872 preferred by the defendant. The plaintiff is the special appellant in this case, and he objects to the order of the Subordinate Judge dismissing his claim for rent on the ground that as the Subordinate Judge had found that the defendant had no talooka rights, and that the notice served upon him was a valid and good notice, he ought to have given plaintiff a decree for the rates paid by occupant ryots, as the Court of first instance had done. We think this objection is reasonable. The Subordinate Judge found the notice to be a valid notice under Section 17 Act X of 1859, and this of course would be equivalent to a finding that the defendant had only a right of occupancy. The Subordinate Judge also found as a fact on the evidence that the talookee sunnud on which the defendant relied to escape enhancement was void as having been granted by a person having no authority to give it. This being so, there seems to be no reason why the Subordinate Judge should not have accepted the finding of the Lower Court as to the rate of rent to be paid by the defendant, considering him as an occupant ryot, and have decided the case that way. It is contended by the other side that the Subordinate Judge was right in holding defendant not to be an occupant ryot, but one occupying some intermediate position between a talookdar and an occupant ryot; and that although he had lost his former position in consequence of the sunnud having been found void, he fell back upon that which gave him a superior *status* to that of ordinary ryots, and entitled him to pay a lesser rent. The nature of this intermediate right has not been explained to us. It is a title unknown to the rent-law, and there is no such class of men between the tenure-holders and the cultivating ryots entitled to the service of notices under Section 17. The case referred to by the Subordinate Judge of Dhunput Singh and others *vs.* Gooman Singh and others,* decided by the Privy Council on the 20th of December 1867, is not at all in point. The parties to that case were actual tenure-holders under a pottah, while in this the defendant has no tenure and no pottah.

In the case of Ooma Churn Dutt and another *vs.* Ooma Tara Debee, reported in Volume VIII, Weekly Reporter, page 181, it has been held that a finding as to the character of a tenure does not in law remove a defendant from the category of ryots whose rents may be enhanced under Section 17 of Act X of 1859; so that even supposing the Subordinate Judge to be right in saying that the defendant holds an intermediate position, and right in not making him liable for the rates of rent paid by simple occupant ryots, he still would be amenable to Section 17 of the Rent Law.

There has been a cross-appeal filed by the defendant in this case. He objects in the first place that there was no relationship of landlord and tenant between him and the plaintiff, inasmuch as he had never paid him any rent, and that the provisions of Section 17 of Act X suppose that some rent must have been previously paid in order to enable the party to increase it; in other words that no enhancement is possible unless some rent has previously been paid. Another objection is that, inasmuch as in a butwarrah proceeding between the plaintiff and the other co-sharers in the estate, the jumma had been settled and fixed in relation to the rent payable by the present defendant, no suit like the present would lie to unsettle that jumma unless the plaintiff first brought a suit to set aside the butwarrah proceedings within 12 years.

With regard to the first objection, it by no means follows that because no rent has passed between two parties, the relationship of landlord and tenant cannot be established, for many tenants do not pay their rents although they ought to do so. The defendant admits that he is a tenant of the plaintiff's, and is willing to pay a certain rate of rent. The assertion, therefore, that no relationship of landlord and tenant exists between the two is a palpable absurdity. Then as to the objection that no enhancement can be had unless some rent has been previously paid, we have no doubt that the meaning of the Section is not restricted to cases in which rent has actually been paid. This would assume that all ten-

* 9 W. R., P. C., 3.

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ants do invariably pay their rents to the landlord, and we think that the Section must be taken to apply as well to enhancement of rent actually paid, as of rent which ought to have been paid and which the tenant would have paid under ordinary circumstances. We, therefore, overrule this objection.

The last objection that the plaintiff not having sued to set aside the butwarrah proceedings the present suit would not lie, is altogether untenable. The fact of a butwarrah having taken place would in no way prevent a co-sharer from enhancing the rent of a ryot on his particular share, notwithstanding that the original arrangement of the jumma had been made on the understanding that the tenant paid such and such a rent at the time of the butwarrah. Every other shareholder would have precisely the same privilege, and could also enhance the rents on his particular share, supposing the ryots to be liable.

We think, therefore, that the judgment of the Subordinate Judge should be reversed, and the decree of the first Court restored with costs payable by the defendant, respondent.

Kemp, J.—I concur in reversing the judgment of the Subordinate Judge.

The 5th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mahomedan Law—(Tulub-ishad)—Pre-emption.

Case No. 571 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 2nd September 1871, *reversing a decision of the Moonsiff of Lushkerpore, dated the* 13*th May* 1871.

Shaikh Dayemoollah and another (Defendants) *Appellants,*

versus

Kirtee Chunder Surmah (Plaintiff) *Respondent.*

Baboo Bipro Doss Mookerjee for Appellants.

Baboo Debendro Narain Bose for Respondent.

In a suit by a co-sharer against the purchaser of a share to establish a right of pre-emption on the ground that plaintiff had stated in the presence of witnesses that he had purchased and that he was the pre-emptor, the requirements of the Mahomedan law were held not to have been complied with, because the statement was not shown to have been made in the presence of the purchaser, or of the seller, or of the premises which are the subject of sale.

Kemp, J.—In this case the defendant is the special appellant. The plaintiff sued on a right of pre-emption. It appears that the plaintiff is a shareholder to the extent of 13 annas in the property sold, and the subject-matter of the suit is the remaining 3 annas which have been purchased by the defendant Dayemoollah. The first Court, the Moonsiff of Sylhet, found that the plaintiff had failed to prove that he had conformed to the requirements of the Mahomedan law in making the "tulub-ishad." In the course of his decision, he quotes several decisions, and also refers to page 483 of Baillie's work on Mahomedan Law.

On appeal the Subordinate Judge, Baboo Mohesh Chunder Sen, has reversed this decision. He is of opinion that there is evidence that the plaintiff complied with the requirements of the Mahomedan law in performing the ceremony of tulub-ishad. The Subordinate Judge says:—"The Moonsiff records that there is no proof that the ceremony of tulub-ishad was observed, but this he has recorded contrary to the depositions written with his own hand." The Subordinate Judge then refers to the depositions of Suroop Chunder Dutt and Olak Nath: he observes that these two witnesses have clearly stated that plaintiff offered Rs. 50 in a cup to the purchaser Dayemoollah Shaikh. "How then," remarks the Subordinate Judge, "does the Moonsiff record that there was no proof of the observance of tulub-ishad." These depositions have been read to us, and from them it is very clear that the requirements of the Mahomedan law in the matter of the ceremony of tulub-ishad have not been complied with. At page 483 of Baillie's Digest of the Mahomedan Law, it is said that "to give validity to the tulub-ishad, it is required that it be made in the presence of the purchaser, or of the seller, or of the premises which are the subject of sale." Now the two witnesses, Suroop Chunder Dutt and Olak Nath, only say that the pre-emptor, that is to say, the plaintiff, in their presence stated that he had purchased,—that he was the pre-emptor; and he cited them to be witnesses to that fact: but they do not say that this was done in the presence of the purchaser, or of the seller, or of the premises subject to sale. On the contrary, it is clear from their evidence that Dayemoollah, the purchaser, was sent for

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after the plaintiff had made the above statements in the presence of the witnesses Suroop Chunder and Olak Nath. The Moonsiff was therefore perfectly right in saying that there was no legal evidence that the plaintiff had acted up to the requirements of the Mahomedan law. There is a decision which has been quoted by the pleader for the appellant which appears to apply to this case in every respect; we allude to the decision reported in Volume XIII, Weekly Reporter, page 77. We, therefore, decree the appeal, reverse the decision of the Subordinate Judge, and restore that of the Moonsiff, with costs payable by the respondent.

The 5th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Injury and Outrage—Damages.

Case No. 630 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 28th December 1871, reversing a decision of the Moonsiff of Kechoogunge, dated the 21st August 1871.

Chundernath Dhur and another (two of the Defendants) *Appellants,*

versus

Issurree Dossee (Plaintiff) *Respondent.*

Mr. M. L. Sandel for Appellants.

Baboo Grish Chunder Ghose for Respondent.

Though mere verbal abuse without consequent injury would give no claim to damages, the Court refused to interfere with an award of damages where a person of some position had been assaulted and grossly abused, holding that her reputation must have been injured and her feelings outraged.

Glover, J.—We see no ground whatever for interfering with the Subordinate Judge's order in this case. The objections which are now raised in special appeal were not taken in the Court of first instance. The defendant there was satisfied with denying the assault and abusive language altogether, although here he sets up a technical case alleging that supposing the abuse to be proved that would not be sufficient to entitle the plaintiff to damages, inasmuch as she has not proved any consequent injury either to her feelings or her reputation. The Subordinate Judge has found as a fact that the plaintiff was beaten, kicked, pushed, and grossly abused. He found also that she was a person of some position in the village, having monetary transactions to the extent of 3 or 400 Rs.; and these facts being taken, it follows as a necessary consequence of a beating inflicted upon her before a number of people, that such an assault and the abusive language then addressed to her must have had the effect of injuring her reputation and outraging her feelings. It is true that mere verbal abuse without consequent injury would give no claim to damages, but this is a very different and a much stronger case.

The special appeal is dismissed with costs.

The 6th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII (B. C.) of 1869 s. 31—Limitation.

Case No. 628 of 1872.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 5th January 1872, reversing a decision of the Officiating Additional Moonsiff of Monghyr, dated the 24th July 1871.

Bijoy Gobind Singh *alias* Mahomed Abdool Ruhman Khan (Plaintiff) *Appellant,*

versus

Karoo Singh (Defendant) *Respondent.*

Baboo Boodh Sen Singh for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

A suit under Act VIII (B. C.) of 1869 brought more than eight months after the latest deposit made by the ryot, was held to have been out of time, as it was not instituted within six months of the date of service of the notice of deposit.

Kemp, J.—We think this special appeal must be dismissed with costs. The deposits were made by the ryot on the 15th of June and on the 8th of September 1870. Under Section 31 Act VIII of 1869, as the suit was not brought until the 23rd of May 1871, the Judge has held, and we think properly held, that it is out of time, inasmuch as it was not instituted within six months

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from the date of service of the notice of deposit. Under Section 47 of the same Act the notice is to be served by the Court, and we must presume, until shown to the contrary, that the notice was issued and duly served. We dismiss the special appeal with costs.

The 7th December 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of Rent—Notice under Act X of 1859 *s.* 17

Case No. 684 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 12*th January* 1872, *affirming a decision of the Officiating Moonsiff of Dundkhorah, dated the* 20*th September* 1871.

Mirzah Sayefoollah Khan (Plaintiff) *Appellant,*

versus

Chaya Thakoor and others (Defendants) *Respondents.*

Mr. C. Gregory for Appellant.

Baboo Doorga Mohun Doss for Respondents.

The omission of the words "same class of ryot" in a notice under Act X of 1859 s. 17, even if unintentional, is sufficient to invalidate a claim for enhancement.

Quære.—Would this be the effect if, notwithstanding the omission, the ryot knew all the grounds on which enhanced rent was demanded of him, and defended himself on all?

Glover, J.—THE point for decision in this special appeal is whether the Subordinate Judge was right in holding the notice served upon the respondent to be legally insufficient.

Mr. Gregory for the special appellant contends that, by the late rulings of this Court, a strict observance of the terms of Section 17 Act X of 1859 is not absolutely required, and that a notice is good if it contains substantially all that is required by the Act, and if there be no reasonable doubt that the tenant understood fully the nature of the demand made upon him.

Mr. Gregory further contends that the defendant in this case knew perfectly well what was wanted of him, and the reasons why the enhancement was asked for; that he objected categorically to the landlord's demand, and gave detailed reasons why his rent should not be enhanced. The omission of the words "same class of ryot" from the notice did not prejudice him.

I think, on the contrary, that the omission was of the most important character, and ought, even if unintentional, of which I have considerable doubt, to invalidate the plaintiff's claim. The essence of this branch of the claim for enhancement is that the ryots whose rents are being compared should be of the same class and possessed of similar advantages. It is not enough to show that A and B hold the same quality of land in the same or adjacent villages, without also showing that the two are in the same position as regards the nature of their tenure. No doubt the tendency of the late rulings of this Court has been to relax somewhat the strict way in which the notice clauses were once interpreted; but I know of no decision (and none of those quoted support the contention) that goes the length of saying that a notice which omits all mention of the class to which a ryot belongs is a good notice.

But it is said that notwithstanding the omission, the defendant in this case did know all the grounds on which enhanced rent was required of him, and defended himself on all. Were this so, the special appellant would have something to go upon, but the contrary is the fact. What the defendant does in his written statement is to reply to all the reasons for enhancement set forth in the plaint. He says nothing about not being the "same class of ryot." This is urged as an argument against him, and it is contended that his silence on this point, and the fact that no issue was raised regarding it, show that he never intended to rely on the omission, or cared about it. To my mind, it is easier to assume that the defendant said nothing about the omission simply because he did not understand that this was a point on which he was called upon by the notice to defend himself. Had he so understood the position, it is hardly likely that a man, who had objected so rigorously to every ground of enhancement urged by the landlord, would have been silent when so very important a part of the matter was being discussed.

I am of opinion that the omission of the words "same class of ryot" from the notice was a most important omission, and that by it the ryot was misled into making a defence which did not include all the reasons he

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might have had for resisting enhancement. I assume that he did not know the grounds on which increased rent was demanded from him from the absence of the necessary words in the notice, and from his omission to give evidence on this particular point. In any case, the onus of showing that the defendant did substantially know all the grounds of enhancement urged against him, although they were not all in the notice, is upon the plaintiff, and I do not see that he has in any way supported it.

It is all very well to relax the letter of the law when it is quite certain that no injustice is the consequence, but it cannot be said in this case that the defendant *certainly* knew all the plaintiff's grounds for seeking to get more rent from him :—the utmost that can be advanced is that he possibly did so.

Under such circumstances, I think that the plaintiff should take the consequences of his negligence. It is much better that he should lose the opportunity of adding to his rent-roll for one year than that his negligence should be condoned at the expense of the ryot, and the latter be called upon to undergo the trouble and expense of proving, if he could, that he ought not to be made to pay, as in this case, a rent five-fold larger than what he has ever paid before. It will be time enough for him to do that, when a demand is legally and properly made and a claim proved.

I would dismiss this special appeal with costs.

Kemp, J.—I concur in dismissing this special appeal.

The 9th December 1872.

Present:

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges.*

Rent fixed by Arbitration—Notice—Written Assent.

Case No. 344 of 1872.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 2nd October 1871, *reversing a decision of the Deputy Commissioner of Maunbhoom, dated the 8th July* 1871.

Mudhoo Manjee (Defendant) *Appellant,*
versus

Rajah Nil Monee Singh Deo (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. R. T. Allan and *Baboo Oopendro Chunder Bose* for Respondent.

No notice of enhancement is required in the case of a suit for arrears of rent at a rate fixed by arbitration where the parties had agreed to submit their claims to arbitrators.

In arbitrations not started with the sanction of the Court, it is not necessary that the agreement should be reduced to writing before it can be binding.

Ainslie, J.—THIS is a suit brought by Rajah Nil Monee Singh against the defendant for arrears of rent at a rate fixed by arbitration. It appears that the defendant, with some 30 or 40 other ryots, entered into an agreement with the Rajah to submit to certain arbitrators, named in the writing containing that agreement, their objections to his claims to enhancement. This writing was registered and delivered over to the Rajah. The arbitrators proceeded to act under this agreement and made an award.

When the suit was instituted, the defendant pleaded that he had withdrawn his consent before the completion of the award for certain reasons stated.

The issue raised by the first Court was whether the award was valid and binding.

There was nothing in the form of the pleadings or in the issue which could show to the Rajah that it was intended to take the ground which has been taken in special appeal, namely, that the agreement was altogether one-sided ; and consequently the Rajah had no occasion to bring forward evidence to establish that he had so acted as to bind himself to the defendant and other ryots in the event of his attempting to resile from the contract.

The first Court takes a ground which is not raised by the pleadings, and rejects the award as of no effect, because it says,—"Before the arbitration can be made binding, "it is necessary that both parties should "express their *recorded* assent to abide by "that award, but in this case nothing of the "kind appears to have been done by the "plaintiff, who, if the award had been un-"favorable to him, might, in the absence of "such *recorded* assent, have backed out of the "award and declared himself not bound by it." This seems to us to be based on the supposition that for an agreement to refer any matter to arbitration to be binding upon the parties, it must be reduced into writing and signed by both or all the parties concerned. Under the provisions of the Civil Procedure Code, there is no doubt that arbitrations under the control of the Court must be

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founded upon an agreement in writing. But the Code is silent with respect to arbitrations which are not started under the sanction of the Court, whether they be such as are afterwards brought into Court under Section 327, or such as may be used as evidence of a contract without any attempt to treat them as equivalent to a decree of Court.

The first ground of special appeal taken here is that there is no mutuality of the agreement. The pleader for the appellant admits that he has no authority for saying that the first Court was right in holding that it was necessary that the Rajah's agreement to be binding upon him should be reduced into writing.

The point taken by the Court of first instance does not seem to have been noticed in the Lower Appellate Court, and we think that the first Court was in error in going beyond the pleadings and in disposing of this part of the case merely as a point of law without giving an opportunity to the plaintiff to tender evidence to show that there really was a contract binding on both sides. The circumstances of the case certainly are such as to favor the conclusion that there was a complete contract. If the point had been distinctly and properly raised in the written statement of the defendant, it might possibly have been necessary to send the case down to the Lower Appellate Court to consider this part of the case. But as the pleadings stand we do not think we ought to do so, for the point was really not raised by the defendant and was not properly before the first Court at all, and can only be disposed of by the trial of an issue of fact which did not arise as the case was placed before the Court.

Then it is said that this is a suit for enhancement without notice under Section 13 of Act X of 1859. But it is quite clear that no notice is required in this case. The suit is founded upon a fresh contract between the parties which is to be found partly in the agreement to submit their claims to arbitration and partly in the award of the arbitrators which has been the result of that agreement, and is not a case by any means analogous to those contemplated by the Act in which the landlord proceeds, without any fresh agreement with his tenant, to raise the rent to be paid by the latter. The agreement given by the ryots contains a distinct stipulation that the rents from the year 1277 are to be paid to the plaintiff at a rate to be fixed by the arbitrators named, and this suit is brought to recover rents at that rate and for that period, and is clearly nothing more or less than a suit on a contract entered into by the defendant.

The appeal must be dismissed with costs.

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CRIMINAL RULINGS.

The 11th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Act XXXI of 1860—*Possession of Arms without license.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Gya.*

Baboo Rameshur Purshad Narain Sing, *Petitioner.*

Mr. R. T. Allan for the Petitioner.

The proceedings of the Magistrate directing the issue of a summons to appear and of a warrant of arrest against a person for the possession of arms without a license under Act XXXI of 1860, were quashed as illegal.

Reference.—The facts of the case are as follows:—

The petitioner Baboo Rameshur Purshad applied to the Magistrate on the 13th April for a license to carry arms. He had held one previously entitling him to carry ten swords, but he had mislaid it, and it was not until he found it again that he came forward for a new license. The consequence was, that by this delay the Baboo had allowed a year and nine months to pass during which he has carried and possessed arms (guns, &c.) without any license. This fact, it would appear, was, however, known to the Magistrate.

When the petition for a fresh license was presented, the Baboo's Mookhtar was ordered to inform his client to appear in person before the Magistrate. Besides this a written order to the same effect was made over to the Court Inspector, who had it served through the Police like any other ordinary judicial process, a receipt of service thereof being obtained through the Baboo's *karpurdaz.*

It is necessary to mention this latter order, because, although it was issued unknown to and unauthorized by the Magistrate, it was the order to which the Baboo referred in his petitions when he raised the objections which apparently caused the Magistrate to issue his summons.

After receiving the above order, the Baboo requested the Court (through his pleader) to be excused from personal attendance, while he took exception to the indefinite character of that order, on the ground that it neither cited any reason why he was to appear personally before the Magistrate, nor fixed any date for his so doing.

The Magistrate observes that he purposely omitted to fix any date as desired to suit the convenience of the Baboo; and he further states that, up to the time the objections were preferred, no charge of any kind had been brought.

Immediately after the receipt, however, of these objections, the Magistrate issued a summons on the Baboo to appear personally at 6 A.M. on the following morning, to answer to an alleged offence, the particulars of which he did not state, against the provisions of Act XXXI of 1860.

At the appointed hour the Baboo caused another petition to be presented, again soliciting to be heard through counsel, but his request was rejected, and a warrant for his arrest issued.

In my opinion these proceedings, *i. e.*, the issue of the summons and warrant are illegal, for, so far as I can see, the Baboo, at the time of presenting his petition, was guilty of no offence whatever under the Arms Act.

Sections 25 and 26 of Act XXXI of 1860 clearly contemplate those cases only where persons are caught in the act of carrying arms; and action under them is warranted only when the offender is caught in *flagrante delicto.* Section 31, again, refers to the search and seizure of arms under certain other circumstances, none of which are applicable to the present case.

The most then that can now be said against the petitioner is that he has in his possession certain arms without a license; but this would be an offence only if the

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provisions of Section 32 of the Act had been extended to, and were still in operation in this District.

The petitioner states that no order was ever issued for the disarming of the District. To ascertain this I wrote to the Magistrate requesting him at the same time to let me know under what Section of the Arms Act he had taken proceedings against the petitioner; but on the 1st point, he states that he can give no answer "at present," and on the other he has practically refused to give any answer at all.

In the meantime, however, I have caused a search to be made through all the Government notifications in my office since 1857, and I am unable to find any order for the disarming of Gya; while, from the Government Notification of 1st October 1860, it is clear that, since that year at all events, Section 32 Act XXXI of 1860 has not been in operation in the Lower Provinces of Bengal.

If the view I have taken of the Law be correct, it seems clear that the petitioner has committed no offence that would warrant the issue of a summons and a warrant for his personal appearance before the Magistrate.

For the foregoing reasons I am of opinion that the proceedings of the Magistrate are illegal and should be quashed. I am therefore under the circumstances compelled to transmit the record for the consideration and order of the High Court.

Judgment of the High Court.

Mitter, J.—Taking the facts as disclosed by the record, we are of opinion that the Judge is quite right, and we accordingly set aside the proceedings of the Magistrate as contrary to law.

The 13th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Unlawful Assembly—Affray—Penal Code s. 141.

Miscellaneous Criminal Case.

Lokenath Kar and others, *Petitioners.*

Baboo Juggut Chunder Banerjee for the Petitioners.

There is no ground for the distinction between an unlawful assembly as a premeditated act and an affray as a sudden one; for, according to s. 141 of the Penal Code, an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

Bayley, J.—We are of opinion that this application must be rejected.

An attempt has been made to draw a distinction between an unlawful assembly as a premeditated act and an affray as a sudden one, and to bring this case under the latter offence. We think this contention is not supported by the law. Referring to Section 141 of the Penal Code, we find that an assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly; and we think that, under all the circumstances, there is no ground to interfere under Section 405. We also think that the punishment awarded is proper, and we decline to interfere in that respect.

The application is rejected.

The 13th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Code of Criminal Procedure s. 282—*Enquiry (kind of, to be held)—Evidence—Cross-Examination.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Mymensingh.*

Noor Mahomed

versus

Nil Rutun Bagchee.

The kind of enquiry required to be held by a Magistrate in cases under s. 282 Code of Criminal Procedure, is a full judicial enquiry, evidence being taken in the presence of the parties charged and opportunity given for the cross-examination of witnesses.

Reference.—Two petitioners appeared before the Magistrate praying for proceedings under Section 282 Code of Criminal Procedure against a third party. The Magistrate examined the petitioners and summoned the party complained against.

On his appearance, without taking any evidence in his presence, and giving him an opportunity of cross-examining the petitioners, depending upon the statements of the latter and certain personal knowledge he himself possessed, the Magistrate passed orders binding the party complained against to keep the peace.

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In explanation the Magistrate admits that, when passing orders, the Full Bench Decision of the Hon'ble Court (W. R. Vol. XII. Criminal Ruling, page 60) was not before him, and that his procedure might have been different if it had been, but does not consider his order was illegal or improper and considers that therefore his proceedings would only have been irregular if he had refused to allow the defendant to cross-examine, which he did not do, as the said defendant made no application.

The Magistrate also thinks (para. 4 of his letter) that a distinction should be made where the execution of personal recognizances is required as distinguished from cases where the party might be called on to provide sureties.

The Magistrate loses sight of the fact that in both cases the principle is the same, the pith of the matter being that there should be a *judicial* enquiry as to whether there was reasonable ground for belief that the defendant was likely to commit a breach of the peace. The Hon'ble Court will observe that the explanation of the Magistrate in respect of the want of opportunity afforded for cross-examination is limited to the petitioners, but nothing is said as to the non-summoning of witnesses and the consequent loss suffered by the defendant in not being allowed to cross-examine the witnesses offered on behalf of the petitioners.

I submit to the Court that the kind of enquiry held by the Magistrate fell short of what the law requires and what the Hon'ble Court has held to be necessary, namely, a full judicial enquiry as in other cases, evidence being taken in the presence of the parties charged and opportunity given for cross-exmination of witnesses.

I, therefore, submit that the order of the Magistrate in this case should be quashed.

Judgment of the High Court.

Bayley, J.—We concur in the view taken by the Judge, and think that the order of the Magistrate should be quashed and the case re-tried with reference to the Full Bench decision referred to in the letter to this Court.

The 15th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Registration—Warrant—Imprisonment (Simple or Rigorous) Act I of 1868 *s.* 2 *cl.* 18—*Act VIII of* 1871 *s.* 80.

Miscellaneous Criminal Case No. 70 of 1872.

The Legal Remembrancer on behalf of Government, *Petitioner,*

versus

Radhoo Churn Ash (*Prisoner, Opposite Party*).

Held that under Act I of 1868 s. 2 cl. 18, the Sessions Judge should have specified in his warrant whether the imprisonment awarded to a person convicted under s. 80 Act VIII of 1871 should be simple or rigorous, but that, as he had omitted this at the proper time, simple imprisonment should now be set forth in the sentence and warrant.

Bayley, J.—THIS is a motion on the part of Government to the effect that the Sessions Judge of Sylhet should, with reference to Section 384 of Act VIII of 1869, have specified in his warrant whether the imprisonment awarded to a prisoner convicted under Section 80 Act VIII of 1871 should be *simple* or *rigorous*. The Sessions Judge has refused to do this, because he says the Registration Law is silent as to the nature of the imprisonment. But Clause 18, Section 2, Act I of 1868, says: "In this Act "and in all Acts made by the Governor-"General of India in Council, after this Act "shall have come into operation, unless there "be something repugnant in the subject or "context—'Imprisonment' shall mean im-"prisonment of either description as defined "in the Indian Penal Code," and thus the imprisonment under Section 80 Act VIII of 1871 must be imprisonment *simple* or *rigorous*.

The Judge should have therefore, in this view of law, determined whether the imprisonment was to be *simple* or *rigorous;* and should have made his sentence and warrant accordingly. But as the Judge omitted this at the proper time, we think that simple imprisonment should now be set forth in the sentence and warrant, and under the powers vested in us under Section 404, we desire that the Judge act as above.

The 15th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Power of High Court—Code of Criminal Procedure s. 404—*Evidence of Accomplices—Admissibility—Credibility.*

Criminal Miscellaneous Case No. 16 of 1872.

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The Government of Bengal, *Petitioner,*

versus

Kazimuddin, *Opposite Party.*

Baboo Jugdanund Mookerjee for the Petitioner.

Baboo Omesh Chunder Banerjee for the Opposite party.

Where although the Judge thought that the evidence of two witnesses was inadmissible against the prisoner as being the evidence of accomplices, yet he did not think the evidence in the case legally sufficient to justify the conviction of the prisoner, the High Court declined to interfere under s. 404 Code of Criminal Procedure, considering that the question of admissibility was a quite different matter from that of credibility.

Bayley, J.—In this case we see no reason to interfere under the extraordinary powers vested in us under Section 404.

Substantially the decision of the Sessions Judge is that, looking to the independent evidence in the case irrespective of the evidence of the two persons previously convicted, he did not think the evidence legally sufficient to justify the conviction of the prisoner. It is true the Judge says that the evidence of those two persons is inadmissible as that of accomplices against the prisoner in this case, and were it necessary for us to go into the question as to whether those two persons were competent witnesses in the case, probably we would have thought that they were. But the question of credibility due to the evidence of those two witnesses is a quite different matter in a motion under Section 404; and as the Judge is of opinion that the evidence on the record is not sufficient to convict the prisoner and has therefore acquitted him, we see no reason to interfere with that order under the extraordinary powers of revision given us by Section 404.

We accordingly reject the application.

The 18th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Procedure—Land Dispute.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of* 24-*Pergunnahs.*

Mukhoda Dossee, *Appellant.*

Baboo Bhowanee Churn Dutt for Appellant.

A Magistrate is bound, before attaching the property in dispute, to take evidence for the purpose of ascertaining who was in actual possession of the subject of dispute, and to record his grounds for being satisfied that a breach of the peace was likely to occur.

Reference.—I CONSIDER that the Cantonment Magistrate's proceedings should be set aside, because he has attached the premises in dispute without having taken the trouble to ascertain who was in possession of the subject of dispute. In his explanation the Cantonment Magistrate refers me to a theft case. That case does not help me. In it Chundermonee Dossee charged Bidhoomonee Dossee and Banee Bhuttacharj with criminal misappropriation of some bricks from her court-yard. The Magistrate dismissed that case with the remark that it was one for the Civil and not for a Criminal Court. On the same date he instituted the present proceedings. His order contains no grounds for his being satisfied that a breach of the peace was likely to occur, and the order and the proceedings consequent thereon appear to me ill-considered and fit to be quashed.

The subject of dispute appears to be the possession of some loose bricks. Trifling as the value of the property is, the pleader for the petitioner urges that his client is by the Magistrate's order unjustly driven to the Civil Court, whereas, if he had made proper enquiries, he would have found that possession was with the petitioner. And as I consider that the Magistrate's order has the effect represented and complained of, and that it was passed irregularly and on insufficient grounds, I refer the case for the Court's consideration with the suggestion that the order should be quashed.

Judgment of the High Court.

Bayley, J.—We concur in the view taken by the Sessions Judge.

It was the duty of the Magistrate to take evidence and fully to enquire into the fact of actual possession and to decide the case upon a finding on that fact. It has also to be seen under Section 318 whether on the evidence there is any likelihood of a breach of the peace. This was not done by the Magistrate. Further, it is not clearly shown that the property was immovable. On the contrary, it appears from the Sessions Judge's letter that the property was loose bricks and therefore movable property.

We concur in the Sessions Judge's view that the proceedings of the Magistrate should be quashed, and they are quashed accordingly.

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The 20th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Code of Criminal Procedure. s. 131—Claim to Property under Seizure—Summoning of Witnesses (named by claimant).

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Bhaugulpore.

Sookhan Sahoo, *Petitioner,*

versus

Government, *Opposite Party.*

Petitioner was charged with the theft of certain money found in his house and acquitted. Proclamation having been made for claimants to come in and claim the property, no one appeared, whereupon petitioner preferred his claim and asked the Assistant Magistrate to summon certain witnesses, but the Assistant Magistrate refused to do so and disallowed his claim, the Magistrate on appeal declining to interfere. On reference by the Judge the High Court held that the Assistant Magistrate was bound to summon the witnesses named by the petitioner, set aside that officer's order, and directed him to dispose of the case after taking due steps for securing the attendance of the witnesses in question.

An information of the theft of certain property and money was lodged with the Police at Begoosurai but against no body by name.

On a search by the Police, a sum of money amounting to Rs. 408-8 was found in the house of the petitioner.

The Police forwarded the money to the Deputy Magistrate of Begoosurai and the petitioner was charged with theft; but the charge not being proved against him, he was acquitted.

He then applied on the 21st July 1871 to the Deputy Magistrate for a refund of the money. Upon this he ordered a proclamation to be issued under Section 131 Code of Criminal Procedure. From this order the petitioner appealed to the Sessions Judge, who dismissed the appeal on the 9th December 1871. Nobody coming forward to claim the money within the prescribed time, the petitioner again applied on the 26th January 1872 for the money, and the Assistant Magistrate called upon him under Section 132 Code of Criminal Procedure to show that the money had been legally acquired by him. The deposition of the petitioner and his witnesses was taken, and the petitioner applied to the Assistant Magistrate on the 16th February 1872 to summon certain *Muhajuns*, who would not attend Court upon his request, to produce their books by which he could conclusively prove that the money had been legally acquired by him. The Assistant Magistrate rejected this application.

From this order of rejection the petitioner appealed to the Magistrate of Monghyr on the 17th February 1872. The Magistrate dismissed the appeal on the 2nd March 1872.

On the 19th February 1872, while the appeal was pending, the Assistant Magistrate ordered that the application of the petitioner for a refund of the money be rejected. The Assistant Magistrate's order was as follows :—

"Sukhan Sahoo petitioner, present in Court, says he has not been able to bring the evidence he said he would bring. Such being the case, he has not proved his claim and his petition is dismissed."

The Magistrate dismissed the appeal on the 2nd March 1872. His order was as follows :—

"In a case in which certain property had been forwarded to the Sub-divisional officer at Begoosurai under Section 130 Code of Criminal Procedure, and proclamation had been issued under Section 131 following, applicant, the party from whose possession the property had been originally obtained, sought to establish his claim thereto. The proceedings were, it may be presumed, such as, although not clearly detailed, are assumed to be held under Section 132. In course of these proceedings, petitioner applied to the Assistant Magistrate to serve summons upon certain persons whose evidence was necessary for him to prove his claim but who declined to attend Court upon his request. This application of petitioner was rejected, and he therefore now applies to this office concluding with the prayer that after perusal of the proceedings, &c., the property may be restored to him. The case is somewhat peculiar. As regards the refusal of the Assistant Magistrate to summon witnesses, I think the course followed, although likely enough to be attended with hardship, was correct, as I do not see any provision in the Code of Criminal Procedure authorizing the issue of summons upon witnesses in such a case ; and no officer is required to issue a process which the parties requisitioned are not bound to obey. As to the general question of the restoration of the property to petitioner, I hold that the matter is one over which this office can exercise no interference. I consider that the most doubtful step in the proceedings was the first one, *viz.*, the

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declaration (by issue of proclamation) that the property, obtained as it had been by the Police in this particular case, was to be dealt with as 'suspected property' under the provisions of Section 130; but against such order an appeal was preferred (under whatever procedure I cannot understand) to the Sessions Judge, by whom however no interference with the order was exercised. At the present moment it is obvious that petitioner has failed to prove to the Assistant Magistrate under Section 132 that the property was legally acquired by him, and no order can be made by this office in the matter. Application rejected."

The Sessions Judge recommended that the orders of the Lower Courts should be reversed upon the following grounds:—

"I consider the Assistant Magistrate's order dated the 16th February 1872 was wrong in not summoning the witnesses and giving the petitioner every opportunity of proving that the money had been honestly come by. Without such evidence his order refusing the refund of the money was made on insufficient grounds. I consider the Magistrate was wrong 1st in holding that he had no power to interfere. The petitioner had been tried, the trial was concluded, the order for the disposal of the property, as far as petitioner was concerned, had been passed, and the Magistrate as the Appellate authority had the power under Section 132 B Act VIII of 1869 to modify, alter, or annul that order. I also hold the Magistrate was wrong in saying that the Criminal Court has no power to summon witnesses in miscellaneous enquiries of this sort. If the Act, as it does, empowers the Criminal Court to try claims under Sections 130 and 131 Act VIII of 1869, it gives him at the same time authority to summon witnesses. The enquiry under Section 131 Act VIII of 1869 is a Miscellaneous Criminal Case to which the procedure of the Code of Criminal Procedure may, under Section 444 Criminal Procedure Code, be applied. The case appears to be a hard one. It is not apparent what was petitioner's connection with the Factory from which the money was stolen, but the question was whether he stole it or not. He was tried on this charge (the Factory prosecuting) and was acquitted. Though the suspicion was that he had stolen from the Factory and no where else, yet, on the case being dismissed, other claimants were invited under Section 130 Act VIII of 1869, to appear and claim the property; and when none appear, the petitioner prefers his claim and attempts to prove it; the Assistant Magistrate refuses to summon his witnesses and disallows his claim, and the Magistrate, when appealed to, refuses to interfere. I question the Assistant Magistrate's right in the first instance to retain the property after petitioner's acquittal; but having retained it on suspicion and having had recourse to Section 132, he is bound to assist petitioner by summoning the evidence he has cited to prove that the money was legally acquired by him."

The judgment of the High Court was delivered by—

Bayley, J.—We think the Sessions Judge is right in holding that the Assistant Magistrate was bound to summon the witnesses named by the petitioner.

The order of the Assistant Magistrate refusing the petitioner's application is therefore set aside, and that officer is hereby directed to dispose of the case after taking due steps for securing the attendance of the witnesses above referred to according to law.

The 29th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Code of Criminal Procedure s. 270—*Award of Compensation—Theft or Robbery—Criminal Force.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Magistrate of Backergunge.*

Gunamanee

versus

Haree Datta.

An award of compensation under s. 270 Code of Criminal Procedure was set aside as illegal in a case of criminal force and theft or robbery, because the charge was in part one of theft or robbery, which did not come under Chapter XV, and because criminal force really was used to the complainant.

Reference.—GUNAMANEE, the prosecutrix, was seen to enter an empty house at 3 or 4 A. M., under rather suspicious circumstances, and was brought out from thence by the accused and another, and let go when it was discovered that she was a woman. On the same day she prosecuted the accused for criminal force and for theft or robbery of Rs. 2.

After examining witnesses, the Deputy Magistrate dismissed the case as false and frivolous, and awarded the accused Rs. 8 as compensation under Section 270.

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It appears to me that the award of compensation is illegal, *1st*, because the charge was in part one of theft or robbery which does not come under Chapter XV; *2nd*, because criminal force really was used to the complainant. The house in which she was found did not belong to the prisoner and he had no legal right to bring her out of it, although his proceedings were excusable on account of the suspicious nature of complainant's movements and of the frequency of fires in Burrisaul.

But if accused was to be excused for dragging out complainant, the latter was surely also to be excused for complaining. She really was doing no harm; and as she felt herself to be innocent and to have been rather ignominiously dragged out to the public road, it was but natural that she should complain. To sum up; the Deputy Magistrate has awarded compensation either for a charge which though false was not frivolous, or he has awarded compensation for a charge which, though petty, was true, and not, I think, either frivolous or vexatious.

I have therefore the honor to recommend that the award of compensation should be set aside.

Judgment of the High Court.

Bayley, J.—We are with the Magistrate of opinion that the order for compensation in this case should be set aside.

We set it aside accordingly.

The 3rd June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Code of Criminal Procedure s. 434—*Power of High Court—Credibility of Witnesses.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Sylhet.*

Shaik Oodla and others

versus

Barkat and others.

Section 434 Code of Criminal Procedure gives the High Court no power to interfere in a case where the difference of opinion between the Magistrate and the Judge is as to the credibility of certain witnesses. The Magistrate's order may be an improper one, but it was passed upon legally sufficient evidence and cannot be termed illegal.

Glover, J.—THE Sessions Judge has referred the cases of these fifteen persons, who, being punished with a fine of 25 rupees or imprisonment in default, had no right of appeal, with a view to having the sentence passed against them by the Magistrate quashed under Section 434 of the Code of Criminal Procedure.

Now this section provides that the Court may, on finding any sentence illegal, or any proceedings irregular, interfere and quash such sentence or proceedings. But in this case, the difference between the Magistrate and the Sessions Judge is as to the credibility of certain witnesses. The Magistrate believes them; the Judge disbelieves them. There is no point of law involved. The Judge does not say that the conviction would be bad in law, even if the witnesses were believed, but that the witnesses were not to be believed.

Section 434 gives this Court no power to interfere in such cases. The Magistrate's order may be an improper one, but it was passed upon legally sufficient evidence and cannot be termed illegal.

The papers are returned.

The 3rd June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Weights and Measures—Fraudulently using false Instruments for weighing—Penal Code s. 264—*Evidence of Intention.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of East Burdwan.*

Government *v.* Kangalee Muduk and others.

Intention is an essential part of the offence of fraudulently using false instruments for weighing; and in the absence of any evidence of such intention in this case, the Court quashed the conviction and directed the return of the fines.

Kemp, J.—WE concur in the view taken by the Judge. We do not think that there is any evidence of an intention (an essential part of the offence) upon the part of the accused to fraudulently use false instruments for weighing. The scales used in markets in the mofussil are of the very rudest construction, and are seldom equally balanced. Such defects are generally visible to a purchaser, and the scales are made to balance by putting some substance, generally a piece of

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earth or a stone, into the lighter scale. In the absence of any evidence of an intention to use the scales fraudulently, we quash the conviction and direct the return of the fines.

The 4th June 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Abetment of Theft and Amendment of Charge—New Trial—Jurisdiction—Hurt—Extortion—Penal Code ss. 323, 327, *and* 384—*Code of Criminal Procedure ss.* 404 *and* 426.

Criminal Miscellaneous Cases Nos. 87 and 88 of 1872.

Tarinee Prosaud Banerjee and another, *Petitioners.*

Baboo Doorga Mohun Dass for the Petitioners.

The carrying off of certain buffaloes belonging to the complainant by order of the accused, and the retention of them in the custody of the latter's servant, were held to amount to an abetment of theft as defined in the Penal Code.

The objection that the Sessions Judge was not justified in amending the charge after the case had been decided, but that he should have, if he thought a further charge necessary, directed a new trial, was overruled as coming clearly within the purview of Section 426 Code of Criminal Procedure, there being no contention that the accused had been in any way prejudiced, or that the punishment awarded for the theft by the Joint Magistrate was more than could have been awarded for abetment of that offence.

Where a person scourged another with nettles in order to extract property from the sufferer, and the Magistrate tried the case as one of hurt (under Section 323 Penal Code) and extortion (Section 384), although the accused ought to have been charged under Section 327, and tried by the Court of Sessions, the High Court declined to interfere under Section 404 Code of Criminal Procedure, and direct a new trial, believing that substantial justice had been done in the case.

Glover, J.—THESE cases were called up under Section 404 Code of Criminal Procedure, on the petition of Tarinee Prosaud Banerjee.

The prisoner was convicted by the Joint Magistrate of Beerbhoom on the 27th January 1872 : (1) of abetment of theft under Sections 379 and 109 Penal Code, and (2) on the 31st January 1872 of committing hurt (Section 323), and extortion (Section 384).

The Sessions Judge, on the 26th February 1872, confirmed the Joint Magistrate's orders, merely altering the conviction of hurt to abetment of that offence (Sections 323 and 109).

Baboo Doorga Mohun Dass contends, with reference to the first case, that the evidence does not support a charge of abetment of theft. What has been proved, in the opinion of both Courts below, is that certain buffaloes belonging to the complainant were carried off by order of the accused, Tarinee Prosaud, and were retained in the custody of his servant.

This would undoubtedly be abetment of what is "theft," as defined in the Penal Code. In a very similar case, Queen *versus* Madaree chowkedar,* decided by three Judges, it was held that a third party taking away a cow from its owner without consent for the purpose of liquidating that owner's debt, was guilty of theft ; and it follows that the person ordering such taking would be guilty of abetment of theft. There seems to be no error of law in the Sessions Judge's proceedings that would warrant this Court's interference under Section 404 of the Procedure Code.

In the other case it is objected, *first*, that the Sessions Judge was not justisfied in amending the charge after the case had been decided. He should, if he thought a further charge necessary, have directed a new trial. And, *secondly*, that the evidence, if it proved anything at all, proved an offence coming under Section 327 of the Penal Code, an offence triable by the Court of Sessions and not by the Magistrate, and that the latter, therefore, had no jurisdiction.

The first objection seems to come clearly within the purview of Section 426 of the Procedure Code, which rules that no finding of a Court of competent jurisdiction shall be reversed or altered on revision on account of any error or defect in the charge, &c., unless the accused person has been awarded more punishment than could have been given for the offence of which he ought to have been found guilty, or unless the accused has been prejudiced. Now, it is not contended that he has been in any way prejudiced, and the punishment awarded for the theft by the Joint Magistrate is not more than could have been awarded for abetment of that offence. The accused had a fair trial, and no harm has been done him by the Magistrate's error.

With regard to the 2nd objection, it is argued that where a particular Section of the law provides for the offence committed, it is illegal to break up the offence, as it were, into two separate parts to which other Sections of the Code will apply, and so change the jurisdiction. That the offence which the Lower Courts held to be proved is torture, by

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* 3 W. R., Criminal Rulings, 2.

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means of stinging nettles, the effect of which was to extort property, *viz.*, Rs. 6 and a cow from the sufferer, which would properly come under Section 327 Penal Code, and that the Magistrate could not make it up of the two separate offences of causing hurt and extortion, the less so as Section 383 only contemplates the fear of injury, whereas in this case the injury, *viz.*, scourging with nettles, was completed.

There can be no doubt, we think, looking to the evidence and to the findings thereon, that the accused ought to have been charged under Section 327 Penal Code, and to have been tried by the Court of Session (*vide* Schedule C. Cr. P.). The question is, whether we ought to interfere under Section 404 of the Procedure Code, and direct a new trial. The objection was never taken in the Court below, and there is no question that the accused has had in every respect a fair trial. It is urged that he has been prejudiced, inasmuch as if the case had been tried by the Court of Sessions and the accused had been convicted, he would have had an appeal on the facts to this Court. No doubt this would have been so ; but are we to say that in our judgment the accused has been prejudiced by the mistake ? He has had two trials, the Appellate Court being presided over by a particularly careful and experienced Judge, and we ought not to assume that, in the event of this Judge committing the accused on trial at the Sessions, this Court would on appeal acquit him on the evidence. This Court has declined to interfere in similar cases, where, although there were technical errors in the proceedings, it was believed that substantial justice had been done. We have read the evidence in this case in order to assure ourselves of this fact, and we see no reason to discredit it.

We are of opinion that in neither of these cases is this Court's interference necessary, and we, therefore, reject both applications.

The 5th June 1872.

Present :

The Hon'ble F. A. Glover, *Judge.*

Marriage — Wife marrying second time (during Husband's Lifetime).

Committed by the Deputy Magistrate and tried by the Sessions Judge of Rajshahye on a charge of marrying a second time during the lifetime of her husband.

Queen

versus

Shookhoo Aurut, Appellant.

Where a woman was convicted of marrying a second time during her first husband's lifetime, the High Court, while thinking it not necessary to reduce the punishment passed by the Sessions Judge, observed that, taking the circumstances of the case into consideration, the extreme youth of the accused, and the influence she was no doubt subjected to, a nominal punishment would have sufficed.

I HAVE no doubt that the prisoner has been rightly convicted. The only possible defence was that her first husband had not been heard of for seven years, although search had been made for him. She altogether failed to prove this, and it seems clear from the evidence that Panchoo remained in his own village after his wife had left him to return to her father's house.

At the same time, taking all the circumstances of the case into consideration, the extreme youth of the accused, and the influence she was no doubt subjected to, I should have, had the case been tried by me, passed a nominal sentence only. I do not, however, think it necessary to shorten the term imposed by the Sessions Judge, *viz.*, six months.

The 6th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Fine (Commutation of, to Imprisonment)— Act XXIII of 1860, *s.* 3.

Reference to the High Court, under Section** 434 **of the Code of Criminal Procedure, by the Officiating Magistrate of Hooghly.

In re Sajjewan Mahatoo.

According to s. 3 Act XXIII of 1860, a fine of Rs. 180 cannot be commuted to imprisonment for a longer term than four months.

Glover, J.—BY Section 3 Act XXIII of 1860, a fine under 200 rupees is commutable to imprisonment for four months. The fine in this case was Rs. 180 ; therefore the term

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of imprisonment cannot be longer than four months. The Deputy Magistrate's order is modified accordingly.

The 6th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Acquittal—Discharge—Second Trial.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Sylhet.

Ramjoy Surmah and others,

versus

Mirza Ali.

Baboo Jugdanund Mookerjee, Junior Government Pleader, for Prosecution.

The order for the release of the the accused as *nirdosh* (guiltless) was held to be an acquittal, and not a discharge, and therefore to have exempted them from a second trial for the same offence.

Glover, J.—After hearing the Junior Government Pleader in support of the Magistrate's order, we agree with the Sessions Judge in thinking that the accused were acquitted by the Deputy Magistrate, and not merely discharged. No doubt that officer refers to Section 250 of the Criminal Procedure Code, but it seems clear that he did so under a mistake, for he had previously taken the defence of the accused, and had examined witnesses in support of it.

After doing so, he recorded an opinion that the accused were to be released as "nirdosh," in other words, "guiltless."

It appears to us that this was a full acquittal after hearing evidence on both sides, and not a simple discharge under Section 250.

And this being so, the accused ought not to have been put upon their trial a second time for the same offence. The Magistrate's order, directing such trial to be held, is therefore set aside.

The 7th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mischief—Taking Complainant's Crop.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Tipperah.

Mahomed Foyaz,

versus

Khan Mahomed.

A conviction for mischief was quashed in a case where it appeared that the complainant had formerly destroyed a crop belonging to the accused, and the latter, instead of complaining at once, merely bided his time and then took the complainant's crop.

Reference.—The Deputy Magistrate, Baboo Kalee Prosad Sein, has convicted Khan Mahomed of mischief, and sentenced him to pay a fine of Rs. 2.

The mischief which is referred to was the taking, as complainant alleged, dishonestly, a crop of linseed, the right to which was disputed.

The Deputy Magistrate explains that the complainant had formerly destroyed a crop of the accused's, and that the latter, instead of complaining at once, merely bided his time and then took the complainant's linseed crop.

It is the essence of the offence of mischief that the perpetrator must cause "the destruction of property or such change in it or in its situation, as destroys or diminishes its value or utility or affects it injuriously." To cut a crop that is grown to be cut is not to destroy it or affect it in the manner defined above. The taking may cause wrongful loss to the grower, and if it be dishonest a conviction may be had for the theft. But it cannot be mischief.

If I believed a conviction for theft would be just, I might hesitate to refer this case; but, from the Deputy Magistrate's own explanation, it is evident that there is a dispute as to the title to the land, and that the accused had reason for believing that he was justified in acting as he is said to have done.

Judgment of the High Court.

Kemp, J.—We think the Officiating Magistrate has taken a correct view of this case. The conviction is quashed, and the fine, if paid, must be refunded.

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The 3rd June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice* and the Hon'ble W. Ainslie, *Judge.*

Code of Criminal Procedure ss. 288 *and* 318—*Recognizances (by Manager as well as Proprietor of Indigo Factory)—Evidence under s.* 288 *(Statements of both parties)—Order (under both Sections)—"Actual possession" in s.* 318 *(meaning of).*

Miscellaneous Criminal Cases Nos. 50 and 51 of 1872.

J. D. Sutherland and another, *Petitioners,*

versus

L. Crowdy, *Opposite Party.*

Mr. G. C. Paul (Advocate-General) and Mr. Walter Sutherland for the Petitioners.

Mr. J. T. Woodroffe for the Opposite Party.

Where the manager of an indigo factory is obliged to enter into recognizances to keep the peace under s. 288 Code of Criminal Procedure, there is no reason, nor has the Magistrate any authority, to extend the order to the proprietor of the factory also.

The statements made by both the contending parties before the Magistrate must be regarded as evidence upon which the Magistrate may act under the said Section, if he thinks it sufficient, without taking further evidence upon the subject.

There is no reason why the Magistrate, if he is satisfied that the circumstances require it, should not make an order under s. 318 as well as under s. 288.

By actual possession is meant, not possession by putting up a tent upon the land, nor merely bodily possession, but the possession of a master by his servant, or the possession of a landlord by his immediate tenant, *i. e.* the person who pays rent to him (not, as in this case, the possession of a superior landlord to whom the occupier of the land did not pay his rent), or the possession of the person who has the property in the land by the usufructuary.

Couch, C. J.—In the first of these cases an application was made to the Court to set aside an order which had been made by the Magistrate of Monghyr under Section 288 of the Code of Criminal Procedure. The order was dated the 6th of February 1872, and ordered the applicants Hurda Narain and Sutherland to enter into recognizances to keep the peace for six months.

It appeared that Sutherland was the manager for Hurda Narain, and it was objected that there was no reason for Hurda Narain being compelled to enter into recognizances. Certainly, there does not seem to be any reason that the order should extend to him, and we may say at once that as regards him it is one which the Magistrate was not authorized to make; and that portion of it must be set aside.

We have then to consider the order as it applies to Sutherland. It was objected by the Advocate-General, who appeared for him, that no evidence was taken by the Magistrate, and that consequently the order was not authorized by the Code of Criminal Procedure, and ought to be set aside.

Now, the order is stated by the Magistrate to be founded upon the statements which were made before him by Sutherland, the petitioner, and by Crowdy, the opposite party, both of whom had been summoned to appear before him. These statements must be regarded as evidence upon which the Magistrate might act if he thought it sufficient. They were admissions, I will not call them confessions, but admissions made by the parties who had been summoned to appear; and if upon their own statements there appeared to be sufficient grounds for the order being made, it would be superfluous for the Magistrate to take further evidence upon that subject.

The Magistrate states that his order was founded upon these statements. He says:—"It appears to me on review that the position of affairs between the parties is distinctly such as (in the words of Section 282) would probably occasion a 'breach of the peace.' Mr. Crowdy has not furnished any evidence in support of his account of the matter (a point dwelt upon by the pleader for the other side); but this want is supplied by the admission of Mr. Sutherland, for he declares that he must have the land on which Crowdy's tent is pitched. Instead of having recourse to law to settle the dispute, both parties are face to face on the ground; and after the statement made by Sutherland, he can hardly now plead that on his pressing his claims, Crowdy will be likely to yield without recourse to force."

It is not for us, as we often have to state in cases of this kind, to consider whether the Magistrate was right or not in being satisfied with this evidence. The only question is, was there before him evidence upon which he might be satisfied? We think that there was. If he came to the conclusion, upon the parties being summoned before him and making their statements, that it was necessary for the preservation of the peace to take a bond from them, he had full authority to do so, and there is nothing which would authorize or justify this Court in setting aside that order. So that, with regard to Sutherland, the order of the Magistrate will remain in force.

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The second of these cases is also an application on behalf of Sutherland to set aside an order of the same Magistrate, dated the 15th of February, and made under Section 318 of the Criminal Procedure Code; and it was objected by the Advocate-General first, that it was improper that an order should be made under this Section as well as an order under Section 288.

With regard to this objection, I see no reason that, if the Magistrate is satisfied that the circumstances require it, he should not make an order under both Sections. There may be cases in which it would be necessary to do so. In this case, if the Magistrate thought that the circumstances required it, he was justified in doing it.

But the principal question which was discussed was, whether the decision of the Magistrate that the possession of one of the plots, namely, the plot marked C on the plan, the principal one in dispute, was to remain with Crowdy, was one which could in point of law be supported, or whether the facts were not such that the Magistrate had exceeded his power, or made an error for which this Court ought to set aside his order?

Now, the circumstances with regard to the land, the possession of which is in dispute, and which dispute was considered by the Magistrate to be likely to lead to a breach of the peace, are stated in his finding, which we must take to be correct, and which appears to be supported by the evidence before him. The principal plot of land, *C*, is said to have been up to the present time, or, rather, when this matter was before the Magistrate, cultivated by Poocha Roy, an Islampore ryot, whose evidence was taken in the case, and he stated that "the land where Crowdy's tent is now standing is mine. It is three *bigahs* in four plots;" and after giving the boundaries, he said, "I have had this land from my father's time, 25 years ago. I pay rent since 1274 to Ram Churn Bhuggut and Jolab Bhuggut, Kutkinadars of Islampore. Before 1274 I paid to Munjhoul Kotee;" and then he gave other particulars as to his getting receipts for the rent, which are not material. The other plots, *A* and *B*, appear by the evidence to have been taken possession of by Crowdy shortly before the matter came before the Magistrate for decision, under sub-leases from ryots of Kumalpore, the sub-lease of *A* being made on the 27th of January, and the sub-lease of *B* on the 29th of January. The Magistrate has found, and I think correctly, that the mere putting up a tent by Crowdy on the land, which was what he was shown to have done, was not a possession within Section 318: he says that the possession must be substantial and practical; but then he holds, upon the evidence, that, as to *A* and *B*, Crowdy was in possession, having obtained the sub-leases from the ryots and having taken possession under them, although a very short time before the matter came before him for decision.

With regard to the plot *C*, which is, as I understand, the piece of land really in dispute between the parties, the Magistrate says that he accepts the account which was given by Poocha Roy as being the correct facts of the case, and upon that he considered that Crowdy was in possession; and made an order that he should be retained in it.

Now, there appear to have been several decisions of this Court which it is necessary to notice. In the 5th Weekly Reporter, page 14, Criminal Rulings, a question of this kind came before a Court composed of three Judges, and Mr. Justice Phear said (Mr. Justice Glover having previously given his judgment): "Had it not been for the strongly expressed opinion of Mr. Justice Glover, I certainly should have been disposed to think that the possession of land, &c., contemplated in Section 318 of the Criminal Procedure Code was (as the Section itself expresses it) 'actual' possession, and not constructive possession by the receipt of rents. It seems to me that the breach of the peace intended to be anticipated is something in the way of a personal struggle for the actual enjoyment of the immoveable property described, and had I been unassisted I should have considered that the primary sense of the words employed supported that view and no other." But the learned Judge, in the following paragraph, says, that whatever might be the conclusion to which further and mature consideration might lead him on this point, he thinks the Magistrate had no jurisdiction to enquire into the matter of possession at all unless he was first satisfied that a breach of the peace was actually likely to occur in reference thereto: and the case was decided upon that point. This opinion that the Section must mean actual possession and not constructive possession, was therefore not necessary for the decision of the case, and it appears to me, from the learned Judge's own words, to have been one which he thought might be altered by further and mature consideration. It was also opposed to the opinion of Mr. Justice Glover in the same case.

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Now, when we look at the terms of Section 318, it appears that actual possession there was not so much intended to mean manual possession, or, as Mr. Justice Phear seems to consider, as excluding a possession by the receipt of rent, but rather seems to have been used as distinguished from the right of possession. The Magistrate is to see who is the party in actual possession of the subject in dispute as distinguished from the person in whom the property or the right to recover possession may be.

The question is, what is to be considered as meant in this Section by possession? I think that it cannot mean only actual or bodily possession. There may be cases in which a person would properly be said to be in possession, although there was no bodily possession by him. There is the case of a servant being in possession, and it may be said that when the servant is in possession it is the possession of the master. So also, if an occupier is paying rent, that is the possession of the landlord to whom he pays the rent. For some purposes, the occupier has a possession; he has a possession which would enable him to bring a suit against a person who wrongfully disturbed him in his occupation; but, still, his possession is the possession of him by whose permission, either given by a lease or any other mode of letting, he holds the land and to whom he pays the rent.

And this view of what is meant by possession and the construction to be put upon it in this Section, is supported by a passage in Domat's Civil Law where possession is treated of; it is in Section 2122, and there, after quoting several authorities from the Institutes, the author says, "From all which it is necessary to conclude that the true possession is, properly speaking, only that of the master; and that, although others besides the master may have a right to detain the thing, such as the tenant, the farmer, the usufructuary, who having a right to enjoy ought by consequence to have the detention of the thing; which in them is only a borrowed possession, or rather the master's own possession who possesses through them, because the right of possession cannot be separated from the property." Here are three classes—the tenant, the farmer, and the usufructuary. Although they have what the author calls a borrowed possession, it is rather the possession of the master than their own; and it appears to me that the proper construction of this Section is, that by actual possession is meant the possession of a master by his servant, the possession of a landlord by his immediate tenant, the person who pays rents to him, the possession of the person who has the property in the land by the usufructuary. These cases appear to me to come fairly within the meaning of the word possession in this Section; and, with every respect to the opinion of Mr. Justice Phear, it appears to me that this is the construction which should be put upon it rather than to limit it to cases of bodily possession.

Then to apply it to the present case, Mr. Crowdy was not in that possession: according to the evidence on which the Magistrate founded his decision, the immediate landlords of Poocha Roy, the persons to whom he paid the rent, were the two persons whom he named. Crowdy appears to have been a superior landlord to them, but that would not come within the meaning of the Section, and Crowdy could not be considered to be in possession of this land by reason of the possession of Poocha Roy, the occupier: nor was he in possession, as the Magistrate has properly found, by reason of his having put up the tent upon the land. I think the Magistrate was wrong in point of law in deciding that Crowdy was in possession and ordering him to be retained in it.

But another objection was taken, namely, that there had not been such a proceeding recorded stating the grounds upon which the Magistrate was satisfied that there was a dispute likely to induce a breach of the peace as would render his proceedings legal. That a compliance with the provisions of Section 318 is requisite, and that an omission on the part of the Magistrate to record a proceeding such as is required by that Section renders the proceedings illegal, was decided in IV Weekly Reporter page 26. On this point we have in the same case in the 5th Weekly Reporter the judgment of Mr. Justice Phear. After the passage which I before quoted in which he states that he thought the Magistrate had no jurisdiction to enquire into the matter of possession at all, unless he was first satisfied that a breach of the peace was actually likely to occur in reference thereto, he says, "It necessarily follows that he must adjudicate definitely upon this point, and the Legislature also adds that he must record his reasons for being so satisfied. In this case he does not appear to have done either of these things."

In another case in the IX Weekly Reporter, page 64, Criminal Rulings, the same learned Judge says:—"I take the opportunity of

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adding that even if there had been a proceeding in this case, and assuming that it was confined to the statement by the Magistrate that he had been directed by the Judge to hold the investigation, it would not be sufficient to satisfy the requirements of Section 318, for it is necessary that the Magistrate himself should enquire into the likelihood of a breach of the peace happening, and should come to a judicial decision upon it. It is that judicial decision which is the foundation of the subsequent investigation, and without it the investigation is void and inoperative." The words of the Section being that, when the Magistrate shall be satisfied that a dispute likely to induce a breach of the peace exists, he shall record a proceeding stating the grounds of his being so satisfied, the learned Judge says, in the first case, that the Magistrate must adjudicate upon the matter, and then he seems to have gone a step further and speaks of a judicial decision whence it has been inferred that the Magistrate must take evidence and proceed in the same way as in an ordinary judicial enquiry.

Now, I must say that I am unable to agree in this view of the requirements of Section 318. All that it requires, in my opinion, is that the Magistrate is to be satisfied that a dispute exists, and he is to record the grounds of his being so satisfied. There is nothing which defines upon what grounds he shall be satisfied or limits him to being satisfied by evidence taken before him. It is properly provided that he shall state the grounds of his being satisfied in order that the revising Court may be able to see that he has not arbitrarily instituted proceedings of this kind. But that is all that is required; and in this case the Magistrate has stated that the ground of his proceeding was the office memorandum which had been previously recorded and which is in these terms:—"Whereas in the case of Government, first party, and Baboo Hurda Narain and Mr. Sutherland, second party, and Mr. Crowdy, third party, recognizances and security have been taken under Section 282 Act XXV of 1861, by reason of there being a probability of a breach of the peace, and in those proceedings it became apparent that a likelihood of a breach of the peace arises from this cause, that within the boundaries of the land which Mr. Sutherland alleges that he holds under a mocurruree lease from Hurda Narain, as a part of mouzah Kumalpore, there are three plots as described below which Mr. Crowdy states to be held by himself of Pasee Mahra. Since it is evident that if an enquiry as to these lands be held under Section 318, the danger of a dispute may be avoided; and as there is a fear that notwithstanding the taking of recognizances and security from each party, yet, on account of the quarrel, an affray may occur: therefore by this proceeding an enquiry under Section 318 is originated and notice is to be served on Mr. Crowdy of the Majhale factory and Baboo Hurda Narain and Mr. Sutherland, his manager, calling upon them to appear on the 15th February 1872 at Begoo Serai, in person or by Mookhtear, with their proofs, and to file written statements respecting the property in dispute."

There is here a formal statement by the Magistrate of the grounds upon which he was satisfied that a breach of the peace was likely to be committed, and I do not think any one would say that he was not justified in coming to that conclusion. The facts were such as might fairly lead him to think that a breach of the peace was likely to ensue; and being so satisfied, and having, recorded the grounds thereof, he had jurisdiction to proceed in the matter. That objection to his proceedings therefore, in my opinion, fails. The grounds upon which it was sought to set aside this order, as regards the whole of it, fail; but for the reason that the Magistrate has taken upon himself erroneously to find that Crowdy was in possession, the order, so far as it relates to the piece of land *C*, must be set aside.

As to costs, we think that each party should pay his own.

The 8th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Trespass—Duty of Magistrate.

Criminal Miscellaneous Case No. 119 of 1872.

Gungaram Malee, *Petitioner.*

Baboo Obhoy Churn Bose for the Petitioner.

A charge of trespass involves an offence under the Penal Code which a Magistrate is bound to enquire into by taking evidence and deciding the case according to law.

Kemp, J.—THIS is an application on the part of Gungaram Malee. The petitioner presented a petition to the Cantonment

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Magistrate of Barrackpore stating that the defendants had committed trespass on the garden of his master, Rajah Komul Kishen Bahadoor. Upon this the Magistrate, after apparently taking the deposition of Gungaram, recorded an order that he would go to the spot and then pass proper orders. The order ultimately passed by the Cantonment Magistrate was "that he had seen the spot; that the case had been exaggerated; that the Rajah's people were in the wrong; that they had dug a large portion of the bank formed in the Khurda khal for the purpose of making bricks, and have done damage to the *khal*; that the Rajah's right was disputed, and that the case was under enquiry; that the Rajah's people should not have again tried to take possession of the *khal*; that this was no case for a Criminal Court, and it was therefore dismissed." It does not appear to us that the complaint made by the Malee has reference to the *khal*, the complaint is that the defendants trespassed on his master's garden, and his petition and deposition make out a *primâ facie* case, into which the Magistrate was bound to enquire. The act complained of amounts to an offence under the Penal Code, and therefore it was the duty of the Magistrate to proceed independent of the fact of any dispute with reference to the *khal* being pending in any other Court. The charge as laid is one of trespass; it involves an offence under the Penal Code, and the Magistrate was, we think, bound to enquire into the charge, to take evidence, and after taking evidence to decide the case according to law. We therefore direct him to take up the case and to decide it.

The 11th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

False Evidence—Jurisdiction—Power of Commitment—Appellate Court—Evidence—Benefit of Doubt to Prisoner.

The Queen *versus* Ramlochun Singh and another, *Appellants.*

Committed by the Magistrate and tried by the Sessions Judge of Tirhoot on a charge of intentionally giving false evidence in a judicial proceeding.

Baboo Nilmadhub Bose for Appellants.

The Magistrate before whom the offence of intentionally giving false evidence in a judicial proceeding is committed, may himself try and commit the persons so offending.

Per Glover, J.—It is a mistaken view of the law to suppose that prisoners in appeal ought to have the benefit of any doubt with reference to any portion of the evidence. The doubt shown must be of the strongest kind before the Appellate Court should be justified in interfering.

Kemp, J.—In this case the prisoners have been convicted of intentionally giving false evidence in a judicial proceeding, and have been sentenced under Section 193 of the Indian Penal Code to two years' rigorous imprisonment. A pleader has been heard for the appellants, and he urged that the Magistrate before whom the offence was committed ought not to have himself tried and committed the prisoners, but that he ought to have sent the case to another Magistrate to dispose of it. This question has already been decided by a Full Bench in a case in which the Magistrate who was also the Registrar of Deeds proceeded against an officer attached to that Department, and it was held by the Full Bench that there was nothing in the law which prevented the Magistrate from proceeding against and committing the prisoner if necessary, notwithstanding that he was himself the Registrar.

The next objection is that in this case the evidence of Mr. May has not been corroborated, and, therefore, under the Full Bench Ruling, to be found in Vol. V, Weekly Reporter, page 23, the evidence of one witness uncorroborated is not legally sufficient for a conviction of perjury. In that case the late Chief Justice Sir Barnes Peacock observes "that the oath of one man is not sufficient to "convict another of perjury when he has "sworn to the contrary, and that you are "not to take the evidence which by an "accident is the more credible, for the purpose of convicting of perjury, but you must "bring something corroborative, or something "more than the evidence of one witness." Now the evidence given by Mr. May in this case is evidence which the pleader has not ventured to attack, and which we see no reason to discredit; further, we think that this evidence has been sufficiently corroborated by the evidence of Seetul Pershad, the Moonshee of the Hatee Factory, who states that he was at the factory during the whole of the day of the 1st of November, which corresponds with the 4th of Kartick, with the exception of the time occupied for his dinner, or about three guntas in the middle of the day. Now the prisoners say that they saw Mr. May on that day talking with the jemadar Shurup Narain on the road east of the bungalow; that the saheb abused the jemadar, and the latter remonstrated with the saheb, and the saheb dismissed him. Then

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we have the evidence of Seetul Pershad that he was with the saheb the whole day; that the saheb had no conversation with the jemadar on the road east of the bungalow; that the jemadar Shurup Narain was not present at the factory on that day, and was not to be found, although searched for, under the instructions of Mr. Hamilton, to render his accounts. The witness Seetul Pershad was at the factory the whole day except for a short time in the middle of the day, and the conversation between Mr. May and the jemadar, deposed to by the prisoners before the Magistrate occurred in the morning, and we think, therefore, that the evidence of Mr. May has been sufficiently corroborated.

The pleader for the prisoners has asked us to consider the question whether the sentence of two years passed upon them is not too severe, and he has drawn our attention to the fact that the substantive prisoner in the case in which the present prisoners have committed perjury was only sentenced to one year's imprisonment. We think under the circumstances of the case that the sentence is too severe. We, therefore, amend the sentence and reduce it to one year's rigorous imprisonment.

Glover, J.—I concur; but I wish to add one word with reference to what has fallen from the prisoner's pleader on the subject of this Court's power to interfere. It has been argued that if it can be shown that there is any doubt with reference to any portion of the evidence or as to any one single fact proved by that evidence the prisoner in appeal ought to have the benefit of it. I think that this is a mistaken view of the law; it is all very well to say that in the Court of first instance, where the Judge and the assessors have an opportunity of hearing the witnesses and of supplementing any defect in their evidence by examination and cross-examination, that any reasonable doubt in their minds should be given in favor of the accused, but when a case comes up to this Court in appeal it is for the appellant to show distinctly that the Lower Court was wrong in its decision. The presumption is that the Lower Court's decision is correct, and advantage cannot be taken of any trifling discrepancies or of any trifling improbabilities to have the decision come to by the Lower Court reversed. The doubt shown must be of the strongest kind before this Court, in my opinion, would be justified in interfering.

The 15th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hearsay Evidence—Error.

Miscellaneous Criminal Case No. 111 of 1872.

Kedar Nath Bose, *Petitioner.*

Mr. C. Gregory for the Petitioner.

The Deputy Magistrate (under the impression that the answer would be hearsay evidence) objected to the petitioner's vakeel asking a witness as to what was the first statement made by prosecutor to him immediately after the alleged occurrence. His decision with regard to petitioner was set aside, and the case sent back for a fresh decision.

Kemp, J.—THE petitioner, amongst other grounds, objects to the proceedings of the Deputy Magistrate in not permitting the petitioner's vakeel to examine a witness, namely, Nilkanth Roy, as to what was the first statement made by the prosecutrix to him immediately after the alleged occurrence. We sent for the papers of the case, and we find that Kedar Nath Bose presented a petition to the Deputy Magistrate, praying the Deputy Magistrate to examine Nil Kanth Roy with reference to the question which the petitioner's pleader wished to put to that witness. On this, the Deputy Magistrate admits that the petitioner's pleader wished to question Nilkant Roy as to what statement the prosecutrix made to him immediately after the occurrence, but that he, the Deputy Magistrate, objected to the question as he thought the answer would be hearsay evidence. This, of course, is clearly wrong, and we therefore think that the case must go back to the Deputy Magistrate with reference to Kedar Nath Bose alone. The Deputy Magistrate's decision with reference to Kedar Nath Bose is set aside. Kedar Nath Bose will be admitted to bail in the sum of Rs. 50, and the Deputy Magistrate will permit Kedar Nath Bose's pleader to examine the witness Nilkanth Roy, who must be recalled, and, after the witness has been examined, the Deputy Magistrate will pass a fresh decision in the case of Kedar Nath Bose.

Glover, J.—The accused was perfectly justified in asking the question of Nilkanth Roy, and the Deputy Magistrate was wrong in refusing to allow the question to be put. The answer might have a very great effect on the Deputy Magistrate's mind as to the guilt of Kedar, the petitioner before us. I concur in the order made by Mr. Justice Kemp.

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The 17th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Criminal Miscellaneous.

Extortion—Penal Code s. 384—Obtaining Money under threat of loss of Appointment.

Case No. 91 of 1872.

Meer Abbas Ali, *Petitioner,*

versus

Omed Ali, *Opposite Party.*

Messrs. W. Jackson and W. W. Linton for the Petitioner.

The making use of real or supposed influence to obtain money from a person against his will under threat, in case of refusal, of loss of appointment, is extortion within the meaning of Section 384 of the Penal Code.

Glover, J.—THIS is an application, under Section 434 Code of Criminal Procedure, to set aside an order of the Magistrate of Dacca convicting the petitioner, Abbas Ali, of extortion under Section 384 Penal Code, and of the Sessions Judge of Backergunge confirming the sentence on appeal.

The only point we have to consider is, whether the taking of the money by Abbas Ali amounts to the offence of extortion. Abbas Ali admits receipt of the money, 2 rupees, but alleges that it was paid to him willingly as a contribution to the expenses of the deceased wife's "Fattia."

Mr. Jackson, for the petitioner, contends that there is no evidence as to the money being paid as a direct consequence of a threat of injury, and none that Abbas Ali had any power to do an injury to the person paying the money. The threat must have been of such a nature that a reasonable man would have been influenced by it, and not of that vague and general nature deposed to by the witnesses.

Mr. Jackson also contends that the offence committed by the petitioner, if any, comes under Section 163 of the Penal Code and not under Section 384.

We have paid every attention to the arguments of the learned Counsel who has appeared for the petitioner, but we are not convinced by them. Extortion is defined to be the intentionally putting any person in fear of "injury and thereby dishonestly inducing "that person to deliver up any property." The word "injury" includes (Section 44) injury to property.

Now there is direct evidence on the record that Omed Ali gave the 2 rupees to Abbas Ali from fear that, if he did not give them, he, Omed Ali, would lose his situation as peadah on the Small Cause Court Judge's establishment. The learned Counsel adverts to one part of this witness's deposition to show that he paid the money of his own accord; but we do not find any words that would convey such a meaning. On the contrary, the words used are "I gave it from fear, not of my own free will;" but even if there were words expressive of having given the money without being actually forced to do so, that would not avail the accused, for the gist of Omed Ali's evidence throughout is that he paid the money most unwillingly and that he only did so to avoid worse consequences. He swears distinctly to Abbas Ali's threatening to turn him out of his peadahship if he did not pay the money; and he deposes to cases in which those had suffered who had opposed Abbas Ali and refused to pay him. It appears to us that this was sufficient evidence, if believed, to prove that the 2 rupees were "extorted;" they were paid unwillingly from fear that, if they were not paid, the witness would suffer injury, in other words lose his appointment, and there is ample evidence to show that Abbas Ali had very great influence in such matters.

We also think it clear from the record that any one might reasonably have considered a threat coming from Abbas Ali as a thing not to be trifled with. We do not consider it necessary to go into detail on this point, or to comment upon the apparently anomalous position of Abbas Ali in the Small Cause Court Judge's household: but there is direct evidence to the fact, that a bad word from Abbas was ordinarily followed by ruin to those against whom he interested himself, and more than one instance is proved of direct and immediate injury resulting from Abbas Ali's influence.

After going through the record, we feel no doubt that Abbas Ali was a man both disliked and feared by the Small Cause Court Judge's establishment, and that he made use of his real or supposed influence to induce members of that establishment to give him money, threatening, in case of refusal, the loss of their situations. We think there was legal evidence of the offence of extortion, and that there is no ground for this Court's interference under Section 434 Code of Criminal Procedure.

The application is therefore rejected.

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Kemp, J.—I am of the same opinion. It appears to me, on the evidence, clear that the consent of Omed Ali was wrongfully obtained, and that Abbas Ali, the accused, did, by intentional intimidation by threats, cause a dishonest transfer of property from Omed Ali to himself.

The 25th June 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, F. B. Kemp, Louis S. Jackson, W. Markby, and W. Ainslie, *Judges.*

Procedure—Complaint—Code of Criminal Procedure s. 66.

References to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Hooghly.*

1. Bhugobut Churn Sein *vs.* Siam Ali.
2. Ram Chunder Ghattak, *Petitioner.*
3. Haroo and another, *Petitioners.*

On receipt of a complaint, the Magistrate of a District is not bound, under Section 66 Code of Criminal Procedure, to examine the complainant before referring the complaint to a Subordinate Magistrate. The examination of the complainant by the Magistrate to whom the case is referred is sufficient for the regularity of the proceedings.

Remarks by the Judges of the First Bench in the case of Haroo and another in referring the same to the Full Bench on the 23*rd April* 1872.

The Chief Justice.—THE Officiating Sessions Judge of Hooghly has sent up the proceedings of the Magistrate in the case noted in the margin, in order that the fine of Rs. 10 imposed on the petitioners may be remitted, and the conviction quashed. The only alleged irregularity in the proceedings has been the omission by the Magistrate of the District to examine the complainants under Section 66 of the Criminal Procedure Code before transferring the complaint for trial to a Subordinate Magistrate.

Haroo and another, Petitioners.

This irregularity was held fatal to the validity of the whole proceedings in certain cases cited by the Judge, the principal of which is that of Grish Chunder Ghose,* (16 W. R., Cr., 40), in which Mr. Justice Glover delivered judgment as follows:—"In the first place he (the "District Magistrate) did not record the "complainant's statement, as he was bound to "do under Section 66 of the Code. There "is an order on the back of the petition "making over the case, but no examination "of the complainant reduced into writing "and signed by the complainant and the "Magistrate." In the cases of Dulali Bewa *vs.* Bhoowan Shah (3 B. L. R., Cr., 53) and of Bhugoban Chunder Poddar *vs.* Mohun Chunder Chuckerbutty (12 W. R., Cr., 49), it has been decided that "such a "departure from the rules of procedure "makes the acts of a Magistrate illegal."

* Kemp and Glover, JJ.

This case was followed in that of Omesh Chunder Pal, 30th September 1871,† one of the Judges (Ainslie, J.) dissenting (8 B. L. R., 19).

† Kemp, Officiating C. J.; Ainslie, J.

On the other hand it was held, in the case of The Queen *vs.* Omesh Chunder Chowdhry‡ (14 W. R., Cr., 1), that a transfer of a complaint by the Magistrate of a District to a Deputy Magistrate exercising full powers, without previously recording any examination of the complainant, was warranted under Section 66 of the Criminal Procedure Code.

‡ Kemp and E. Jackson, JJ.

The first case cited by Mr. Justice Glover does not bear materially upon the question before us. In the case of Mohun Chunder Chuckerbutty,§ (12 W. R., Cr., 49) Mr. Justice Kemp decided that, as a matter of fact, the Magistrate had no complaint before him, and Mr. Justice Markby concurred in this finding. It may possibly be gathered from the judgments that the learned Judges were inclined to hold that the omission by the District Magistrate to record a complainant's examination, as required by Section 66, would invalidate all subsequent proceedings by a Subordinate Magistrate to whom the complaint might be transferred; but this was not the point on which the judgments turned, so that it seems that there is really no authority, except that of the case of Grish Chunder Ghose, for holding the examination of the complainant before transfer of the complaint absolutely essential.

§ Kemp and Markby, JJ.

Section 273 of the Criminal Procedure Code, under which District Magistrates are empowered to refer complaints to Magistrates subordinate to them, in no way defines the stage at which the transfer may be made; and Section 275 makes all rules prescribed for the guidance of the Magistrate of the District applicable to proceedings by the Subordinate Magistrate.

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This Court, in Circular No. 6, dated 16th May 1864, paragraph 2, held that "a Magistrate may at once make over the complaint "to be enquired into and tried by any Magistrate subordinate to him." Such Subordinate Magistrate should, in this latter case, proceed in the manner laid down by Sections 66 and 67 Code of Criminal Procedure.

The question for reference to the Full Bench is "whether, on receipt of a complaint, the Magistrate of a District is bound, under Section 66 of the Criminal Procedure Code, to examine the complainant before referring the complaint to a Subordinate Magistrate."

Order of the Judges of the First Bench, referring the following cases to the Full Bench on the 23rd April 1872 :—

This case and the cases numbered 85 and 101 of 1871 will be referred to the Full Bench for decision of the point stated by the Sessions Judge in his letter of the 6th of January last.

Letter No. 85, dated the 12th August 1871, from G. Bright, Esq., Sessions Judge of Hooghly, to the Registrar of the High Court, Appellate Jurisdiction.

Bhogobut Churn Sein *vs.* Siam Ali.

SIR,—I have the honor to forward the case as per margin for the orders of the High Court under Section 434 of the Code of Criminal Procedure, as I think that the order of the Deputy Magistrate ought to be quashed.

Petitioner instituted proceedings against the accused, charging him with matters triable under Chapter XIV of the Code of Criminal Procedure. The Magistrate to whom the petition was presented made over the case to Mr. Godfrey, but without recording the statement of the complainant, as required by Section 66. Mr. Godfrey ordered the police to make an enquiry, and they reported in form D., that is, that the charge was false. Mr. Godfrey therefore dismissed the case.

Queen *vs.* Grish Chunder Ghose and others, dated 7th August 1871 (16 W. R., Cr., 49).

Under the High Court Rulings (7 W. R., 47, and 2 W. R., 47), Mr. Godfrey must be said to have acted illegally in dismissing the case without taking the evidence of the witnesses for the prosecution, whose names were entered in the original petition; and under the High Court Ruling as per margin, the Magistrate acted illegally in not recording the statement of complainant when the petition was first presented. As under these circumstances the whole proceedings appear to be illegal *ab initio*, they should, I think, be set aside, and the Magistrate and the Deputy Magistrate be directed to proceed in accordance with the law.

The case does not seem to require any explanation from the Lower Court.

Letter No. 101, dated the 16th September 1871, from G. Bright, Esq., Sessions Judge of Hooghly, to the Registrar of the High Court, Appellate Jurisdiction.

Ram Chunder Ghattak, Petitioner.

SIR,—I have the honor to forward the case as per margin under Section 434 of the Code of Criminal Procedure for the orders of the High Court, as it appears that the proceedings are illegal.

A complaint was preferred before the Magistrate, charging the accused with theft and unlawful assembly. The Magistrate, without recording the complaint under Section 66 of the Code of Criminal Procedure, made over the case for trial to a Subordinate Magistrate, by whom the complaint was recorded. Under the recent ruling of the High Court as per margin, such procedure was illegal; and I must therefore submit the case with a recommendation that the conviction should be set aside.

Golap Rar *vs.* Roushun Ali, &c., 7th August 1871.

Letter No. 2, dated the 6th January 1872, from H. T. Prinsep, Esq., Officiating Sessions Judge of Hooghly, to the Registrar of the High Court, Appellate Jurisdiction.

Haroo and another, Petitioners.

SIR,—I have the honor to forward the record of the case as per margin to be laid before the High Court.

The prisoners have been convicted of using criminal force, and have been sentenced to fine of Rs. 10, or in default to three weeks' rigorous imprisonment.

The illegality on account of which I have been called upon to make this reference consists in the omission of any preliminary examination of the complainant under Section 66 Code of Criminal Procedure. In all other respects, and in all proceedings held in the presence of the accused, the procedure enjoined by the Code has been observed.

The rulings on this point have not been uniform. In the case of Mohun Chunder Chuckerbutty (14 W. R., 49), it was held (Kemp and Markby, JJ.) that, because no preliminary examination of the complainant had been recorded before the case was

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referred to a Deputy Magistrate under Section 273, the entire proceedings were without jurisdiction and null and void; and further that Sections 426 and 439 would not apply. This precedent has been followed in two unreported cases coming from this Court: Rowshun Ali, 7th August 1871, present Kemp and Glover, JJ.; Omesh Chunder Pal, 30th September 1871, present Kemp, Officiating C.J., Ainslie, J., *dissenting*.

On the other hand I find that, in the case of Omesh Chunder Chowdhry (14 W. R., Cr., 1), where, instead of recording the preliminary examination of the complainant, the Magistrate sent the petition to the Deputy Magistrate for enquiry and trial, the High Court (Kemp and E. Jackson, JJ.) refused to interfere, and quoted the Court's Circular No. 6, dated 16th May 1864.

The importance of a conclusive decision on this point will, I trust, be considered a sufficient excuse for my soliciting that this reference be laid before a Full Bench of the Court, especially as it will be found that the principle laid down in the case last quoted is that which appears to have been enunciated by a Full Bench in the case of Naran and another (14 W. R., 34.)

It is, I submit, much to be deprecated that, when the trial in the presence of the accused has been conducted strictly in accordance with law, the whole proceedings should be vitiated on account of some informality in the absence of the accused which could not have prejudiced his trial.

Judgment of the Full Bench.

Couch, C.J.—We are of opinion that the question referred to the Full Bench should be answered in the negative. We agree in the decision in the case of The Queen *vs.* Omesh Chunder Chowdhry (14 W. R., Cr., 1). This case was not cited in the case of Grish Chunder Ghose (16 W. R., 40), where no one appeared to support the conviction. In the other cases the point was not decided. The examination of the complainant by the Magistrate to whom the case is referred, is sufficient for the regularity of the proceedings.

The 14th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Witnesses for the Defence (Right of Accused to call)—Omission of Magistrate to enter on Record—Adjournment.

Queen *versus* Rajnarain Mytee, *Appellant.*

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of giving false evidence.

Mr. W. M. Bourke and *Baboo Gopal Lall Mitter* for Appellant.

Where the omission of a Magistrate, in committing a prisoner, to enter on the record the names of certain persons who had been named as witnesses for the defence at the Sessions, was brought to the notice of the Judge, and an order was made by the Judge, requiring the witnesses to be served, but the witnesses did not appear and the Judge tried the prisoner in their absence, and refused an adjournment in order to their production, the High Court held that the prisoner was entitled to have the benefit of the examination of the witnesses in question, and directed the Judge to examine them accordingly.

IMMEDIATELY after this case had been committed by the Magistrate, it was found that the names of some persons, who had been named to the Magistrate as witnesses for the defence at the Sessions, were not entered on the record. The case having passed out of the hands of the Magistrate, this omission was brought to the notice of the Judge by petition dated 23rd November, praying that summonses might be issued to these persons, and the Judge granted an order as prayed for. The required summonses were issued, but were not served on some of the witnesses. None of these witnesses were present at the trial. When the Court was about to pass judgment, a petition was presented on behalf of the prisoner on the 22nd of January, praying for an adjournment in order to the production of these witnesses, and that the necessary steps might be taken to enforce their attendance. The Judge declined to grant that prayer. In his judgment he observed:—"Although all the "witnesses he named before the Magistrate "were present, yet he only examined one, and "that one did not assist him. His vakeel "wished the case to be postponed for other "witnesses not named before the Magistrate, "but this I could not allow."

The petitioner then preferred a petition to the High Court (*present* Couch, C.J., and Ainslie, J.), whose order thereon will be found set out in the following judgment of the Division Bench before whom the case subsequently came on to be heard:—

Bayley, J.— In this case the Chief Justice and Mr. Justice Ainslie, on the 19th April last, required the Judge to certify whether all the witnesses named in the petition of the 23rd November and stated by the Judge to

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have been present, of whom the pleader, it was stated by the Judge, declined to examine more than one, were actually present at the trial, and whether the two witnesses named in the petition of the 22nd January, for whom the vakeel wished the case to be postponed, were named in the petition of the 23rd November.

With reference to the first point, the Judge now says that *none* of the witnesses named in the petition of the 23rd November were present at the trial—a statement inconsistent with the supposition that the pleader declined to examine more than one witness out of all; and on the second point the Judge says that the two witnesses, for whom the vakeel wished a postponement, were not mentioned before the Magistrate, forgetting to notice, however, that he himself had given orders for their attendance upon the petition of the 23rd November above referred to.

Under these circumstances we think it proper that the prisoner shall have the benefit of the examination of the witnesses named in the petition of the 23rd November marginally noted, and we accordingly direct the Judge to take their depositions, and send them to this Court without delay.

1. Ramjeebun Bhuttacharjee.
2. Eshan Chunder Ghose.
3. Shama Churn Ghosal.
4. Cally Mundul.
5. Sutrooghun Mytee.
6. Kanye Mytee.
7. Bissumbhur.

The 21st June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Stray Cattle—Code of Criminal Procedure s. 62 *—Penal Code s.* 289*—Reference—Power of High Court.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Mymensingh.*

Government *v.* Mozuffer Khalifa.

The order of a Deputy Magistrate prohibiting the owners of cattle from allowing their animals to stray, and a conviction under Section 289 of the Penal Code against the accused for permitting his pony to stray, were quashed as illegal upon a reference under Section 434 of the Code of Criminal Procedure.

Reference.—THE Deputy Magistrate of Jamalpore promulgated an order on the 27th August 1869 in general terms, prohibiting the owners of cattle, calves, goats, sheep, and ponies, from allowing such animals to stray loose within and about the town and station of Jamalpore, prescribing the limits within which the said order would have effect.

On 6th of last month one Mozuffur Khalifa was convicted under Section 289 for permitting his pony to stray about loose.

With reference to a ruling of the High Court, which is exactly in point in the present case, the Deputy Magistrate had no authority to pass the order he did under Section 62 (Weekly Reporter, Vol. XII, page 36); and the conviction also under Section 289 is clearly an illegal one not warranted by anything within the meaning of the Section.

The Deputy Magistrate, Mr. Donough, in explanation, defends his order under Section 62 Code of Criminal Procedure which appears to him to have been appropriate, legal, and proper, and pronounces such an order to be one not open to revision by the High Court, citing as his authority the case of the Queen *versus* Abbas Ali Chowdree (14 Weekly Reporter, p. 46.)

But upon a reference of my own* to the High Court, the question of the Court's power to set aside an *illegal* order under Section 62 was specially mooted and referred, and the Court set aside the order to which I had taken objection, and which had been passed under Section 62 by the Joint Magistrate of this District.

I therefore submit that the order of the Deputy Magistrate under Section 62 should be quashed as being illegal with special regard to the Ruling of the Court in Weekly Reporter, Vol. XII, page 36, Criminal Rulings, and that the conviction under Section 289 Penal Code should be set aside as being also illegal, and not warranted by anything within the meaning of the Section under which it was made.

Judgment of the High Court.

Kemp, J.—We concur with the Sessions Judge in the view he has taken of this case. The order of the Deputy Magistrate must be quashed, and the fine, if paid, refunded.

* 15 W. R., Cr. Rul., pp. 56—58.

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The 24th June 1872.

Present:

The Honorable F. B. Kemp, and F. A. Glover, *Judges.*

Information regarding an Offence (Zemindar's Omission to give)—Intention.

Criminal Miscellaneous. Case No. 110 of 1872.

Luchmun Pershad Gorgo, *Petitioner.*

Baboo Bhoyrub Chunder Banerjee for the Petitioner.

Intentional omission is the gist of the offence of a zemindar omitting to give information regarding an offence.

Kemp, J.—We think that the fine in this case must be remitted. There is no evidence that the zemindar, Rajah Luchmun Pershad Gorgo, intentionally omitted giving information in respect of an offence, which he was legally bound to give. It appears that the Police were on the spot immediately after the occurrence. There is no evidence to our satisfaction that the zemindar knew anything about it, and there is certainly no evidence that he intentionally omitted to give information, and it is the gist of the offence that there should be an intentional omission. We therefore remit the fine.

The 25th June 1872.

Present:

The Honorable F. A. Glover, *Judge.*

Grievous Hurt—Evidence.

Committed by the Magistrate and tried by the Sessions Judge of Hooghly on a charge of voluntarily causing grievous hurt.

Queen *versus* Purmanund Dhulia *alias* Purmeshur, *Appellant.*

To establish a charge of grievous hurt, it is not necessary to prove that the accused struck the complainant so severely as to endanger the latter's life.

Glover, J.—If this case had come before me on the facts, I should have said that there was no sufficient evidence to prove the charge of grievous hurt.

The Judge, moreover, should not have told the Jury, with reference to the charge, to consider whether the accused intentionally struck his mother so severely as to endanger her life—that amount of proof was not required to establish a charge of grievous hurt.

This error, however, has in noway prejudiced the accused, and this Court cannot interfere with the Jury's finding on the evidence. The appeal must be rejected.

The 25th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Breach of the Peace—Code of Criminal Procedure ss. 62 and 404—Rival Markets—Jurisdiction.

Criminal Miscellaneous.

Case No. 96 of 1872.

Lalla Mitterjeet Singh, *Petitioner,*

versus

Rajcoomar Sircar, *Opposite Party.*

Baboo Doorga Mohun Dass for the Petitioner.

Baboo Rashbehary Ghose for the Opposite Party.

Where a new *haut* was established about half a mile from a long established market, and the Deputy Magistrate was of opinion that the holding of the two *hauts* on the same days of the week would induce a breach of the peace, HELD that the order passed by the Deputy Magistrate, under Section 62 of the Code of Criminal Procedure, directing petitioner to abstain from holding his *haut* on certain days, was not beyond his power or out of his jurisdiction to pass, and therefore was one with which the High Court could not interfere under Section 404.

In this case the petitioner, aggrieved by the order of the Deputy Magistrate of Perozepore, passed under Section 62 Code of Criminal Procedure, directing him to abstain from holding a *haut* on certain days, applied to the Court, under Section 404, to set aside the order as illegal, on the ground that, under Section 62, the Deputy Magistrate had no jurisdiction to pass such an order.

Glover, J.—It seems to us that this case comes exactly within the meaning of the rule laid down by the Full Bench in the case of Abbass Alee Chowdhree *vs.* Alim Meah and others (XIV Weekly Reporter, 46).

The order passed by the Deputy Magistrate was not such a one as was beyond his power or out of his jurisdiction to pass, and therefore the decision in Government *vs.* Surjo Kant

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Acharj (XVII, Weekly Reporter, 37) does not apply.

In this case the new *haut* had been established within 13 russees, or about half a mile of the opposite party's long established market, and we must assume that the Deputy Magistrate was right in his opinion that the holding of the two *hauts* on the same days of the week would in all probability induce a breach of the peace.

The order passed by the Deputy Magistrate therefore would not, in accordance with the ruling of the Full Bench, quoted above, be one with which this Court could interfere under Section 404 Code of Criminal Procedure.

The 26th June 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Code of Criminal Procedure s. 404—*Power of High Court.*

Miscellaneous Criminal Case No. 130 of 1872.

Bunkabeharee Sein, *Petitioner.*

Baboo Kali Mohun Doss and *Mr. M. L. Sandel* for the Petitioner.

There is nothing in Section 404 Code of Criminal Procedure which obliges the High Court to interfere; and in cases in which it is clear that substantial justice has been done, the Court is not bound and ought not to interfere even if, on some small point of law, the Judge below has made a mistake.

Kemp, J.—We do not think it necessary to interfere in this case. We sent for the record, and we have heard the argument, and we are satisfied that the judgment of the Lower Court is a just one. The application is rejected.

Glover, J.—I wish to add one word with reference to what has fallen from Baboo Kali Mohun Doss on the subject of this Court's action under Section 404. That Section gives this Court the power, when it finds that there has been any error on any point of law in the decision of the case, to interfere and to pass such orders as it may think right; but there is nothing in that Section which obliges this Court to interfere, and I am of opinion that, in cases in which it is clear that substantial justice has been done, this Court is not bound to and should not interfere even if, on some small point of law, the Judge in the Court below has made a mistake.

The 26th June 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Penal Code ss. 304 *and* 304 *A—Culpable Homicide not amounting to Murder—Beating— Jurisdiction.*

Reference to the High Court, under Section 434 *of the Code of Criminal Procedure, by the Judicial Commissioner of Chota Nagpore.*

Mussamut Auhuchia Dosadin

versus

Mussamut Anoop Koonwur Thakooranee.

Where an old woman of 70 so beat a lad of 18 as to cause his death, and the Assistant Commissioner was of opinion that the beating was in the shape of chastisement such as a mother would inflict on a disobedient child, and convicted the accused under Section 304 A of the Penal Code, HELD that the Assistant Commissioner had no jurisdiction in the case, and that he should have committed the accused for trial before the Sessions Court on a charge under Section 304.

Kemp, J.—In this case the Extra Assistant Commissioner in charge of the subdivision of Palamow has found that the death of Somarroo, a lad of eighteen, was caused by the prisoner, Mussamut Anoop Koonwur, who is said to be 70 years old. The Assistant Commissioner, though he finds that the boy was beaten most severely, and that his death resulted from the injuries inflicted upon him by the accused, was of opinion that the beating was in the shape of chastisement such as a mother would inflict on a disobedient child, and convicts the accused under Section 304A of the Penal Code, and sentences her to pay a fine of Rs. 100, in default of payment six months' rigorous imprisonment; one-half of the fine, if realized, to be paid as compensation to the mother of the deceased.

The Assistant Commissioner is wholly wrong in saying that the accused admitted her guilt. She distinctly denied it; her words are "ham kusoorwar nuhee hai."

We think, after reading the evidence, that the Assistant Commissioner had no jurisdiction in this case, and that he ought to have committed the accused to take her trial before the Sessions Court on a charge under Section 304 of the Penal Code. The order of the Assistant Commissioner is quashed. The fine, if paid, to be returned to the accused.

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The 26th June 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Code of Criminal Procedure s. 318—*Preliminary Proceeding — Possession — Absent Co-sharer.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Mymensingh.*

Koilas Nath Roy, 1st Party,

versus

Kalee Narain Chuckerbutty, 2nd Party,

Petitioner.

The order of a Deputy Magistrate in a preliminary proceeding under s. 318 Code of Criminal Procedure, requiring both parties to produce "a written statement of their respective *claims to the share in dispute*," was held to mean that the parties were to file their statement in respect of their *claims to possession*; and the Deputy Magistrate having subsequently retained in possession the person whom he found in possession, his proceeding was considered sufficient, notwithstanding that the order passed by him was adverse to an absent co-sharer.

Reference.—CERTAIN proceedings were held by Mr. Deputy Magistrate Andrew, then in charge of the Sub-Division of Kishoregunge, under Section 282 of the Code of Criminal Procedure.

Acting on the knowledge obtained in the said proceedings, the Deputy Magistrate determined on taking action under Section 318 of the Procedure Code. He then recorded a proceeding, but a very irregular one, under Section 318.

Section 318 lays down the kind of enquiry to be made by a Magistrate when he is satisfied that a dispute exists concerning land, &c., likely to induce a breach of the peace, *i. e.*, an enquiry as to which party is in possession.

The proceeding however of the Magistrate as found in the record sets out at once with a most pronounced declaration that a certain party *is* in possession, thus prejudging the very question which the Section provided should, after full enquiry, be determined.

After the proceeding follows the order, which incorrectly described what the parties were required to do. The order was as follows :—

"That Koilas Nath Roy on the one side "and Dharma Narain Chuckerbutty on the "other produce within 3 days a written state-"ment of their respective claims to the share "in dispute."

It is clear that under such an order as this one party might come in claiming his *right and title* and another by possession.

The precise words of the law are unmistakeable, and the parties should have been called on "to give in a written statement of "their respective claims *as respects the fact* "*of actual possession* of the subject in "dispute."

It is also urged by the petitioner to this Court, Kalee Narain Chuckerbutty, that though in the Deputy Magistrate's judgment he is distinctly spoken of as a co-sharer, and his interests have suffered by the decision arrived at, no notice was issued to him calling on him to appear, and judgment was passed against him in his absence.

The Magistrate in explanation on the 1st point states as follows : "I considered a refer-"ence to the proceeding held as regards the "same parties, *i. e.*, Koilas Nath Roy on the "one side and Dharma Narain Chuckerbutty "on the other, and in whose presence the "requisite evidence was recorded, to be equi-"valent to an explicit statement of my being "satisfied that such a dispute did exist, else "no proceedings under Section 282 could "have been entered in."

This explanation does not meet irregularity of pronouncing upon the fact of possession before proceeding to try the question.

On the 2nd point the Deputy Magistrate in the 2nd para. of his explanation says, "Kalee Narain Chuckerbutty is a co-sharer "with Dhurma Narain Chuckerbutty, the "former is well known as a Mooktar con-"stantly employed in Nasirabad. The latter, "his co-sharer, appears from the record of the "case to have been the principal acting party "and agent on behalf of Chuckerbutties, and "hence he alone was made the one party "while Koilas Nath Roy was made the "other."

I would submit that the Deputy Magistrate's proceeding should be quashed, 1*st*, because he did not record a proper proceeding according to law, and passed incorrect orders; and, 2*ndly*, because he was bound to give notice to the petitioner who was known to be a co-sharer and against whom an adverse decision should not have been passed in his absence.

Judgment of the High Court.

Kemp, J.—On considering the case, we see no reason to interfere with the Deputy Magistrate's proceedings.

The preliminary proceeding is not very carefully worded, but it seems clear that the Deputy Magistrate contemplated that the

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parties were to file their statement in respect to their claims to possession. His subsequent proceeding under Section 318 is, we think, sufficient. He finds on the evidence that Koilas Nath Roy is in possession, and the Deputy Magistrate retains him in possession. The alleged possession of the opposite party by "bausgharee" was found to be fictitious.

The 2nd July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Criminal Trespass—Fishing in a Lake by alleged prescriptive Right—Unsuccessful Suit for Rent.

Miscellaneous Criminal Case No. 102 of 1872.

Sristeedhur Paroee and others, *Petitioners,*

versus

Indrobhoosun Chuckerbutty, *Opposite Party.*

Baboo Bama Churn Banerjee for the Petitioners.

Mr. R. T. Allan and *Baboo Anund Chunder Ghosal* for the Opposite Party.

In the definition of criminal trespass, the entry and the *intention* with which a party enters are the essentials.

Thus where A and B all along asserted their prescriptive right to fish in a lake free of rent, and C had failed to establish the relationship of landlord and tenant in a suit brought by him under Act X of 1859 to get rent from them: HELD that no conviction for Criminal trespass could be had against A and B, and that C's remedy was by suit in the Civil Court either to eject them if he treated them as trespassers, or to have them declared liable to pay him rent for the future.

Glover, J.—I HAVE felt some difficulty about this case, but, after consideration, I think that the petitioners should succeed, and the order of the Courts below be set aside.

I do not think it necessary to go into the question as to how far the release of the "Bhowur" or lake by the Collector settled the rights of the complainant, Indrobhoosun Chuckerbutty, as the action of the defendants (petitioners before us) does not seem to bring them within the purview of Section 441 Penal Code.

To convict under this Section, it must be shown that the defendants entered upon property in the possession of another, with "intent to commit an offence;" and I think that in this case the element of "intention" is wanting.

The defendants asserted, and had all along asserted, a prescriptive right to fish in the Bhowur without payment of rent, and the zemindar had already failed in a suit brought under Act X of 1859 to get rent from them, not having been able to prove that they were his tenants or had ever paid rent to him.

It may therefore be reasonably concluded that the defendants thought that they had vindicated their claims, and had a right to fish, as they had done heretofore. It cannot, I think, be presumed that they continued to fish with any intent "to commit an offence;" they considered themselves possessed of a right to which the decision in the Act X suit had given some color, and determined to exercise it. They seem to have acted *bonâ fide*, and not to have exceeded their supposed privileges.

The zemindar's notice, warning them not to fish, did not change the state of things so far as Section 441 is concerned; and after what has occurred between the parties, no conviction for criminal trespass can possibly be had. The zemindar must establish his rights by a suit in the Civil Court to eject the defendants, or sue to have the defendants declared liable to pay him rent for the future.

Kemp, J.—I quite concur in this view of the case. In the definition of criminal trespass the entry and the "intention" with which a party enters are the essentials. In this case it appears to me clear that the petitioners have exercised a supposed right in a *bonâ fide* manner. They have all along asserted their right to fish in the lake free of payment of rent, and the attempt of the opposite party to establish the relationship of landlord and tenant has signally failed. It was found that the *jumma-wassil-bakees* filed by the zemindar to establish tenancy and payment of rent were false. It is for the zemindar to take steps to establish his right to receive rent from the petitioners or (if he treats them as trespassers, which he has hitherto not done) to eject them.

The 3rd July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Penal Code, s. 412—Receiving stolen Property—Dacoity—Presumption.

Queen

versus

Samiruddin, *Appellant.*

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Committed by the Deputy Magistrate, and tried by the Officiating Additional Sessions Judge of Backergunge, on a charge of knowingly retaining property transferred by the commission of dacoity.

Baboo Greeja Sunker Mujoomdar for the Appellant.

Mere possession of stolen articles of trifling value does not warrant the presumption that the receiver knew them to have been the proceeds of a dacoity, or had acquired them from one whom he knew or believed to be a dacoit.

Glover, J.—We think that the conviction of this prisoner, under Section 412 Penal Code, cannot be sustained. The Sessions Judge has disbelieved all the evidence regarding the dacoity, so far as it affected the prisoners before him; and the only thing proved against the accused is the possession of a *peerun* and a *dhotee* which formed part of the property stolen. We agree with the Sessions Judge that the identification of these two articles is well established, and that the accused was unable to rebut that evidence.

But it does not follow from this that the accused can be convicted under Section 412. There must be something more than the mere fact of articles of such trifling value being found in a man's house to establish the fact that he knew them to have been transferred by dacoity, or had acquired them from one whom he knew or believed to be a dacoit. Of course, the articles having been proved to have belonged to the prosecutor, the accused would have to explain how he came by them, and failing in that, the presumption that he came dishonestly by them would be established. But it is one thing to have come dishonestly by things, and quite another thing to have done so, knowing that they had been acquired by dacoity. The receiver may have supposed them to have been the produce of theft, or of robbery by a single person or of house-breaking: there can be, in the absence of any evidence as to how he got them, no presumption that he knew them to have been the proceeds of a dacoity.

Taking the evidence in this case as true, the most it establishes is that the accused was knowingly in possession of stolen property, and he would therefore come under Section 411 of the Penal Code, and not under Section 412.

The sentence allowed by Section 411 is three years' rigorous imprisonment, and the prisoner must have the sentence passed by the Sessions Judge commuted to that extent.

The 5th July 1872.

Present:

The Hon'ble F. B. Kemp, and F. A. Glover, *Judges.*

Arms (Possession of, without License)—Gya —Act XXXI of 1860, *s.* 32.

Reference to the High Court, under Section 434 *of the Code of Criminal Procedure, by the Officiating Sessions Judge of Gya.*

Modnarain Puri, *Petitioner.*

The mere possession of arms without a license in Gya was held to be no offence under the Arms Act XXXI of 1860, the provisions of s. 32 of that Act not having been extended to that District.

Reference.—During the search by a Police Inspector of Nowadah of the petitioner's house in a criminal case, he found twelve swords, six daggers, and one *pata* (double-edged sword), and forwarded them to the Deputy Magistrate of Nowadah, stating that the petitioner had them in possession without any license.

The defendant alleged that he had never used the arms, and therefore no necessity existed for his obtaining a license.

The Deputy Magistrate, however, fined the petitioner Rs. 50 under Section 5 of Act XXXI of 1860, and ordered the arms to be forfeited to Government.

That the petitioner had arms in his possession is not denied; but the mere possession of arms without a license is, as has already been lately decided by the High Court, no offence whatever under the Arms Act, the provisions of Section 32 not having been extended to this District. It is not stated that the petitioner possessed these arms under *suspicious circumstances*, or that their possession by him was dangerous to the *public safety*.

Under the above circumstances it seems to me that the proceedings of the Deputy Magistrate are illegal, and should be quashed.

As the Deputy Magistrate is now transferred to another District, no explanation accompanies this reference.

Judgment of the High Court.

Glover, J.—Under the circumstances stated by the Sessions Judge, we are of opinion that no offence was committed by Modnarain Puri, and that the Deputy Magistrate's order should be set aside.

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The 5th July 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act XX of 1865 *s.* 11—*Mookhtar (Criminal Court)—"Acting."*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Backergunge.*

Kalee Churn Chund, *Petitioner.*

The mere writing of a petition for a party who afterwards presents that petition himself is not "acting" as a mookhtar in a Criminal Court within the meaning of s. 11 Act XX of 1865.

Reference.—THE Officiating Joint Magistrate has punished Kalee Churn Chund, a Revenue Agent, under Section 13 Act XX of 1865, for practising as a mookhtar in his Court, a Criminal Court, without having previously obtained a properly stamped certificate authorizing him so to practise.

It appears that Kalee Churn Chund wrote out a petition of complaint for one Komorudin which the said Komorudin presented himself in the Joint Magistrate's Court. The Officiating Joint Magistrate is of opinion that this Act of Kalee Churn Chund in drawing up and writing a petition for a complainant to be presented by him in a Criminal Court is practising within the meaning of Act XX of 1865.

By Section 11 of the Act mookhtars duly admitted and enrolled may appear plead and act in any Criminal Court subject to certain conditions of their certificate, and these words embrace the whole of what constitutes the more general term "practice." In the present instance Kalee Churn neither appeared nor pleaded. Did he then act? It seems to me that he can only be said to have acted in a private capacity, not in the sense contemplated by the Act in a public capacity as a medium between the complainant and the Court. The law does not forbid one person from giving advice to another or from drawing up a petition for another on any matter out of Court; and so long as the adviser or writer abstains from dealing with the Court itself in any way in connection with the matter, he must be considered to be absolved from all consequences under Act XX of 1865.

If the Officiating Joint Magistrate's view of practising were carried to its extreme logical conclusion, the liberty of the subject would be very seriously infringed, and a large class of persons such as clerks, &c., would be liable to punishment.

I therefore solicit the High Court to set aside the order of the Officiating Joint Magistrate, and remit the fine that has been imposed upon Kalee Churn Chund.

Judgment of the High Court.

Glover, J.—There can be no doubt, we think, that the Judge is right, and that the mere writing of a petition for a party who afterwards presents that petition himself is not "acting" in the sense of Section 11 Act XX of 1865.

We therefore set aside the order of the Joint Magistrate, and remit the fine imposed upon Kalee Churn Chund.

The 11th July 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Dispute concerning Land—Cultivation of disputed Land (pending Possessory Action under Act XIV of 1859 *s.* 15*).*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Tipperah.*

Shib Churn Chuckerbutty

versus

Ishen Chunder Chuckerbutty.

In a dispute concerning land, the Magistrate having found one party to be in possession, had no power to give the opposite party found not to be in possession, permission to cultivate the disputed land pending the decision of any possessory action he might bring under s. 15 Act XIV of 1859.

Kemp, J.—WE think that the view taken by the Sessions Judge is correct. The defendants have been found to be in possession. How they obtained that possession is foreign to the requirements of Section 318 Criminal Procedure Code. The order of the Deputy Magistrate giving the opposite party who were found not to be in possession, permission to cultivate the disputed lands pending the decision of any possessory action they may bring under Section 15 Act XIV of 1859, is illegal and must be quashed. We fail to see how such order was calculated, as observed by the Deputy Magistrate acting on the advice of the Magistrate, to prevent a breach of the peace.

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The 11th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—False Charges—Abetment—Penal Code s. 108 *and ss.* 212 *to* 218.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Cuttack.*

Queen

versus

Paun Pundah and another.

The Lower Criminal Courts cannot punish, as abettors, persons who gave evidence in support of false charges or rather charges found by such Courts to be false.

Section 108 of the Penal Code does not contemplate any acts of subsequent abetment, or provide for the punishment of such officers except when they are such as are defined in ss. 212 to 218.

Reference.—I HAVE the honor to submit, under the provisions of Circular No. 18, dated the 15th July 1863, the record of Queen *versus* Mussamut Sarsoti and others, with a view to the setting aside as illegal of the sentence passed upon Paun Pundah and Dutt Hurry. Those sentences being under one month are not appealable to me.

The Assistant Magistrate of Bhuddruck, Mr. Fiddian, has convicted the persons aforesaid solely on the ground that they gave evidence in support of a charge brought by one Sarsoti against her husband, which charge he had found in a prosecution against Sarsoti and others under Section 211 to be false.

I have on appeal found that the falsity of the charge was not established; but I am of opinion that, even admitting that the charge was false, the prisoners could not legally be convicted under Sections 211 and 109 as abettors.

After careful consideration, I hold that Section 108 does not contemplate any acts of subsequent abetment, and that the Code does not provide for the punishment of such offences, except when they are such as are defined in Sections 212 to 218 of Chapter XI of the Indian Penal Code.

Many very excellent reasons could be assigned for this apparent though not real omission. It will, however, suffice for the purposes of this reference to point out that if the inferior and theoretically less experienced Criminal Courts were allowed to punish, as abettors, persons who gave evidence in support of false charges or rather charges found by the said Courts to be false, the provisions of the Procedure Code by which the punishment of the crime of false evidence can only be inflicted by the Sessions Court, would be practically neutralized and set at nought. It is, I think, obvious that this was never intended, and that the framers of the Criminal Procedure Code, although they allowed the Lower Criminal Courts to punish for false charges, never vested them with authority to punish those who supported such charges not by previous acts but by evidence merely.

Judgment of the High Court.

Kemp, J.—We concur with the Sessions Judge. The conviction and sentence are set aside.

The 17th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mahomedan Law—Nikah Marriage—Legitimacy.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Midnapore.*

Sheikh Moneerooddeen

versus

Ramdhun Bajeekur and others.

The *nikah* form of marriage is well known and established among Mahomedans. The issue of a *nikah* marriage would be legitimate under the Mahomedan Law.

Kemp, J.—THE Sessions Judge has, in our opinion, taken a right view of this case. The *nikah* form of marriage is well known and established amongst Mahomedans. See Vol. VI Weekly Reporter, p. 60.

In page 15 Baillie's Digest of Mahomedan Law, it is stated that the words by which a marriage is contracted are of two kinds, "*shureet*" or plain, and "*kinayut*" or ambiguous. The *shureet* or plain are *nikah* and *tazweez*. The issue of a *nikah* marriage would be legitimate under the Mahomedan law. The order of the Officiating Magistrate is set aside, and he will be directed to proceed with the trial of the case.

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The 9th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Penal Code s. 323—Hurt—Killing a Daughter without Intention.

Committed by the Deputy Magistrate and tried by the Sessions Judge of Rungpore on a charge of Culpable homicide not amounting to murder.

Queen

versus

Beshor Bewa, *Appellant.*

Where, according to the prisoner's own confession (which was the only direct evidence against her), she, with a view to chastising the deceased, her daughter of 8 or 10 years of age, for impertinence, but without any intention of killing her, gave her a kick on the back and two slaps on the face the result of which was death—HELD that the conviction should be under s. 323 Penal Code of voluntarily causing hurt, and the punishment one year's rigorous imprisonment.

Kemp, J.—THE only evidence against the prisoner is her confession, and this must be taken in its entirety. The prisoner states that the deceased, her daughter, a child of 8 or 10 years of age, was impertinent to her, that is to say, mocked her: that she, with a view of chastising her but without any intention to kill her, gave her one kick on the back and two slaps on the face; that the child fell down senseless; that the prisoner, thinking the child was dead, buried the body and gave out that the child had died of cholera.

This is all that the prisoner admits, and it does not, in my opinion, amount to more than voluntarily causing hurt under Section 321 Indian Penal Code. The prisoner has not been charged, as she might have been, under Section 201 of the Code, of causing the disappearance of evidence of the commission of an offence, knowing or having reason to believe that an offence had been committed.

We convict the prisoner under Section 323; and as the provisions of Section 334 do not, under the circumstances, apply, we sentence her to one year's rigorous imprisonment.

Glover, J.—The only direct evidence against this prisoner is her own confession. The statement of the one boy is palpably false in many particulars, and that of the other does not distinctly implicate the prisoner more than she herself confesses to.

The truth seems to be that, in a fit of passion she struck the girl, her daughter, on the head or face, and the force of the blow knocked the child down senseless. The mother, thinking apparently that the girl was dead, tried to conceal her share in the matter by hanging up the body to the beam, and so to make it appear that the girl had committed suicide.*

This is probably what occurred, for the medical evidence shows that the girl was partly suffocated by hanging, and the deposition of the second boy gives a good deal of color to the supposition. There is, however, no *proof* against the prisoner except her own statement, and that does not amount to more than an admission of having voluntarily caused hurt.

The woman had, so far as I can see, no intention of doing anything more than chastise a disobedient and impertinent child, and does not appear to have used any extraordinary violence.

Her hanging up what she supposed to be the dead body of her daughter would not aggravate any offence for which she was committed for trial; for, thinking her child already dead, she could not be guilty of intentionally inflicting any further violence.

I concur therefore with Mr. Justice Kemp in thinking that the conviction should be under Section 323 of the Penal Code, *viz.*, of voluntarily causing hurt, and that the punishment (the highest that the law allows) should be one year's rigorous imprisonment.

The 18th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of Private Defence of Person and Property —No fear of Assault—Unarmed Persons.

Queen

versus

Gour Chand Chung and another, *Appellants.*

Committed by the Deputy Magistrate and tried by the Officiating Additional Sessions Judge of Backergunge on a charge of murder.

* It appears from the judgment of the Sessions Judge that the prisoner's young son Manu, seeing the deceased hanging, cried out to his brother Uni, and that before Uni came up, the prisoner cut the rope and told Uni to say that the deceased had died of cholera. Then, it would seem, followed the hanging which is referred to in the judgment of Kemp, J.

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The right of private defence of person and property was not allowed to be pleaded in a case where there was no fear of an assault such as is described in the clauses of Section 100 of the Penal Code, and where the prisoners used deadly weapons (spears) and killed two unarmed persons whom they found ploughing land which the prisoners believed to be theirs.

Glover, J.—THE substantial objection to the Judge's finding taken by the prisoners in appeal is, that, on the evidence, they ought to have been acquitted as having acted within their right of private defence of person and property.

The facts are undisputed: the prisoners did kill with their spears two men, and did wound severely a third. The dispute was about a small piece of land which had, in previous years, been in the cultivation of Ramkishno, but which had, during the preceding year, been cultivated by the father of the prisoners. There is evidence also that the Tehseeldar of the landlord had taken rent from the prisoner's father for that year, and had told Ramkishno, on his applying for his land, that he might take it if he could.

There seems to be no doubt that Ramkishno and his relatives, five or six in number, went to the field on the day in question and commenced ploughing. We find no reliable evidence that there were more than, at the utmost, eight or ten persons present, and in noway believe the prisoner's statement that there was an assembly of 250 men sent to support the zemindar's nominee. The prisoners came to the field armed with spears, and, after a few words of remonstrance on either side, killed two of Ramkishno's party and wounded a third. There is no evidence that any resistance was made, or that any of Ramkishno's people were armed. Immediately after the attack, the prisoners returned home and then went to the police-station at Madaripore, where they gave themselves up.

The Sessions Judge had held, and we think quite rightly, that the prisoners altogether exceeded their right of private defence.

In the first place, there could have been no right of private defence of the person, for, as we said before, there is no proof that Ramkishno was supported by any number of people, or that any one individual of his company was armed. There could have been, therefore, no fear of an assault such as is described in the clauses of Section 100 Penal Code.

And as to private defence of property, granting that the prisoners honestly thought that the land was theirs, that did not justify them in using deadly weapons or in killing two unarmed persons whom they found upon the land. Taking everything in the light most favorable to them, they could only, by Section 104, have defended their property against criminal trespass by acts that did not extend to the voluntarily causing of death. As a matter of fact, moreover, they might easily have applied to the authorities, and had no right to take the law into their own hands at all, for the field was only being ploughed, and no injury would have been caused by the delay.

We agree with the Sessions Judge, therefore, that the prisoners are not protected, and that their cirme is nothing less than murder, under Section 302. We reject the appeal.

The 19th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Code of Criminal Procedure s. 62—*Penal Code ss.* 188 *and* 114—*Disobedience of lawful Order of Public Servant—Abetment—Hook Swinging or other Self-torture.*

Miscellaneous Criminal Case No. 128 of 1872.

Dwarick Misser and others, *Petitioners.*

Baboo Grish Chunder Mookerjee for the Petitioners.

Where by direction of Government, the Magistrate promulgated an order under s. 62 Code of Criminal Procedure, directing all persons to abstain from hook-swinging or other self-torture in public and from the abetment thereof, and no such order was upon the record, the High Court annulled the conviction of the prisoners by the Deputy Magistrate under ss. 188 and 114 Penal Code for having knowingly disobeyed that order.

Kemp, J.—THESE three men have been convicted by the Deputy Magistrate of Kulna, Baboo Ram Coomar Bose, under Sections 188 and 114 of the Indian Penal Code and sentenced to one month's simple imprisonment. There being no appeal against this sentence the petitioners moved this Court. The finding of the Deputy Magistrate is as follows: "The Court finds that the accused being "present, abetted disobedience of an order "duly promulgated by a public servant, "namely, the Magistrate of Burdwan, under "Section 62 of the Criminal Procedure Code, "which disobedience caused or tended to "cause annoyance to persons lawfully em-"ployed, knowing that such an order had "been duly promulgated, and have thereby

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"committed an offence punishable under Sec-"tions 188 and 114 of the Indian Penal "Code Section 188 enacts that whoever "*knowing* that, by an order promulgated by "a public servant lawfully empowered to "promulgate such order, he is directed to "abstain from a certain act, or to take cer-"tain order with certain property in his "possession or under his management dis-"obeys such direction, &c." In this case although the Deputy Magistrate in his finding alludes to an order promulgated by the Magistrate of Burdwan under Section 62 no such order is on the record and therefore we fail to see how the accused could be convicted of having knowingly disobeyed an order promulgated by a public servant. The Deputy Magistrate refers to a resolution of the Bengal Government dated the 15th of March 1865. By that resolution all Magistrates of Districts in the Lower Provinces were required, "under the powers vested in them "by law, whenever they shall consider that "such direction is necessary to prevent "annoyance to persons lawfully employed, "or danger to human life, health, or safety, "to direct any person to abstain from the "act of Hook swinging, or other self-torture, "in public, and from the abetment thereof, "or to take such order with property in his "possession or under his management as may "serve to prevent the commission of the "act, and persons who disobey any such "injunction should be prosecuted and punish-"ed according to law." There is no evidence in this case that any such injunction was issued, and there is no order under Section 62 of the Code of Criminal Procedure upon the record. The conviction and sentence are therefore annulled and the prisoners must be released.

The 22nd July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Penal Code s. 202—*Code of Criminal Procedure s.* 422—*Omission to give Information of Offence—Additional Evidence (called for by Appellate Court).*

Miscellaneous Criminal Case

No. 141 of 1872.

Woodoy Chand Mookhopadhya, *Petitioner.*

Baboos Hem Chunder Banerjee and *Doorga Mohun Doss* for the Petitioner.

Per Kemp, J.—Before a person can be convicted of an offence under Section 202 Penal Code, there must be legal evidence (1) that he has knowledge or reason to believe that some offence has been committed; (2) an *intentional* omission to give *any* information respecting that offence; and (3) that he is legally bound to give that offence. In this case, the Sessions Judge having found that there was *no* evidence at all, Section 422 Code of Criminal Procedure did not apply, as that Section only authorizes an Appellate Court to direct *additional* evidence to be taken where there is *some primâ facie* evidence bearing upon the guilt or innocence of the accused, but not where there is *no* evidence at all.

Per Glover, J.—The Sessions Judge, having found that an offence was committed, and that the accused were bound by law to give information respecting it, but that there was not on the record evidence of their *omission* to give that information, was competent under Section 422 to order the deficiency to be supplied; the object of that Section being the prevention of a guilty person's escape through some careless or ignorant proceedings of a Magistrate, or the vindication of a wrongfully accused person's innocence where the same carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth.

Glover, J.—THE Magistrate convicted the accused under Section 202 Penal Code, holding that they knew of the commission of the dacoitee in Mussamat Urjela's house, and, so knowing, intentionally omitted to give information to the authorities.

The Sessions Judge on appeal found that a dacoitee had taken place, and that the accused were all aware of the fact, but that there was no evidence on the record to prove the "omission." He therefore ordered the Magistrate, under Section 422 Code of Criminal Procedure, to supply the necessary evidence, and to return the case to his Court for final disposal.

It is not quite clear to me, from the wording of the Sessions Judge's order, whether the evidence required was on the point of simple "omission" or of "intentional omission;" and if I were trying the case as a Regular Appeal, I am not sure that I should agree with the Sessions Judge as to there being no evidence as to the fact of "omission." I think that there is some evidence both as to the actual omission, and as to the intention also; but however that may be, I do not, after much consideration, find anything illegal in the Sessions Judge's order. Section 422 Code of Criminal Procedure gives the Appellate Court power to direct further enquiry to be made, and additional evidence to be taken, whenever it thinks such enquiry and evidence necessary "upon any point bearing upon the guilt or innocence of the appellant." The words are exceedingly large, and give an almost unlimited discretion.

In the present case, the Sessions Judge considered it proved that persons who were bound by law to give certain information were possessed of that information, but that there was not on the record evidence of their

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"omission" to supply the information in question to the Police. No doubt proof of the omission was absolutely necessary, and without it there was no case against the accused. But the Section (422) gave the Sessions Judge the power, as it seems to me, of ordering the deficiency to be supplied.

If an Appellate Court is bound under all circumstances to decide on the guilt or innocence of an accused person on the evidence taken in the Court of first instance, and has no power to supplement it in any way, then I cannot understand the object of Section 422 Code of Criminal Procedure. That object I take to be the prevention of a guilty person's escape through some careless or ignorant proceedings of a Magistrate, or the vindication of a wrongfully accused person's innocence, where the same carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth. The words of the Section are, as I said before, "*any* point bearing upon the guilt or inno-"cence of the appellant," and the Judge's action appears to me to have been perfectly justified.

Kemp, J.—I regret that I am unable to concur with Mr. Justice Glover. Apart from the fact that the Magistrate omitted in this case to record any finding, I am of opinion that, before a person can be convicted of an offence under Section 202 of the Indian Penal Code, there must be legal evidence, first, that he has knowledge or reason to believe that some offence has been committed ; second, an "intentional" omission to give "any" information respecting that offence ; and, third, that he is legally bound to give that information.

The petitioner, Woodoy Chand Mookhopadhya, as the village gomashta, was legally bound to report crimes. An offence, in this case dacoitee, was committed ; of this there appears to be evidence which, though discredited in the first instance by the Deputy Magistrate, was believed by the Magistrate, and on appeal, by the Sessions Judge. It may also, I think, be conceded that the petitioner had knowledge, though not immediate, of the offence, but the Sessions Judge finds, and I quote his own words, "there is *no* evidence as to the 'main' point in the charge, the omission to give information." "The case," says the Judge, "must accordingly be sent "to the Magistrate to have evidence taken on "this point under Section 422 of the Code of "Criminal Procedure." The accused, be it remembered, remained in jail, and there he would have remained but for the action of this Court which released him on bail while the Police were hunting up evidence to convict him.

It appears to me that the "main" point under Section 202 is whether the omission was intentional. There may be knowledge or a reason to believe that an offence has been committed ; there may be an omission to give any information ; but it is clear, at least to me, that the gist of the offence is the intention. Now the Sessions Judge finds, not that the evidence is insufficient, though there may be some evidence, but that there is no evidence at all. Section 422, in my opinion, does not apply to such a state of things. Where there is some *primâ facie* evidence bearing upon the guilt or innocence of the accused, the Appellate Court may, under Section 422 of the Code of Criminal Procedure, direct additional evidence to be taken ; but in the case before us the Sessions Judge finds that there is no evidence at all. What then was there to add to, and how does the necessity for additional evidence arise ? I am of opinion that the accused ought to have been acquitted, as there is no evidence of an intentional omission, or, according to the Judge's finding, of any omission at all.

I therefore quash the conviction and sentence, and direct the immediate release of the petitioner.

The 24th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Commitment—False Evidence—Abetment—Penal Code ss. 193 *and* 109.

Reference to the High Court by the Judicial Commissioner of Assam.

In the case of Dinonath Buroua and others.

Baboo Sreenath Banerjee for Dinonath Buroua.

The commitment of certain persons charged, under s. 193 Penal Code, with intentionally giving false evidence in a judicial proceeding, was held to be illegal, inasmuch as the sanction of neither the Court before or against which the offence was committed, nor of some other Court to which such Court is subordinate, was given.

It is not necessary, to constitute the offence of abetment, that the act abetted should be committed.

Resolution.

Kemp, J.—READ a letter from the Judicial Commissioner of Assam, dated the 3rd July 1872, submitting, for the orders of the Court, the record of a case of commitment made by

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the Deputy Commissioner of Luckimpore, which, the Judicial Commissioner is of opinion, should be quashed.

The Judicial Commissioner observes that there are two groups of accused; the first group consists of six persons, *vide* margin. These six men have been charged with "intentionally giving false "evidence in a judicial proceeding before "the Assistant Commissioner;" and with reference to them, the Judicial Commissioner is of opinion that the commitment is illegal, as neither the sanction of the Court before or against which the offence was committed, nor of some other Court to which such Court is subordinate, has been given. If this be the case, the commitment is illegal.

No. 1 Group.
1. Dooti.
2. Paniha.
3. Noolin.
4. Kalea.
5. Hur Mohun.
6. Ramnath.

With respect to the second group, *vide* margin, the Judicial Commissioner observes that these four men have been committed on a charge of "abet-"ting the intentionally giving false evidence "by certain persons, namely Pooran, Donai, "and Mangoll before the Assistant Commis-"sioner of North Luckimpore." He is of opinion that the commitment is illegal on two grounds:—

7. Dinonath.
8. Holi.
9. Ramdass.
10. Doorga Ram.

1st,—That no person can be convicted of abetting an offence under Section 109 of the Penal Code until the person or persons accused of having committed the offence have been convicted of the charge involved.

2nd,—That the committing officer had no jurisdiction, inasmuch as no sanction for the prosecution of the offence abetted, namely, an offence under Section 195 of the Penal Code was given.

The Court is of opinion that it is not necessary to constitute the offence of abetment that the act abetted should be committed. But if there is no record of any sanction having been given, either by the Court before or against whom the original offence, namely, the offence under Section 193 was committed, or by some Court to which such Court of primary jurisdiction is subordinate, and of which fact we are not certain, the commitment of the parties composing the second group would be illegal, on the second ground stated by the Judicial Commissioner, though not on the first ground.

The 26th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Identification of Accused (after Prosecution closed).

Miscellaneous Criminal Case No. 137 of 1872.

Jankee and others, *Petitioners.*

Mr. C. Gregory for the Petitioners.

The identification of an accused after the evidence for the prosecution has been completed, will not be legally sufficient if there is nothing to show that the witnesses were on their oaths at the time they made the identification.

Kemp, J.—In this case, we think that there is no reason to interfere, except in the case of the petitioner, Neemun Singh, against whom there is no evidence whatever, and he will be acquitted.

The other prisoners were named by one or more of the witnesses for the prosecution, and the Courts below have thought proper to believe that evidence. We cannot, under Section 404 Code of Criminal Procedure, interfere, and the order is affirmed.

We may observe that the identification of the accused, after the evidence for the prosecution had been completed, would not be legally sufficient, as there is nothing to show that the witnesses were on their oaths at the time they made the identification.

The 26th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Code of Criminal Procedure s. 184—*Property of absconding Offender declared to be at Disposal of Government — Restoration of — Power of High Court—Review of Order—Cancelment of Order.*

Miscellaneous Criminal Case No. 134 of 1872.

The Government of Bengal, *Petitioner,*

versus

Meer Surwar Jan, *Opposite Party.*

Mr. H. Bell, Legal Remembrancer, for the Petitioner.

Baboo Doorga Mohun Dass for the Opposite Party.

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The High Court cancelled a previous order made by it (under an error in law caused by a misrepresentation of the facts) directing the restoration of the moveable property of a prisoner which was under attachment; the Court not having been informed at the time that the property in question had, under s. 184 Code of Criminal Procedure, been declared to be at the disposal of Government.

Property so declared to be at the disposal of Government can only be restored by Government.

Kemp, J.—In this case Mr. Bell, the Legal Remembrancer, appeared on behalf of the Government of Bengal and moved the Court to cancel an order passed on the 27th March 1872, on the *ex parte* petition of one Surwar Jan.

On the 8th July 1872, notice was issued to Surwar Jan to appear in person or by pleader.

It appears that Surwar Jan was committed by the Magistrate of Furreedpore to the Sessions to take his trial on a charge of riot with murder. Surwar Jan was convicted by the Sessions Judge, but, on appeal, was acquitted by this Court.

Previous to the apprehension and commitment of Surwar Jan, he had evaded process, *viz.*, a warrant issued against him, and certain moveable property belonging to him, which had been attached, was declared to be at the disposal of the Government under Section 184 of the Code of Criminal Procedure. After the acquittal of Surwar Jan by this Court, he was put on his trial under Section 174 of the Penal Code, and being convicted was sentenced to imprisonment for a term of six months and a fine of Rs. 1,000, this being the maximum sentence which can be passed under that Section.

Surwar Jan then petitioned this Court, and, on the 22nd December 1871, Justices Kemp and E. Jackson were of opinion "that it could not be said that Surwar Jan's absence did not originate in a desire to evade process," but on the last ground of his petition, which contained a prayer for mitigation of punishment, those Judges held that, although they confirmed the conviction, they were of opinion that as Surwar Jan had been then some months in Jail and had been acquitted of the graver charge of riot with murder, the remaining portion of the sentence ought to be remitted. Nothing was said as to the remission of the fine, but doubtless it was the intention of the Judges to remit it.

Subsequently, on the 27th March 1872, Surwar Jan presented a petition to this Court praying that as he had been, as he states, "released by this Court from the unjust sentence passed by the Magistrate," the Court would be pleased to direct the confiscated moveable property to be restored to him. On this petition we passed an order directing the Magistrate "to restore all the moveable property of the petitioner which may be under attachment."

It is clear that the pleader who presented this petition did not place the true circumstances of this case before the Court; no mention of the fact that the property in question had been declared to be at the disposal of the Government was made; the petitioner was also incorrect in stating that this Court had "released him from the unjust sentence passed by the Magistrate." What the Court did, was to mitigate the sentence, although they upheld the conviction.

It has been argued by the pleader for Surwar Jan that this Court is not competent to review its order, and a Full Bench case to be found in Volume 5 of the Weekly Reporter, Criminal Rulings, page 61, was referred to. In that case it is laid down that a review of judgment will not lie from a sentence or judgment pronounced by the High Court or by a Division Bench of the High Court on appeal. But in this case our order was passed without notice to the Magistrate or the Government of Bengal, and the facts of the case were, to say the least, not correctly stated.

Being therefore of opinion that the property which has been declared to be at the disposal of the Government of Bengal, can only be restored to Surwar Jan by that Government, and that our order of the 27th March 1872, which, though it refers in terms to the property under attachment, clearly contemplated the property in question, was based upon an error in law caused by a misrepresentation of facts, we cancel it.

The 29th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Certificate under Act XXVII of 1860—*Disputed Possession of House—Procedure.*

Miscellaneous Criminal Case No. 131 of 1872.

Seetaram Sahoo, *Petitioner,*

versus

Roy Sheo Gholam Sahoo Bahadoor, *Opposite Party.*

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Baboos Kalikishen Sein and *Rughoobuns Sahoy* for the Petitioner.

Messrs. R. T. Allan and *C. Gregory* for the Opposite Party.

A certificate under Act XXVII of 1860 only authorizes the holder thereof to collect the debts due to the estate of a deceased person, but does not entitle him to recover or to take possession of any property belonging to the deceased from any person who may be in possession (whether wrongful or rightful) of that property. The Magistrate ought to maintain the person in possession, and leave the other party to bring a suit in the Civil Court to prove his title to the property independently of the certificate.

Kemp, J.—In the matter of the petitioner Seetaram Sahoo, in case No. 131, it will be necessary to enter to some extent into the history of this case. It appears that Ram Churn Sahoo died in 1269. The petitioner Seetaram Sahoo alleges that he is the adopted son of Ram Churn Sahoo; that after the death of Ram Churn Sahoo he was residing with his adopting mother, the widow of Ram Churn, in the house in dispute; that during the lifetime of the widow he lived in that house, and that no attempt was made to disturb his possession until after the death of the widow which took place some time after that of her husband, or in 1271. On the death of the widow the opposite party, Roy Sheo Gholam Sahoo Bahadoor, who claims to be a cousin of the late Ram Mohun Sahoo, applied to the Judge for a certificate under the provisions of Act XXVII of 1860. In that case he obtained a certificate, and the order of the Judge is now pending in appeal before this Court in Miscellaneous Regular Appeal No. 156. It is sufficient, however, here to say that it appears from the decision in that case that the petitioner Seetaram Sahoo who was the objector in the certificate case was unable, as he states, to produce the deed of adoption, inasmuch as it was in Calcutta at the time, and no opportunity was given him to produce it. That case is now under appeal, and we have nothing further to do with it. Shortly after the death of the widow a riot took place, and from the proceedings taken in that case before Mr. Gribble the Joint Magistrate and his decision dated the 24th of March 1872, it is very clear, without going further into the case, that Sheo Gholam's party were in the wrong. It is evident from those proceedings that Seetaram Sahoo and his wife were residing in the disputed premises, and that a riotous attack was made on the house by Sheo Gholam's party in force with the intention of summarily ejecting Seetaram and his wife from the premises. From that decision the conduct of the Deputy Magistrate seems to us blameable; he was on the spot at the time and he appears to have taken no active steps to prevent the riot. Be that however as it may it is very clear that Sheo Gholam's party were the agressors, and they were convicted of rioting by the Joint Magistrate Mr. Gribble, who, at the time he passed his decision of the 24th March 1872, was clearly of opinion that Seetaram Sahoo, with his wife, was residing in and in possession of the disputed house. Subsequently several petitions were presented, and amongst them a petition by Beerun Singh, a servant of Sheo Gholam Sahoo, in which he petitioned the Magistrate to issue an injunction under the provisions of Section 62 Act XXV of 1861, the Code of Criminal Procedure, upon Seetaram Sahoo calling upon him to remove his wife from the disputed premises within a certain time. The Magistrate refused to issue any injunction, but referred the petitioner to Section 448 of the Penal Code; that is to say, directed him to take proceedings against Seetaram and his wife for house trespass, although the Magistrate had previously held that Seetaram and his wife were residing and had been residing before the riot on the premises in dispute. Subsequently Seetaram Sahoo, on the 2nd of April 1872, prayed the Magistrate to give him the protection of the Police, alleging that although his wife was then living in the house in dispute with his servants and he was thus in possession thereof, he apprehended a breach of the peace on the part of Sheo Gholam Sahoo's wife if he, the husband, attempted to visit his wife in the house in dispute; he therefore asked for a guard of 4 Constables and a Head Constable of Police; the expenses of which guard he offered to defray.

The Magistrate, upon this petition, passed an order to the effect that whereas the possession of Sheo Gholam Sahoo had been found by a competent Court, if Seetaram Sahoo and his wife desisted from going to the house in dispute, no affray was likely to take place; he therefore refused to accede to the prayer of the petitioner. That is briefly the state of the case up to the time when this Court was asked to send for the record of the case. The record was sent for on the 20th of June 1872.

It is clear to us that the certificate under Act XXVII of 1860 could only authorize the holder thereof, Roy Sheo Gholam Sahoo Bahadoor, to collect the debts due to the estate of the deceased Ram Churn Sahoo

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Such a certificate does not entitle him to recover or to take possession of any property belonging to the deceased from any person who may be in possession of that property. The possession of Seetaram Sahoo and his wife, whether a wrongful or a rightful possession (and upon this point we cannot pronounce any decision), has, to our minds, been clearly proved in this case, and therefore Sheo Gholam Sahoo, if he seeks to recover possession, must prove his title independent of his certificate. The real struggle between the parties in this case is as to who is to bring a suit in the Civil Court, and upon whom the *onus* is to lie. From the very commencement of this case, namely, in the riot case, there is no doubt that Mr. Gribble, however he may have changed his opinion from that expressed on the 24th of March 1872, thought that Seetaram's wife was in possession, and that at the time of the riot both the wife and husband were in the house with their servants, and Sheo Gholam Sahoo's people were convicted of rioting and were punished. In the petition of Beerun Singh it is admitted that the wife of Seetaram and his servants are still in the house, and an application was made to the Magistrate for an injunction calling upon them to vacate the premises. Throughout the proceedings it is clear to us that Seetaram and his wife's possession of the house has been admitted by the opposite party. We therefore hold that the order of the Magistrate in this case is an improper and illegal order, and that Seetaram Sahoo and his wife ought to have been maintained in possession of this house, leaving the opposite party Sheo Gholam Sahoo to bring, if so advised, a suit in the Civil Court to prove his title to the house independent of the certificate which he has obtained.

The order of this Court therefore is that the order passed by the Magistrate, and that of the Sessions Judge confirming that order, be set aside, and that Setaram Sahoo and his wife be retained in possession of the house in dispute until the title to that house is decided by a competent Court. The Magistrate of the District will see that, in the exercise of their right of possession in that house, Seetaram and his wife are not in any way molested or hindered.

The 24th July 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Code of Criminal Procedure s. 318—*Land Disputes—Disputes as to Right to collect Share of Rent—C. O. No.* 10 *of* 18*th April* 1863—*Regulation V of* 1812 *s.* 26—*Regulation V of* 1827.

Miscellaneous Criminal Case No. 120 of 1872.

Ramrunginee Dassee, *Petitioner,*

versus

Gooroodass Roy, *Opposite Party.*

Mr. Woodroffe for the Petitioner.

Mr. Lowe for the Opposite Party.

Section 318 Code of Criminal Procedure refers only to disputes concerning land, but not to a dispute as to the right to collect the rents of a joint undivided estate in a certain proportion. The latter must be dealt with under Circular Order No. 10 of 18th April 1863 and s. 26 Regulation V of 1812, as amended by Regulation V of 1827.

Kemp, J.—THIS case was before the Court on the 13th of January 1872, on that occasion we observed that the first party Ramrunginee Dassee, being, as she alleges, a joint sharer in the property in dispute, had attempted to exercise her right to collect the rent in a certain proportion in the undivided estate; and that if such was the case, the matter could not come under the provisions of Section 318 of the Code of Criminal Procedure, but must be dealt with as directed in the Circular Order of this Court, No. 10, dated 18th April 1863.

We further directed the Magistrate in retrying the case to give the parties an opportunity of appearing before him. The Magistrate, on receipt of our remand order, thought proper to make over the case to the Deputy Magistrate, Baboo Bhoobun Mohun Raha, who has found that the dispute comes within the purview of Section 318 of the Code of Criminal Procedure, and on the evidence that the second party Baboo Gooroodass Roy is in possession. The order of the Deputy Magistrate, directing that the second party be kept in possession until ousted in due course of law, is dated the 17th April 1872.

On the 26th June on the petition of the first party Ramrunginee Dassee, we directed a rule to issue on the second party to show

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cause why the order of the Deputy Magistrate should not be reversed.

The case has been fully argued before us by Mr. Lowe for the second party in support of the Deputy Magistrate's judgments, and by Mr. Woodroffe for the first party in support of the rule.

The position of the parties is this:—Gooroodass Roy, the second party, and Doorgadass Roy, the husband of Ramrunginee, the first party, were uterine brothers. Doorgadass died in 1838. After his death his widow Ramrunginee set up a will and a power to adopt, dispute arose, and two suits were instituted in the late Supreme Court on the part of the widow; one to establish the will and her power of adoption, the other for her share in the joint undivided estate. These suits were eventually compromised, and a decree was passed according to the terms of that compromise, the result being that it was declared that Ramrunginee was entitled to a one-fourth share of the joint undivided estate and her power to adopt was recognized. This decree was passed in February 1846.

It is alleged by Gooroodass Roy that the compromise upon which the decree of February 1846 is based contemplated the execution of a further deed between the parties according to the terms of which Gooroodass was to manage the collections from the share of his sister-in-law Ramrunginee; that in pursuance of this, an *ekrarnamah* or power of attorney was executed by Ramrunginee on the 18th Assar 1253 (June 1846) according to the terms of which Ramrunginee made over her whole title to a share of the joint undivided estate to him for the consideration of an allowance by way of maintenance of Rs. 200 per mensem for the term of her life. It is under this deed that Gooroodass claims to be in exclusive possession of the whole estate, with the right to collect 16 annas of the rent from the tenantry. The execution of this deed is emphatically denied by Ramrunginee.

The Deputy Magistrate observes, with reference to this deed, that "the genuineness or otherwise of it is a question for the Civil Court to settle." He then proceeds to state that it appears to be true that Ramrunginee did execute "*a*" power of attorney in favor of Baboo Gooroodass Roy, inasmuch as in her deposition, under Section 177 of Act VIII of 1859, she said—"Perhaps "Gooroodass Roy took a power of attorney "signed by me" and further that in the same deposition she has stated:—"He does "not pay me Rs. 200 per mensem, but "Rs. 2,000 per annum."

We so far concur with the Deputy Magistrate that it will be for the Civil Court to decide the question of whether Ramrunginee did execute the *ekrar* or not. We have looked at it and considered its terms to enable us to ascertain the precise position of the parties, and for no other purpose. The deed in question is one of a very peculiar description. The widow is made to give up willingly her right to adopt, to establish which she had brought to a successful conclusion a suit in the Supreme Court, and to accept a monthly salary by way of maintenance of Rs. 200 in lieu of a one-fourth share in a joint undivided estate of very great magnitude and value.

Ramrunginee has on oath denied the execution of this deed. Baboo Gooroodass Roy has not deposed to its execution. The deed is not registered. It was originally engrossed on an insufficient stamp, and though executed in 1846, it was not produced in any Court, or in any way published to the world before 1861, and that too in an *ex parte* proceeding. Again in 1865 it was successfully repudiated by Ramrunginee when she was permitted to take out execution of a decree jointly, in proportion to her share in the undivided estate in spite of this deed.

If, therefore, this deed be left out of the question, as either of doubtful authenticity or one upon the genuineness of which this Court cannot under the provisions of Section 318 decide, the parties revert to the position which they held under the decree of the late Supreme Court under which Gooroodass Roy is entitled to a three-fourth share, and Ramrunginee to a one-fourth share of the joint undivided estate.

When the present dispute arose between the parties, and proceedings were instituted under the provisions of Section 318 of the Code of Criminal Procedure, both parties, and more particularly the second party Gooroodass Roy, repudiated the idea that the Section applied. In the *kyefeut* of Gooroodass Roy, we find a statement to the effect "that, inasmuch as Ramrungi-"nee alleges that she is in possession of her "share, the provisions of Section 318 can-"not apply, and it is only the Civil Court "which can take cognizance of the dispute." Section 318 of the Code of Criminal Procedure refers to disputes concerning land. In this case there is no dispute concerning land, the dispute is as to the right to collect

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the rents of a joint undivided estate in a certain proportion. Ramrunginee states :— "My right to a one-fourth share in the joint "estate has been declared by a competent "Court. I claim my right to collect the "rents in proportion." Gooroodass admits that the right of Ramrunginee was declared, but asserts that she has divested herself of that right according to the terms of the *ekrar*. In this state of things, if we admit the *ekrarnamah* or power-of-attorney to be genuine, of which we entertain grave doubts, the position of Gooroodass Roy is that of an attorney for the lady ; he, as member of a joint family, is managing the share of another member of that family, and therefore his possession would not be adverse. Take away that *ekrar*, the right of the widow of Doorgadass Roy, namely Ramrunginee, to a one-fourth share of the joint undivided estate having been declared, any dispute as to the exercise of that right which, as in this case, has taken the form of an attempt on her part to exercise her legal rights by collecting her proportion of the rent, cannot come within the purview of Section 318 of the Code of Criminal Procedure, but must be dealt with as directed in our remand order, under Circular Order No. 10, dated 18th April 1863, and Section 26 Regulation V of 1812, as amended by Regulation V of 1827.

The order of the Deputy Magistrate is reversed.

The 2nd August 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Nuisance—Penal Code s. 290—*Criminal Trespass—Filling up Public Ditch or Drain—Criminal Procedure Code s.* 426.

Miscellaneous Criminal Case No. 154 of 1872.

Roopnarain Dutt and another, *Petitioners*.

Baboo Romesh Chunder Bose for the Petitioners.

The petitioners who filled up a portion of a ditch or drain which formed part of a public way, and which belonged to the public, instead of being convicted of a nuisance punishable under s. 290 Penal Code, was convicted of criminal trespass. But inasmuch as they had not been sentenced to a heavier punishment than might have been awarded if they had been convicted of a nuisance, the High Court, acting under s. 426 Code of Criminal Procedure, declined to interfere.

Couch, C. J.—THE Magistrate says, "from "the evidence recorded in this case, no other "charge than that of criminal trespass can "be sustained" (a remark the justness of which we need not consider). "The defendants themselves admit that their men threw earth which they dug from a tank in the public drain. This could not have been done without trespassing on the said drain. The object in this filling up a part of the drain with the earth might be an encroachment on the drain hereafter. This case might have been dealt with as an obstruction if from the beginning the procedure laid down for such cases had been followed by the issue of the usual notice."

It is clear from this language, from his saying, "this filling up a part of the drain" which refers to the throwing the earth into the drain, that the Magistrate considered and found that a part of what is called a drain had been filled up, and that the filling up was such as to cause an obstruction, because he says it might have been dealt with as an obstruction if the procedure laid down for such cases had been followed.

We have then to consider the fact that the persons who have been convicted did fill up a portion of a ditch or drain which formed part of the public way and which belonged to the public, and to an extent that would interfere with the manner in which the public are entitled to use it. It would be an injury to the public, and in my judgment a nuisance within the meaning of Section 268 of the Penal Code. Certainly, persons are not at liberty to place a quantity of earth upon any part of the public road, whether it is a part which is actually used for the passage of vechicles, or not. In either case a person has no right to interfere with the use of it according to the public rights.

Then this being, upon the evidence in the case, a nuisance, and punishable by Section 290, which provides for the punishment of nuisances not otherwise punishable by the Code, by a fine which may extend to Rs. 200, the applicants have not been sentenced to a larger amount of punishment than might have been awarded for the offence which they ought upon the evidence to have been found guilty of. The case has been misunderstood by the Magistrate when he thought that it might be brought within the Section relating to criminal trespass; but acting under Section 426 of the Code of Criminal Procedure, which is in my opinion a most wholesome provision of the law and should always be considered when an application under Section 404 is

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about to be made to the Court, I think we ought not to interfere with the conviction. I do not see any ground for supposing that the accused in this case have been prejudiced in any way by the error of the Magistrate in convicting them under the wrong Section. The proceedings, therefore, must be returned.

The 8th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Reference—Criminal Procedure Code s. 434—*Different View of Evidence by Sessions Judge.*

Reference to the High Court under section 434 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Beerbhoom.*

Ramdhun Mundle and others, *Applicants.*

The taking by the Sessions Judge of a different view of the evidence from that taken by the Magistrate is not ground for a reference under s. 434 Criminal Procedure Code.

Ainslie, J.—THE finding of the Magistrate is sufficient to warrant the conviction. The Sessions Judge appears to come to take a different view of the evidence, but that is not ground for a reference.

The 17th August 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Magistrate's Powers—Discharge—Act XXV of 1861 *s.* 250— *Erroneous Order of Sessions Judge acted on by Magistrate.*

(Miscellaneous Case.)

Jint Sahoo, *Petitioner*,

versus

Bheekon Roy, *Opposite Party.*

Mr. M. L. Sandel for the Petitioner.

Baboo Taruck Nath Sein for the Opposite Party.

A Magistrate, after he has discharged the accused under s. 250 of the Code of Criminal Procedure, has power, if circumstances appear to him to require it, to take up the case again and to re-try and convict the accused; and the circumstance that he was led to enter upon the second enquiry and second trial by an erroneous order made by the Sessions Judge is no ground for setting aside his proceedings and the conviction.

Couch, C.J.—IN this case as the offence was one triable by a Subordinate Magistrate of the first class, the Sessions Judge had not power to make the order which he made, and the case coming up to us under Section 404 we decide that that order was an erroneous one and ought to be set aside; but it does not follow from this that the subsequent proceedings before the Magistrate ought to be set aside. If the order of the Sessions Judge was essential to the action of the Magistrate in again taking up the case and trying the accused, of course, the order being set aside, the other proceedings would also be set aside. But the Magistrate, after he had discharged the accused under section 250, had power, if circumstances appeared to him to require it, to take up the case again and to re-try the accused. He appears to have had before him on the second occasion some fresh evidence upon which he drew up a charge, and having heard the defence of the accused convicted him, which he had power to do. In whatever way the Magistrate was set in motion on the second occasion, there has been a proper conviction of the accused. The Magistrate might, and, indeed, ought to have taken up the case again, and to have tried it as he has done. Therefore I do not think that the circumstance that he was led to enter upon the second enquiry and second trial by the Sessions Judge having made his order, is a ground for setting aside his proceedings and the conviction. If that were now to be done, it would be the duty of the Magistrate, upon the facts with which he is now acquainted, to take up the case and investigate it. It would not be proper that a person who appears upon the evidence taken to have committed an offence should go entirely free and unpunished because the Sessions Judge had made this order erroneously.

A decision of Mr. Justice Kemp and Mr. Justice Glover, dated the 28th of March 1872, in the case of Mr. Caspersz and the Raneegunge Coal Company * has been read to us;

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* The 28th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

In the matter of H. P. Caspersz, *Petitioner*,

versus

The Raneegunge Coal Company, *Opposite Party.*

The Advocate-General and *Mr. M. L. Sandel* for Petitioner.

No one for Opposite Party.

Kemp, J.—THIS is an appliction on the part of Mr. H. Caspersz who has been heard through counsel to-day.

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but that decision is not in conflict with what we now decide. It set aside the order of the Sessions Judge; but nothing was said as to what the consequences of setting it aside would be, that question really not arising in the case.

It appears that the petitioner on the complaint of the Raneegunge Coal Association was charged with criminal misappropriation of certain moneys belonging to that association. The charge comprises three items, namely, Rs. 99-4-9 on account of moneys to be paid to coolies, Rs. 111-1-6 due to carters, and Rs. 100 being the wages of a Sircar by name Lullit Lal Singh, who has been examined in this case. The case was heard by Mr. R. Sevestre, Deputy Magistrate of Raneegunge, who is vested with the full powers of a Magistrate. The Deputy Magistrate after going into the whole of the evidence for the prosecution came to the conclusion that no charge of misappropriation had been made out against the accused, and he dismissed the case. The Sessions Judge of Burdwan, acting under the provisions of Section 435 of the Code of Criminal Procedure, has ordered the Deputy Magistrate to make further enquiry into the complaint.

It is against this order that this Court has been invoked to exercise the powers vested in it under Section 404 of the Code. The Judge did not think proper to order the commitment of the accused. There can be no doubt that in this case as the accused was not put on his defence the order dismissing the case amounts only to a discharge of the accused, and that the Judge was competent under Section 435, if he thought proper, to order the commitment of the accused. Not having done so, and having acted under the alternative portion of Section 435, the Judge was bound to keep strictly within the terms of that Section. Now, the terms of that Section, in as far as the alternative portion of it is concerned, are, that in the case of such offences, that is to say, offences triable by the Court of Sessions or by the Magistrate of the District or by any officer exercising the full powers of a Magistrate, the Court of Sessions may order an enquiry to be made into any case which the Magistrate or other officer exercising the powers of a Magistrate may have dismissed *without enquiry*. Now in this case, can it be said that the complaint has been dismissed without enquiry? We think that the contention of the learned counsel in this case is correct. There can be no doubt that not only has there been an enquiry in this case, but that there has been a most elaborate enquiry. Witnesses for the Coal Association have been examined, their account-books have been produced, and the whole case has, in our opinion, been thoroughly enquired into, and *primâ facie* the decision of the Deputy Magistrate appears to us, as far as we can judge of it from the evidence which he alludes to, a proper decision; but, be that as it may, he has dismissed the case as against the accused after taking evidence and after due enquiry. We have not found any authority contrary to the learned counsel's contention with the exception of a Criminal Letter which is to be found in Vol. 3 W. R., page 21. In that case the Sessions Judge appears to have doubted whether he could proceed under the latter portion of Section 435 in a case where some enquiry had been made, and the letter referred to informed him that he was in error in supposing that he could not proceed under that Section because the words "*without enquiry*" mean without proper enquiry. We are not bound by this criminal letter; and, following the words of the law, we must hold that there has been an enquiry in this case, and it can hardly be said that the enquiry has not been a proper one. We therefore think that the order of the Judge ordering a further enquiry must be set aside.

Glover, J.—I wish to add one word (whilst entirely concurring in the order to be passed), to guard myself against giving any opinion as to the sufficiency or otherwise of the enquiry made by the Deputy Magistrate. We have not had the evidence before us, and the Judge on the other hand says that he considers the enquiry not to have been a proper or sufficient one. I wish to avoid pledging myself to any opinion as to the sufficiency of the enquiry. It is enough for the purposes of this case that there was *an enquiry*.

The 23rd August 1872.

Present:

The Hon'ble Sir Richard Couch, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Jurisdiction—Magistrate.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Dacca.

Joy Chunder Bundopadhya,

versús

Jhoroo Kopalee.

One Magistrate has no authority to set aside the order of another Magistrate.

Reference.—I THINK that the Magistrate's order in this case was illegal.

In the first place I do not see that the Magistrate had any authority to set aside any order of another Magistrate passed under Chapter XX Criminal Procedure Code.

In the next place I do not see that the Deputy Magistrate's order was illegal, as the Magistrate says.

A notice was served on the defendant to open a certain road. It was competent to him either to show cause why that road should not be opened, *or* to appeal to a Jury. He elected the former course. In showing his objection, he made certain statements the accuracy of which the Deputy Magistrate thought should be tested by a local enquiry. There seems to me to be nothing in the law prohibiting the Deputy Magistrate from doing so.

I would, therefore, move the Court to set aside the order of the Magistrate of the district, and restore the order of the Deputy Magistrate.

Judgment of the High Court.

Couch, C.J.—The order of the Magistrate should be annulled. The law did not give any appeal to him. He had no authority to make the order which he did.

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The 24th August 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Act II of 1867, *B. C. (Operation of).*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Magistrate of Moorshedabad.*

The Queen

versus

Zohur Sheikh and others.

A sentence of rigorous imprisonment in default of fine, passed under Act II of 1867 (B. C.), was set aside, the notification of the Government extending the Act to Jungipore not having been published in three successive numbers of the Government Gazette.

Reference.—On the 4th of June last, the Deputy Magistrate of Jungipore recorded a proceeding that it appeared that one Zohur Sheikh had committed the offence of gambling, and therefore summoned him for the 7th of that month.

On the 28th of June, the Deputy Magistrate fined the prisoner in the sum of Rs. 20, and sentenced him in default to rigorous imprisonment for 10 days under Act II of 1867,—the Section not mentioned, but presumably under Section 4 of the Act.

In Section 2 of Act II of 1867 (B. C.), it is provided that it shall be competent to the Lieutenant-Governor to extend by a notification to be published *in three successive numbers* of the Calcutta Gazette all or any of the Sections of the Act. Now it appears that the notification extending the Act to Jungipore and Balighatta was only published once in the Gazette of November 17th, 1869, in page 2042 of the Calcutta Gazette; and as the Act has therefore not been legally extended to Jungipore and Balighatta, I fear that the order of the Deputy Magistrate is illegal as being without jurisdiction, and must be reversed.

Some months ago a case occurred in which the Joint Magistrate acquitted some persons accused of gambling in Berhampore, on the ground that the notification extending the Act to Berhampore had been published in one issue only of the Gazette, and I therefore reported the matter in order that measures might be taken to rectify the omission. Subsequently the notification extending the Act to Jungipore and Balighatta among other places was published in the three successive Gazettes of May 29th, June 5th, and June 12th last. As, however, the offence in this case had evidently taken place before June 4th (*vide* para. 2), the Act had not at that time been extended according to due form of law.

It appears to me that this is not a case in which it is necessary to call for any explanation from the Lower Court.

Judgment of the High Court.

Ainslie, J.—We concur with the Magistrate and set aside the conviction and sentence passed on Zohur Sheikh, and direct that the fine, if levied, be refunded.

The 24th August 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Act XXV of 1861, *ss.* 308 *and* 404—*Obstruction — Thoroughfare — Jurisdiction — High Court.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of the* 24-*Pergunnahs.*

Messrs. Angelo Brothers, *Petitioners,*

versus

Messrs. Cargill and Co., *Opposite Party.*

The Advocate-General for the Petitioners.

Messrs. J. W. Lowe and *W. C. Trotman* and *Baboo Gocoolnath Chatterjee* for the Opposite Party.

When cause is shown by a party under Section 308 of the Code of Criminal Procedure, it is the duty of a Magistrate to, and he must, enquire whether there is a thoroughfare within the meaning of the Section, and whether there is an obstruction. It cannot be said that, in entering upon that enquiry, he is not acting within his jurisdiction. If he decides any point of law erroneously, the case falls under Section 404 of the Code; but if he decides upon evidence before him, the case does not come within the Section in question, even if his decision upon the evidence be an erroneous one; nor is an erroneous decision upon the evidence an excess of jurisdiction which would enable the High Court to interfere under its general power of superintendence.

Couch, C. J.—In this case, which was referred to this Court under Section 434 of the Code of Criminal Procedure by the Judge of the 24-Pergunnahs, the Magistrate had proceeded under Section 308 of the Code of Criminal Procedure, and had made an order

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which the Sessions Judge says he is of opinion was in excess of his jurisdiction and ought to be quashed.

Section 308 gives power to the Magistrate, whenever he considers that there is any unlawful obstruction or nuisance which should be removed from any thoroughfare, to make an order calling upon the person causing the obstruction or nuisance to remove it or to show cause to the contrary.

In this case, cause was shown by the persons upon whom the order was made—Messrs. Angelo Brothers; and the Magistrate entered upon the enquiry. Now, when cause is shown, it is the duty of the Magistrate to, and he must, enquire whether there is a thoroughfare within the meaning of the Section, and whether there is an obstruction. It cannot be said that, in entering upon that enquiry, he is not acting within his jurisdiction. If, in the course of the enquiry, he decides any point of law erroneously, the case may be taken up by this Court under Section 404 of the Code of Criminal Procedure; but if there is evidence before him, and he decides upon it, although his decision upon the evidence may be an erroneous one, yet if there is no error in law, the case does not come within Section 404; nor is an erroneous decision upon the evidence an excess of jurisdiction which would enable this Court to interfere under its general power of superintendence.

With reference to what is an excess of jurisdiction in cases of this kind, or a want of jurisdiction, the language of Lord Denman in a leading case upon questions of this description may be usefully quoted. It is in the case of the Queen *versus* Bolton, in the 1st Volume of the Queen's Bench Reports, page 66. There an order had been made by Magistrates under an Act of Parliament, which gave power to them in certain cases to make orders for giving up possession of land to the Church Wardens and Overseers of a Parish; and the case being brought before the Court of Queen's Bench by a *certiorari*, Lord Denman, in his judgment,—having stated that there were two points made, first, that the proceedings all being regular upon the face of them and disclosing a case within the jurisdiction of the Magistrates, the Court could not look at affidavits for the purpose of impeaching their decision; and the second, that, even if the affidavits were looked at, the case would be found to be one of conflicting evidence in which there was much to support the conclusion to which the Magistrates had come,—says: "The first of these is a point of much importance, because of very general application; but the principle on which it turns is very simple: the difficulty is always found in applying it. The case to be supposed is one like the present, in which the legislature has trusted the original—it may be (as here) the final—ju isdiction *on the merits* to the Magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it."

And then, in the subsequent paragraph with regard to the objection of want of jurisdiction, he says: "But where a charge has been well laid before a Magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the enquiry: in so doing he undoubtedly acts within his jurisdiction: but in the course of the enquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and *so* that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the Magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that, in every stage of the enquiry up to the conclusion he could not but have proceeded, and that if he had come to a different conclusion his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the enquiry: and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry."

Here, if the Magistrate has come to a wrong conclusion upon the evidence, it does not affect his jurisdiction. He had jurisdiction to enquire, and if there was, as in this case, evidence before him, he cannot be said to have exceeded his jurisdiction, although his conclusion may not be the conclusion that ought, in the opinion of the Sessions

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Judge or of us, to be drawn from the evidence. The Magistrate had to decide whether there was a thoroughfare and whether there was an obstruction ; it was not necessary to determine what is meant by thoroughfare ; whether a public way along which all persons have a right to pass and repass, or a way along which only some persons have a right to pass and repass. In either case, there was evidence upon which the Magistrate might find that there was a thoroughfare. There was evidence, especially what Mr. Lowe referred to, *viz.*, the statements of the parties themselves, that it was a public thoroughfare, and there certainly was abundant evidence that it was a way which was used by a considerable number of persons. The Magistrate, therefore, had evidence before him ; and there has not been in this case either an erroneous decision upon a point of law or an acting without jurisdiction or in excess of jurisdiction.

The proceedings must be returned : the Court makes no order under Section 404.

The 29th August 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Act XXV of 1861 *ss.* 15, 23, *and* 68—*Joint Magistrate—Complaint.*

Reference to the High Court by the Sessions Judge of Dinagepore.

Roy Luchmiput Singh, *Petitioner.*

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Rashbehary Ghose* for the Petitioner.

A Joint Magistrate who has been vested with the full powers of a Magistrate of a district, and to whom a case is duly made over by the Magistrate, is competent, under Sections 15, 23, and 68 of the Code of Criminal Procedure, to initiate proceedings without any formal complaint against parties other than those mentioned in the original complaint.

Reference.—THE question that has arisen is this, whether a Joint Magistrate, to whom a case has been duly made over by the Magistrate, is authorised to take up the case and summon other parties than those immediately mentioned in the original complaint if in the course of the trial he finds grounds for so doing.

It appears that the Officiating Judge who has been in charge during my absence on leave has reversed in appeal an order of this trial passed by the Joint Magistrate, on the ground that the case as taken up against the appellant was not made over to him for trial, but that his proceedings against the appellant were such as are contemplated in Section 68, Code of Criminal Procedure, and consequently only cognizable by the Magistrate of the district.

As presumed by the Magistrate in his third para., I think it probable that the Officiating Judge was in ignorance of the original case being made over in due form.

I feel no doubt myself that, under the circumstances, the Joint Magistrate had power to proceed against the appellant ; but as the matter is of some importance, I remit the papers for the opinion of the High Court.

Judgment of the High Court.

Bayley, J.—Reading Sections 15, 23 and 68 of the Code of Criminal Procedure together, I am of opinion that the Joint Magistrate had jurisdiction to act as he did in this case.

Mitter, J.—I am of the same opinion. Assuming that the charge subsequently brought against the petitioner Luchmiput Singh was not covered by the order of reference issued by the Magistrate of the district, it appears to me clear that the Joint Magistrate had power, under Section 68 of the Code of Criminal Procedure, to initiate proceedings against the petitioner without any formal complaint. Section 23 of that Act says :—" The Local Government may invest " any person with the powers of a Magis- " trate or of a Subordinate Magistrate of " the first or second class, as described in " the last preceding Section, with a view " to the exercise by such person of such " powers under this Act or under any " special or local law." The Joint Magistrate has been vested by Government under this Section with all the judicial powers of the Magistrate of the district, and it follows therefore that the Joint Magistrate was authorized, under Section 68 of the Criminal Procedure Code, to initiate this case exactly in the same way as the Magistrate of the district could have done, that is to say, without any formal complaint. Otherwise a Subordinate Magistrate who is in charge of a division of the district would be competent to exercise the powers conferred by Section 68, whereas a Joint Magistrate who possesses all the powers of a Magistrate would not be competent to proceed under that Section.

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The 29th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Daily Fine—Bye-law—High Court (Extraordinary Powers).

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Hooghly.

W. N. Love, *Petitioner.*

Where the accused was convicted of having infringed a Bye-law of the Howrah Municipality, and was fined 1 rupee for the offence, and also to pay a daily fine of 2 rupees till he complied with the Bye-law, the High Court remitted the daily fine as illegal, but declined to exercise its extraordinary powers by setting aside the fine of 1 rupee which was inflicted for an offence actually committed.

Reference.—THE petitioner, W. N. Love, has been convicted under Section 18 of the Howrah Municipal Bye-laws quoted in the margin and fined 1 rupee for infringement thereof, as well as ordered to pay a daily fine of 2 rupees (I presume until he complies with the Bye-law).

The external roofs and walls of any hut or any other building whatever, about to be erected or renewed in or near any large bazar or main road, shall not be made of grass leaves or any other inflammable materials. The Commissioners may from time to time notify what bazars and roads come under the above denomination.

An order of this description has been held not only to be contrary to law but to vitiate the entire conviction (see *In re* Sagor Dutt,* 1 Bengal Law Reports, 41, Or. Cr.), and following that rule I feel bound on petitioner's application to submit the proceedings, under Section 434 of the Code of Criminal Procedure, to have that order set aside.

Judgment of the High Court.

Mitter, J.—We think that the daily fine of 2 rupees was illegal, and ought to be set aside. But, under the circumstances of this case, we do not think it necessary to exercise our special powers of discretion by setting aside the fine of 1 rupee, which was inflicted upon the prisoner for an offence actually committed. The conviction on that offence is not bad in law, and we do not see any reason for exercising our extraordinary powers by setting aside that conviction.

The 29th August 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Act XXV of 1861 *s.* 290—*Recognizance.*

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Dacca.

The Queen

versus

Komodinee Kanth Banerjee Chowdhry.

It is illegal and contrary to Section 290, Code of Criminal Procedure, to take a second recognizance before the period fixed in the first recognizance has expired.

Reference.—THIS case is similar to one I referred in my letter No. 704 of 25th June last from Furreedpore. During the pendency of one recognizance for a time of one year, the Deputy Magistrate has called on the applicant to execute a second engagement for a similar period.

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* The 10th September 1868.

Present:

The Hon'ble J. P. Norman and J. B. Phear, *Judges.*

In the matter of

Sagore Dutt—The Queen

versus

The Justices of the Peace for Calcutta.

THE facts of this case, as given in the Bengal Law Reports, are shortly these:—

The accused was convicted by a Justice of the Peace for keeping a warehouse for jute without a license, and was fined Rs. 300 and ordered to pay a daily fine of Rs. 25. The case was brought before the High Court by *certiorari*, when the Advocate-General, in arguing against the conviction, contended, as the second branch of his argument, that there was a defect in imposing a fine of Rs. 25 for every day after the conviction during which the accused should use the warehouse for storing jute without a license. He urged that this was fining the accused for an offence which had not been committed, and that the conviction was therefore bad.

The judgment of the Court was delivered as follows by—

Norman, J.—We are of opinion that the conviction is bad on the second ground stated by the Advocate-General. In addition to the fine of Rs. 300, the Judge imposed a further fine of Rs. 25 for every day during which the warehouse was kept for storing jute, after the date of the conviction. It was in fact an adjudication in respect of an offence which had not been then committed. The conviction cannot be amended: a conviction must either be wholly good or wholly bad. Part of it being bad, it is bad altogether and must be set aside.

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Now the form of recognizance prescribed by the Code is perfectly general, and seems simply to declare that the recognizant is a turbulent character and must be subjected to a special restraint; so that if, at the suit of A, a recognizance were taken from B, and he broke the peace ultimately against C, and not A, I have no doubt that his recognizance might be forfeited. I do not think therefore that it can in any way be urged correctly that the recognizances were required in reference to separate transactions.

Under these circumstances it appears to me that the Deputy Magistrate's order of the 15th June last, requiring the applicant to execute a recognizance for a term of one year during the pendency of a similar recognizance, was illegal under Section 290, and I beg therefore to refer it to the Court in order that it may be quashed and the Deputy Magistrate may be directed to proceed according to law.

I wish to make no remarks as to the propriety or otherwise of the order, but simply as to its legality.

Judgment of the High Court.

Mitter, J.—We concur with the Officiating Sessions Judge in holding that the second recognizance was illegal. The first recognizance was general and unlimited in its terms according to the form given in the law, and it is therefore clear that to take a second recognizance before the period fixed in the first recognizance would be a virtual interference with the provisions of Section 290, Indian Criminal Procedure Code.

The 3rd September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, *Judge.*

Jury (wrong Verdict)—High Court.

The Queen

versus

Nidheeram Bagdee and others, *Appellants.*

Committed by the Magistrate, and tried by the Officiating Additional Sessions Judge of 24-Pergunnahs on a charge of dacoity.

Mr. H. E. Mendies for the Appellants.

Where a jury convicted a prisoner contrary to the charge of the Sessions Judge, which charge was held by the High Court to have been a proper charge, the High Court refused to interfere, although it concurred with the Sessions Judge in thinking that the verdict of the jury was not correct. The case was one in which an application could be made to the Government; but as regards the Court, the petitions were rejected.

Couch, C.J.—It is provided in the Code of Criminal Procedure that where the conviction is on the trial by the jury, an appeal shall only be admissible on a matter of law. In this case, as regards the five prisoners whose petitions are now before the Court, there does not appear to have been any misdirection by the Judge. As it was right to do he has in his charge to the jury dealt with the cases of the different prisoners separately. He first gave the jury his direction with regard to the parties who were accused of having *committed* the *dacoity,* and then he dealt with the case of the sixth prisoner, Prosunno Coomar Banerjee, who was charged with *abetting.* It does not follow from its being the opinion of a Bench of this Court before which the case of Prosunno Coomar came that there was a mis-direction in consequence of which the learned Judges thought he ought to be acquitted, that there is any mis-direction as regards the other prisoners. In fact the Judge properly directed the jury as regards them. He pointed out that as to two of them there were the confessions before the Magistrate which might be considered by the jury as corroborating the evidence of the accomplices. As to the other three, he told the jury, and properly, that the accomplices were not corroborated, and he directed the jury that it would not be safe to convict them without corroboration. Notwithstanding that, the jury did convict them. The Judge has said that he does not approve of that verdict because the conviction rests upon the testimony of accomplices only, but he adds to that, "the Court cannot say that any injustice has been done." What he means by that, I do not precisely know. The case stands thus: the jury have, contrary

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to the direction of the Judge, exercised a power which they possessed of convicting the prisoners. There is no matter of law upon which there can be an appeal to this Court, and no matter, in my judgment, upon which this Court has power to set aside the verdict of the jury and to direct an acquittal.

A decision of this Court* has been handed up to us. With every respect to the learned Judges who made that decision, I am unable to concur with them. I think the proper course in this case is not for the High Court to set aside the verdict of the jury and acquit the prisoners, but that it is a case in which an application may very properly be made to the Government, and it will be supported by the opinion which has been expressed by the Judge that he did not approve of the verdict of the jury, in which we concur. As regards any order of this Court, the petitions of these five prisoners must be rejected.

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* The 2nd April 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

The Queen

versus

Shib Chunder Mundle, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of 24-Pergunnahs on a charge of forgery.

Mr. R. E. Twidale and *Baboo Nil Madhub Sein* for the Appellant.

Kemp, J.—THE prisoner has been convicted of the offence of using as genuine a forged document, and sentenced to three years' rigorous imprisonment. The charge of the Judge is clearly one for acquittal. The verdict of the jury is supported by no evidence, and is so clearly wrong that we referred to the Judge to know whether the verdict of the jury was approved of by him. The Judge has now in reply to our call stated that the verdict was disapproved of by him, and given his reasons for disapproving of the verdict, in which we concur. It is perfectly clear to our minds that the prisoner is innocent, and that there has been no alteration in these accounts. The entry in the plaint of the 26th Assar was clearly a mistake. We acquit the prisoner and direct his immediate discharge.

The 5th September 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Forgery—Cheating—Act XLV of 1860 *ss.* 465 *and* 468.

The Queen

versus

Banessur Biswas, *Appellant.*

Committed by the Deputy Commissioner, and tried by the Officiating Judicial Commissioner of Assam on a charge of forgery.

Mr. Munmohun Ghose for the Appellant.

HELD, that where a person's object was to deceive his employer by falsifying account-books which were in his custody, such deception being likely to cause damage to his employer, he was rightly convicted under Section 468 of forgery with intent to cheat, instead of under Section 465 of simple forgery.

Bayley, J.—THIS is a case in which the Judicial Commissioner and the jury of Nowgong in Assam have unanimously found the prisoner guilty under Section 468 of the Indian Penal Code; and as it is admitted that there was no misdirection to the jury, the law would not admit of our interference with the conviction by the said Judge and the jury.

We are, however, pressed with two points by Mr. Ghose for the prisoner; *firstly*, that the conviction should have been under Section 465, and not Section 468, of the Indian Penal Code; and, *secondly*, that the fine of Rs. 120 should not have been imposed on the prisoner.

Without entering further into the case, it is quite clear from the facts recorded on the evidence that the cashier's books were altered when in his charge "for the purpose of cheating," Section 468, and the case therefore falls under Section 468.

The sum of Rs. 120 charged to the prisoner were merely expenses to recoup Government for the loss which it may have incurred in prosecuting, and in paying witnesses.

I would reject this appeal.

Mitter, J.—I am of the same opinion. It seems to me clear that the object of the prisoner was to *deceive* his employer by falsifying the account-books which were in his custody; and as such deception was likely to cause damage to his employer, the conviction under Section 468 appears to me to be right.

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The 9th September 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, F. B. Kemp, Dwarkanath Mitter, and W. Ainslie, *Judges*.

Jurisdiction—Breach of the Peace—Riot—Haut—Act XXV of 1861, *s.* 62.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by Mr. C B. Garrett, Officiating Sessions Judge of Dacca, dated the* 15*th July* 1872.

Bykuntram Shaha Roy and others,

versus

Meajan.

The Advocate-General and *Baboos Mohinee Mohun Roy* and *Doorga Mohun Doss*, in support of the reference by the Judge.

Mr. Woodroffe and *Baboo Romesh Chunder Mitter*, in support of the Magistrate's order.

A Magistrate or other officer exercising the powers of a Magistrate is legally competent under Section 62 Act XXV of 1861, to issue an order prohibiting a land-holder from holding a haut on any particular spot on his estate on particular days, on the ground that such an order is likely to prevent a riot or an affray.

THIS case was referred to a Full Bench by Kemp and Glover, J.J., with the following remarks :—

Kemp, J.—The question before us is whether a Magistrate or other officer exercising the powers of a Magistrate can legally issue an order, under Section 62 of the Code of Criminal Procedure, prohibiting a land-holder from holding a *haut* on any particular spot on his estate on particular days, on the ground that such order is likely to prevent a riot or affray.

There are conflicting judgments on this point. We refer to the 4th Vol., Weekly Reporter, page 12, Criminal Rulings, Seeb Chunder Bhuttacharjee *vs.* Sadut Ali Khan and others ; and the 11th Vol., Weekly Reporter, page 5, Criminal Rulings, case of Kalika Pershad and others.

We therefore refer the case to the Full Bench for decision. The question we would submit to the Bench is—

Whether a Magistrate or other officer exercising the powers of a Magistrate is legally competent to issue an order, under Section 62 Act XXV of 1861, prohibiting a land-holder from holding a *haut* on any particular spot on his estate on particular days, on the ground that such order is likely to prevent a riot or affray, or because a riot or affray has already occurred.

The case came on for argument before the Full Bench on the 22nd August 1872.

Mr. Woodroffe.—The facts of the case are these. Mr. Wells, the Magistrate of Humedpore, by an order, dated the 3rd May 1872, states—"It is urged by the "pleaders for Bykunto Ram Roy that he is "old and that his zemindaries are worked "by his son. This is nowhere shown in "evidence and is not probable, for it is else-"where urged that Bykunto Ram Roy has "been bound down to keep the peace." The Magistrate then goes on to deal with the question of keeping the peace, which I do not understand is any part of the present question.

"It must be remembered" (he proceeds) "that Fureedpore is renowned for lattials and "furnishes men in that capacity to all neigh-"bouring districts," and after pointing out an alleged discrepancy in the evidence, he says—"I consider the probability of a breach "of the peace taking place established, and the "necessity of binding down both parties "satisfactorily shown." The Magistrate then ordered that a bond should be taken from both parties, and his order concludes as follows :—"Moreover, I fear that this may "not be sufficient to prevent a riot or affray, "if the new market-place is allowed to con-"tinue to be held in such close proximity to "the old one, and on the same days, and at "the same times. The old excuse is of "course urged that there is great *zulum* and "extortion in the old market, and it is pre-"tended that the villages have set up the new "one themselves. Nothing of this is proved "or attempted to be shown. In short, if an "opposition market was set up for such an "object, a place in the immediate vicinity "to hold it would hardly have been selected. "The real secret crops up when the mooktears "for Bykunto Ram urge that they do not "force men to go to the new market for they "have no *tolah* in the new market, and every "one would come voluntarily. It is a well-"known fact that to induce people to come, "every zemindar always commences by "taking no *tolah*. There can be no doubt "Bykunto Ram, who has been and is at "enmity with Beepeen Roy, only institut-"ed this new market to cut out and destroy "the old one. Had he done it merely with "a view of relieving the ryots from oppres-"sion, he could have set up the new market

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"a mile or two off and had it on different "days. I consider that if the new market "at or near Baüsrussee is allowed to be "held on Tuesdays and Saturdays, the "same days as market is held at Rajapore, "only a few yards distant, that riot or affray "may ensue. I accordingly by this written "order, under Section 62 of the Procedure "Code, direct Bykunto Ram and every one "in his service not to hold, or countenance, "or encourage the holding of a market at or "near Baüsrussee on Tuesdays and Satur-"days, and I further order that no person "or persons assemble and create a market "on those days at or near Baüsrussee."

Mr. Garrett, the Officiating Sessions Judge, has referred the matter under Section 434 of the Code of Criminal Procedure.

The first question which appears to me to arise under this state of facts is, whether there could have been any reference by the Officiating Sessions Judge of Dacca to this Court; whether this Court, in other words, is competent to deal with it under Section 404. I contend that the order of the Magistrate under Section 62 is not a judicial proceeding or a proceeding of Court, but an order passed by an officer, in discharge of his executive duties, for keeping the peace of the district over which he has charge; and if any one thinks that his rights are invaded by that order, he must proceed according to law.

The Advocate-General.—I object to this question as being one that has not been referred to the Full Bench. When the case goes back, the Division Bench will deal with that question as it pleases.

Mr. Woodroffe.—When a question is referred to the decision of a Full Bench, it is at all times competent for any of the parties interested in the matter to show that, in point of fact, the question does not arise at all. [*Couch, C. J.*—Have you any authority to show that when there is a reference to a Full Bench, the Full Bench is bound to entertain an objection as to a question not referred to them?] There are decisions of the Court in which it has been so held. [*Mitter, J.*—When a point has been properly referred, that is the only point to be determined and the only point to be argued.] That is just what I am endeavouring to do. [*Couch, C.J.*—I think you ought to be limited to what is referred to the Full Bench, unless you can show us any authority to the contrary.] With the Court's permission, I shall cite my authorities on this question hereafter. Meanwhile I shall direct the Court's attention to the question which has been referred for decision, *viz.*, as to the legality of the Magistrate's order under Section 62. In the case of Abbas Ali Chowdry *vs.* Illim Meah (14 W. R., 46), it was held by a Full Bench (Phear, J., dissenting) that an order passed by a Magistrate under Section 62 was not of the nature of a judicial proceeding, and could not therefore be interfered with by the High Court under Section 404. I am referring to this case to show what the powers of a Magistrate are under Section 62. Another portion of the decision had reference to the question as to what the High Court could do under Section 404. The judgment of the Chief Justice deals solely with the question relative to Section 62, and shows clearly why a Magistrate's order is not and never was intended to be regarded as a judicial proceeding. That, then, being the nature of the order passed by the Magistrate, the Officiating Sessions Judge says with reference to it—"It appears to me "that the order passed by the Magistrate "under Section 62, Criminal Procedure Code, "is wrong in law and principle. It is said "by the Magistrate that this *haut* has been "established only with a view to draw cus-"tom from Beepeen Behary's old one, and "thus to touch him in the most sensitive "part of his nature, *i. e.*, his pocket; but it "is the right of every zemindar *primâ facie* "to establish a market in his land: if he "has a right to do this, it cannot signi-"fy what motive actuates him to use that "right. Had the Magistrate found that "no measure he would use would pre-"vent Bykunto and Beepeen Behary from "fighting about the market, I think he might "legally have passed an order enjoining the "parties to discontinue their markets; but "in prohibiting one market and leaving the "other untouched, he seems to me to have "passed an order that could only legally be "passed by a Civil Court, after an investigation of the respective rights of both parties." I apprehend that if a Magistrate finds that a man insists in doing an act, which in itself may be a legal act, for the purpose of causing annoyance or injury to others, and that the act is one which, when done, will cause riots and affrays, and particularly in a district where the records of this case show that the affrays which take place in this district are not altogether of the most harmless character, but are attended with loss of life, great brutality, and injury to very many persons, the Magistrate is justified to pass an order under Section 62 directing the person to abstain from that act. The Officiating

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Sessions Judge puts the case as an infringement of a civil right of the parties. It may however be a question, I think, whether a zemindar has a right to open a *haut* in his property. It may be that the right to establish such a market or fair may require the concurrence of the Civil authorities. The mere collecting of persons might in itself be a nuisance and could only be allowed by prescription or grant from the Crown. But however that may be, it certainly cannot be said that any man has a right to open a *haut* and get a collection of persons together with what is an invariable adjunct of a *haut*, —a sufficient band of lattials. Protection should not only be given to those persons who go to the market, but also to prevent others from being taken *nolens volens* to the new market, and that I think is generally the effect of establishing a new market. It cannot be said that a Magistrate cannot say upon what days markets shall be held. Moreover, the language of the Section itself seems to point in no doubtful way to this, that the Magistrate should in certain cases interfere with the ordinary rights and enjoyment of property.

The two decisions which have led to this reference are reported in 4 Weekly Reporter, p. 12, and 11 Weekly Reporter, p. 5. Now, Section 62 has a very much wider scope than simply referring to nuisances. There are other Sections in the Code which deal with nuisances, such as the Section relating to the fouling of water, the leaving unprotected the sides of a tank, the placing of obstructions upon a public high road, &c. But Section 62 has not reference so much to the act itself as to the consequences likely to result from it. [*Couch, C.J.*—Section 63 says that the obstruction, &c., must be an unlawful one, *i. e.*, a public nuisance: Section 62 does not say so.] No, and for a very good reason. Section 62 is a wider one; it is not limited to the doing of unlawful acts, but rather says that the Magistrate may direct a person to abstain from a certain act which may be lawful or unlawful in itself. The case in the 4 Weekly Reporter was hardly on all fours with the present proceeding. In that case it was held that a Magistrate could not, under Section 62, interfere with the Civil rights of a landholder to establish *hauts* within his estate and to hold them any day most convenient to him; and Trevor, J., said—"I am clearly of "opinion that these words do not authorize a "Magistrate to interfere with the exercise of "any of his ordinary rights by a landholder, "merely because such exercise may require "vigilance on the part of the Police, and "may, in the absence of such vigilance, lead "to an affray." Now, the Magistrate of Furreedpore has certainly not laid himself open to such remarks, because it appears that he did pass an order binding both parties down to keep the peace; but fearing that this would not be sufficient to prevent a riot or affray, he made an order under Section 62 also. The effect of the decision in the 4 Weekly Reporter would appear to be to relieve the Police from the discharge of their duties in a case where a breach of the peace is likely to take place; and it seems to me that no order was passed more likely to lead to a breach of the peace than the order passed in the 4 Weekly Reporter, p. 12. [*Kemp, J.*—That is the view which was taken by the Sudder Nizamut Adalut. There is a Circular Order of the late Nizamut Adalut almost in the same words as Mr. Justice Trevor's judgment.] In the 11 Weekly Reporter, p. 5, the case was one in which a Magistrate ordered the rival holders of two *hauts* to abstain from holding their *hauts* on the same day upon adjacent pieces of ground, as he apprehended a continuance of riots and affrays, and annoyance or injury to persons lawfully employed in them; and it was held that the order was strictly within the provisions of Section 62, and the High Court refused to interfere with it. [*Mitter, J.*—What is the duration of the injunction in this case?] So long as there was another market (Beepeen Behary's old one) held on Tuesday and Saturday, Bykunto was not to hold a new market in the immediate vicinity on the same days. [*Kemp, J.*—If the Magistrate has not power to issue an injunction not to hold the market on a particular day, may he not prevent the holding of a *haut* on any day at all?] There is a plain rule for construing Acts of Parliament, *viz.*, that an Act must be construed with reference to the object for which a power is vested in a person. [*Kemp, J.*—Peace is the object in this.] If the Magistrate should be of opinion that the holding of a market at all would lead to a breach of the peace, there can be no doubt that he would have a right to prevent the owner of it from holding that market. [*Mitter, J.*—Does not the Magistrate go a little too far in this case in saying that by merely causing a market to be held in a new spot, it will lead to a perpetual breach of the peace?] What the Magistrate meant was, that whereas a market is to be held at Baüsrussee on the same day as the market is

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held at Rajapore, it appears to me that riot or affray may ensue; and I therefore direct that such market shall not be held so long as it is held on those days, and so long as the holding of that market is likely to lead to a breach of the peace. [*Mitter, J.*—Would not that order be too indefinite—"*so long as*?"] It is an order by an executive officer, and he can rescind it when he sees it necessary. [*Couch, C. J.*—If the order is defective in that respect, it can be amended.] Just so; but, as it stands, the simple question is whether or not the Magistrate is competent to issue an order under Section 62, prohibiting a landholder from holding a *haut* on any particular spot on his estate on particular days, on the ground that such order is likely to prevent a riot or affray, or because a riot or affray has already occurred. [*Mitter, J.*—The Magistrate can pass an order under this section only when an affray is likely to occur, and not when one has actually occurred.] [*Couch, C. J.*—He did not pass the order because an affray has occurred, but because (from previous affrays having occurred) others are likely to occur.] [*Mitter, J.*—Then the past riots are referred to only as evidence of future riots likely to occur.] Just so.

On the first point, *viz.*, whether there can be a reference by the Officiating Sessions Judge under Section 434, and whether this Court can deal with such reference under Section 404, I would refer to the Full Bench Ruling in the 7th Weekly Reporter, 135, where, upon a reference by Bayley and E. Jackson, J.J., it was held that "the point which has been referred to us does not arise; the case will go back to the Division Bench which referred it." So in the Full Bench case, reported in the 6th Weekly Reporter, Miscellaneous Rulings, 72, the Court said that it was unnecessary for them to determine the point which had been referred for their decision, and that if they were to determine that point their decision would be a mere *obiter dictum*. A case can only be referred to a Full Bench when there is a point for judicial decision arising out of a conflict between two judicial decisions. In this case as there is no judicial decision, no point can be referred. [*Couch, C.J.*—This is a criminal case and sent up to the High Court by the Sessions Judge under Section 434.] To another Bench. [*Couch, C. J.*—No, to the High Court under Section 435, which is wider in its terms than Section 404.] If your Lordships think so, I suppose I cannot raise the question. [*Couch, C.J.*—The question ought to have been raised before the Division Bench.] [*Kemp, J.*—Mr. Kennedy appeared and did not raise that question.] I am informed. [*Couch, C.J.*—We must take what Mr. Justice Kemp says as having taken place in the Division Bench.] Certainly, but it is open to Counsel to bring certain facts before the Court by way of a reminder. However, as that point has been ruled against me, I do not purpose to argue it any longer, but will leave the case in your Lordships' hands with regard to the other question as to the competency of the Magistrate to pass such an order under Section 62. [*Couch, C.J.*—There was a case in the Bombay Court (6 Bom. H. C. Rep., Crown Cases, 36) where we had to consider the validity of a Magistrate's order under Section 62, and we held that it was valid.]

Baboo Mohinee Mohun Roy (*contra*).—Constructions upon the cases in the 4 Weekly Reporter, and the 11 Weekly Reporter have already been laid before your Lordships by the learned Counsel on the opposite side. There was an earlier case which arose in the year 1863, immediately after the passing of Act XXV of 1861. In that case a reference was made to the High Court by the Sessions Judge of Backergunge, and the question raised in that reference is precisely the same as the one that is now being considered. The date of the order of the High Court is 23rd June 1863. There were four Judges (reads letter of Registrar).*

Then came the case reported in the 4 Weekly Reporter, 12, in which two Judges placed the same interpretation upon Section 62 as was put upon it by the other four Judges in 1863; and Loch, J., said—"I think that Section "62 refers to what would in England be "called nuisances, and authorizes the Magis-"trate in such cases to interfere summarily. "It does not give him authority to interfere "with the Civil rights of zemindars." Whether this be so or not, and whether Loch, J., was correct in saying that Section 62 ought to be limited to cases of nuisances, nothing has been urged against the correctness of the view held by Trevor, J., that it was not the intention of the Legislature to empower Magistrates to interfere with the Civil rights of parties in this manner. Immediately after Section 62, there is Section 63, which possibly may throw some light upon the proper interpretation to be placed upon Section 62. [*Bayley, J.*—A proper interpretation put upon Section 62 will throw light on Section 63.] It may be so either way. But all that is

* See 18 W. R., Criminal Letters, p. 1.

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meant by the Legislature by Section 62 is expressed in Section 63 in the single word *nuisance*. [*Couch, C.J.*—Then what was the use of Section 62 ?]

The Advocate-General (who just then come in, addressed the Court on the same side.)—The question argued by my learned friend opposite is whether Section 62 enables the Magistrate to restrain persons from doing lawful and unlawful things. To so much of his argument as refers to the power of the Magistrate to restrain the doing of unlawful things, I have nothing to say. But it is contended by my learned friend that Section 62 is intended to empower Magistrates to restrain the doing of what is lawful in itself provided it tends to lead to a breach of the peace. Now Section 62 not only refers to breaches of the peace, but to obstructions and taking order with property in one's possession so as to prevent annoyance or injury. According to that view, a Magistrate may prevent a person from having music in his own house. [*Mitter, J.*—Suppose a Magistrate were to tell a man, you shall have no music in your house after 10 o'clock.] I contend that the Magistrate could not pass such an order. But suppose, instead of preventing a new *haut* from being held, the Magistrate had prohibited the holding of the old *haut*, according to the construction put upon the Act, the order of the Magistrate would be final. I may put a variety of other cases under the first three clauses of the Municipal Act, *e.g.*, the case of rival cloth dealers and the like. There would be no limit to the power which the Magistrate would have under that Act, and the Magistrate would become a potentate. [*Bayley, J.*—Opening rival cloth-shops would not lead to a breach of the peace.] I am not so sure of that. We read in England of breaches of the peace arising between rival omnibus-drivers and conductors. [*Couch, C.J.*—I don't think you ought to suppose cases where there would be no exercise of discretion.] Well, suppose, that my having music in my house annoyed my neighbours, could the Magistrate put a stop to it ? [*Mitter, J.*—Supposing music led to breaches of the peace, would not the Magistrate be justified in putting a stop to it ?] [*Couch, C. J.*—There is a case in the 6th W. R., 40, about music.] [*Mitter, J.*—But without confining ourselves to music only, suppose a Magistrate has facts and circumstances before him from which he comes to the conclusion that, if a person is allowed to use his property in a particular way, or at a particular time, there is a likelihood of a breach of the peace, cannot he prevent that person from so using his own property ?] That comes to the case of preventing a man from doing an act perfectly lawful, only because it may lead to a breach of the place. Then I ask, who is the person who should be restrained in the present case ? I contend that it is the man who owns the old *haut* who should be restrained, if any restrain is to be put at all on the enjoyment of civil rights. [*Mitter, J.*—Those who have to regulate the peace of the country have a right to put certain restrictions on the enjoyment of those rights.] I do not doubt that, but the interpretation put upon the law is that Magistrate cannot interfere with civil rights of this description. [*Couch, C.J.*—I am not aware that that interpretation has ever been put.] Yes, in the Circular Letter of 1863. [*Couch, C. J.*—I am not quite sure whether that letter is in point. It appears to point to injury to property, but the words of Section 62 relate to injury to person.] [*Mitter, J.*—In a case which came before Mr. Justice Bayley and me, a zemindar complained that his neighbour had stopped an aqueduct, and the Magistrate ordered the latter to open a *pyne* half a mile long, and we held that we could not interfere.] I submit that, if in this particular case, the Magistrate had a right of interfering, he would have a right to interfere in a great many other cases. Obviously some limit should be put. This is a Section in a Code of Criminal Procedure, which does not purport to affect rights of property. When the rights of persons are cut down, it must be by clear general words. If a Magistrate is to control the doing of lawful acts, I would put another case. Suppose two rival pleaders or advocates could not meet without committing a breach of the peace, could the Magistrate put a restraint upon them under this Section instead of binding them down to keep the peace ? Mr. Justice Trevor says that what is required to prevent affrays is greater vigilance on the part of the Police. [*Couch, C.J.*—You might just as well put a case under Section 318 and say that there is no occasion for a Magistrate under that Section to determine and maintain who is in possession, but that any breach of the peace likely to occur should be prevented by the Police.] That is a very old power. It began with an old Regulation, and the power is expressly given. But in this case it is necessary to give the words of the Act such an interpretation that injustice and injury may not

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arise. Otherwise it will come to this that the discretion of the Magistrate will have to be considered in each case. [*Couch, C. J.*—We shall probably consider that discretion does not mean arbitrary discretion, and we shall probably hold an order made without exercise of discretion to be an order made without jurisdiction.] The whole gist of the matter is, what was the intention of the party.

The Court took time to consider.

The judgment of the Court was delivered as follows on the 9th of September by

Couch, C.J.—The question referred to the Full Bench is "whether a Magistrate or other officer exercising the powers of a Magistrate is legally competent under Section 62 Act XXV of 1861 to issue an order prohibiting a landholder from holding a *haut* on any particular spot in his estate, on particular days, on the ground that such order is likely to prevent a riot or an affray."

We are of opinion that this question ought to be answered in the affirmative. Section 62 of Act XXV of 1861 runs as follows:—"It *shall be lawful* for any Magistrate, by a written order, to *direct any person to abstain from a certain act*, or to *take certain order with property in his possession or under his management whenever* such Magistrate shall consider that *such direction* is *likely to prevent* or *tends to prevent* a riot or an affray." The above provisions clearly show that it is lawful for a Magistrate to issue a written order to any person directing him to abstain from any particular act, or to hold any property in his possession or under his management subject to any *particular condition*, if such Magistrate shall be satisfied that *such direction* is *likely* to prevent a riot or an affray. The word *certain* placed before the word *act*, and afterwards repeated twice in the expression "to take *certain* order with *certain* property in his possession," leaves no reasonable doubt in our minds that the Legislature intended to give full and ample powers to the Magistrate, the chief officer entrusted with the duty of preserving the peace of the district, to restrain any person from doing any act, or to command him to hold any property in his possession subject to any condition, whenever such Magistrate shall consider that such a course of procedure is likely to prevent, or even tends to prevent, a riot or an affray. No doubt, the powers conferred upon the Magistrate by the Section ought, like all other powers of discretion created by law, to be exercised in a reasonable manner; and it may further be admitted that the Magistrate is bound, before he issues the order, to satisfy himself upon reasonable grounds that that order is likely to prevent, or tends to prevent, a riot or an affray. But if a Magistrate, after exercising the necessary discretion, issues an order directing a particular landholder not to hold a *haut* on a particular spot on a particular day upon the ground that the holding of the *haut* at that particular place and time by that particular individual is likely to lead to a serious breach of the peace, we cannot upon a proper construction of Section 62 say that the order is null and void for want of jurisdiction or power. The law gives a very wide discretion to the Magistrate in matters affecting the public tranquillity, and it is not for us to curtail that discretion by construing the Act in a manner contrary to the plain and obvious meaning of the words in which it is expressed.

It has been argued that the powers vested in the Magistrate by Section 62 must be confined to those acts and modes of enjoyment of property only which are in themselves unlawful, and that as there is nothing inherently illegal in a man holding a *haut* on his own land on any particular day he chooses, the order passed by the Magistrate in this case must be set aside as void for want of power. But not only is this restricted construction not supported by the actual words of the Section, but its adoption might in many cases lead to the most dangerous consequences. A particular act or a particular mode of enjoyment of property might be perfectly innocent and lawful in itself. But the act may be done, or the property enjoyed in that particular mode, under circumstances calculated to lead to a serious breach of the peace, attended even with loss of human life; and it would be by no means proper or desirable to hold that even in such case, the chief Peace officer of the district has no power to issue an order such as that contemplated by Section 62. Whether a zemindar is in all cases entitled to establish a *haut* on his own land, but in close proximity to a previously established *haut* belonging to another zemindar, is a question upon which we need not express any opinion. Nor is it necessary for us to determine the question whether the Magistrate has in this particular case exercised his discretion in a proper manner, or whether his order as it stands requires any amendment either as to the duration of the injunction or otherwise. For these questions have not been referred to us by the Division Bench. Assuming, however,

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that there is nothing unlawful in a zemindar holding a *haut* on his own land on any day he chooses, and assuming also that the mere fact of his holding a *haut* on such a spot and on such a day would not be sufficient to warrant a Magistrate in coming to the conclusion that a breach of the peace is likely to take place, it seems to us clear that there may be other circumstances connected with the holding of the *haut* at that particular place and time which would fully justify a Magistrate in issuing an order under Section 62, at least for a limited period of time, if the Magistrate is satisfied, after a reasonable exercise of the discretion vested in him by that Section, that such an order is necessary for the preservation of the public peace.

It is stated in one of the cases mentioned in the order of reference, that a Magistrate has no power under Section 62 to issue an order that would interfere with any one's right to enjoy his own property in any lawful manner he pleases. Whether a Magistrate can, under that Section, issue such an order as would be utterly destructive of a man's right of property, is not a question which we are called upon in this case to determine one way or the other. It is sufficient for us for the purposes of this reference to say that it is quite within the power of the Magistrate under Section 62 to *modify* the enjoyment of such right, at least for a temporary period, by imposing upon the owner of the property such conditions as the Magistrate, after taking into consideration all the facts and surrounding circumstances of each particular case, shall consider necessary to prevent a riot or an affray. Every individual right is, to a certain extent, subject to the general interest of society; and after giving our best consideration to the question referred to us, we feel ourselves bound to come to the conclusion that the Legislature has purposely vested the Magistrate with powers sufficient to cover a case like the one mentioned in the order of reference. It is notorious that in this country rival *hauts* are frequent sources of riot and affray; and there is something in the nature of such *hauts*, namely, the assemblage of large crowds of men on both sides, which may be said to have a certain tendency to lead to a breach of the peace. We do not mean to say that such general facts alone are sufficient to justify the exercise of the discretion vested in the Magistrate by Section 62. But we think that there may be other circumstances connected with those general facts,—as for instance, the existence of bitter hostility between the owners of the rival *hauts*, the preparations already made by them for the commission of a breach of the peace, &c.,—which might render it absolutely necessary to exercise that discretion for the preservation of public tranquillity.

The 13th September 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Breach of Contract—Factory—Act XIII of 1859 *—High Court (Extraordinary Powers of Revision).*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Magistrate of Moorshedabad.*

Messrs. James Lyall & Co.

versus

Ram Chunder Bagdee.

The High Court declined to exercise their extraordinary powers of revision in a case in which the Joint Magistrate dismissed a complaint of breach of contract under Act XIII of 1859 on the ground that that Act did not apply to this contract, which was a contract to work at a certain factory.

Reference.—A CHARGE under Act XIII of 1859 was brought by a servant of Messrs. James Lyall and Co. against one Ram Chunder Bagdee, a spinner, of having neglected to fulfil the contract into which he had entered to work at a certain factory. The Joint Magistrate, to whom authority has been given by me to receive petitions within certain thannahs, after recording the statement of the complainant, dismissed the complaint, as he held that the Act was inapplicable to the species of contract into which it appeared that the accused person had entered.

Although I am disposed to agree to a certain extent with the Joint Magistrate, that contracts of this kind being intermittent can hardly be said to be such as were contemplated by Act XIII of 1859, still the accused person must be presumed to have known the service to which he was binding himself; and it would seem that in thecases quoted by the Joint Magistrate, *viz.*, Koonjobeharry Lall on behalf of Messrs. Lyall & Co. *v.* Rajah Doomney and Koonjoobeharry Lall *v.* Rughoonath Dome, page 29 (Criminal Rulings), dated 10th August 1870, Vol. XIV of the Weekly Reporter, the Judges of the High Court have ruled that a person bound by a similar

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contract, who neglected to attend at the factory, could be prosecuted under Act XIII of 1859. I am not aware that this ruling has in any way been disturbed, and it would therefore appear that the order of the Joint Magistrate dismissing the complaint is illegal and should be reversed.

As the attention of the Joint Magistrate was drawn to the ruling quoted by me before the complaint was dismissed by him, it does not appear to be necessary for me to call for any explanation from him.

Judgment of the High Court.

Bayley, J.—This Court do not think it necessary to exercise their extraordinary powers of revision in this case on this reference.

The 17th September 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Breach of the Peace—Notice to Co-sharers of Land —Act XXV of 1861 *s.* 318.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Jessore.*

Gobind Chunder Ghose and another, *Petitioners,*

versus

Anundo Chunder Sircar and another, *Opposite Party.*

Mr. J. S. Rochfort for the Petitioners.

Mr. M. L. Sandel and *Baboo Joy Gobind Shome* for Opposite Party.

There is nothing in the law which enjoins the serving of notice upon all the co-sharers in an estate which may in some shape or other form the subject of a litigation under Section 318 of the Code of Criminal Procedure. The only parties entitled to notice are those concerned in the dispute which is likely to induce a breach of the peace.

Reference.—THE Deputy Magistrate of Khoolna, being satisfied that a dispute likely to induce a breach of the peace existed concerning the possession of 350 beegahs of land called the Ghineer Abad, caused proceedings to be instituted under Section 318 of the Criminal Procedure Code, the parties being Anundo Chunder Sircar and Beni Mohun Biswas on one side, and Gobind Chunder Ghose and Shama Soonduree Dassee on the other.

The Deputy Magistrate found that Anundo Chunder and Beni Mohun were in possession, and directed them to be maintained in possession, and Gobind Chunder and Shama Soonduree have applied to this Court to refer the case to the High Court.

The person on whose evidence the Deputy Magistrate ordered the institution of these proceedings was one Tomizuddi, who represented himself to be the gomashta of one Guggon Chunder Dutt, and he stated that Guggon had taken the disputed land on a lease on behalf of the Baptist Missionary Society, and that his possession was obstructed by Gobind Ghose, Anundo Ghose, Hullodhur Ghose, and Dwarkanath Ghose.

Guggon subsequently presented a petition to the Deputy Magistrate, saying that he was not the owner of the land, but that Anundo Sircar and Beni Mohun had taken it on behalf of the Missionary Society, and upon this representation Anundo and Beni were apparently made to take the place of Guggon in the case.

These two men in their written statement admit having taken the land, but say nothing about the Missionary Society; and the Deputy Magistrate, in deciding the case, does not say whether they hold the land on their own account or on behalf of the Society, and the petitioners object that this is an illegality on the part of the Deputy Magistrate sufficient to warrant his proceedings being quashed.

I think the Deputy Magistrate ought to have distinctly stated whether Anundo and Beni are to be kept in possession as representatives of the Missionary Society or on their own account, though I hardly think that the omission would necessitate his proceedings being quashed.

There is, however, another important omission on his part, which in my opinion invalidates the whole of his proceedings.

Anundo and Beni claim to have taken a lease of the disputed land from one Farman Shah, and the three pottahs under which Farman professes to have held it have been filed.

These pottahs, the genuineness of which is denied, are signed by ten different co-sharers of the Abad; but instead of issuing notices to

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all of them, as required by Section 318, the Deputy Magistrate issued a notice to one only, Gobind Chunder.

One of the co-sharers, Shama Soonduree, two days before the case was decided, appeared before the Deputy Magistrate and requested time to produce her evidence, and also requested that Guggon, who was in Court, might be examined; but the Deputy Magistrate refused both requests on the ground that they were made too late: but this seems a very inadequate reason when the Deputy Magistrate had never given her an opportunity of producing any evidence before.

All the co-sharers and their representatives through whom Farman Shah claims have a right to be heard in the case, and I therefore beg to recommend that the Deputy Magistrate's proceedings be quashed and that he be directed to re-try the case after giving proper notice to all the parties concerned, and giving them opportunity to produce any documentary evidence and call any witnesses they may desire.

Judgment of the High Court.

Glover, J.—This is a reference made by the Sessions Judge of Jessore to have a certain order, passed under Section 318 of Act XXV of 1861 by the Deputy Magistrate of that district, quashed.

The only substantial ground on which the Judge thinks the Deputy Magistrate's order illegal is, that whereas the pottah under which one of the parties in this case claims was signed by a great number of co-sharers of the land in question, and all of those co-sharers have not been served with notice, but only one of them, this is a sufficient ground for invalidating the whole of the Deputy Magistrate's proceedings.

There is nothing in the law which enjoins the serving of notice upon all the co-sharers in an estate which may in some shape or other form the subject of a litigation under Section 318. That Section says, that after a Magistrate is satisfied that a dispute likely to induce a breach of the peace is about to take place within his jurisdiction, he shall record a proceeding stating the grounds of his being so satisfied, and shall call all parties *concerned in such dispute* to give in written statements of their respective claims. It is quite clear that the other co-sharers, who, Mr. Rochfort contends, have not been served, were not concerned in the dispute, for in that case they would have undoubtedly appeared in the Court below and taken steps to support the reference made by the Judge. The only parties concerned were those who did appear before the Deputy Magistrate; and although it may be technically said that Shama Soonduree got no notice, it is clear that she was all along aware as to what was going on, for she appeared in Court and prayed to have witnesses examined on her behalf. That her case was not thoroughly gone into was her own fault, for the petition asking for the examination of the witnesses was made, as the Deputy Magistrate says, at the last moment; and in the exercise of the discretion allowed him by the law, he refused to grant any further postponement of the case.

Under the circumstances, it appears to us that there is no ground on which to support the Judge's recommendation, and we accordingly decline to interfere with the order of the Deputy Magistrate.

The 17th September 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Indigo Crops – Complainant—Servant (of Indigo Planter).

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Bhaugulpore.

Boodhoo Roy

versus

Ramdyal Singh and others.

In a case in which the servant of an Indigo Planter preferred a charge against certain parties for cutting and carrying away indigo crop which was in his charge, the Joint Magistrate dismissed the charge on the ground that a more responsible servant ought to have laid the complaint:

HELD that the Joint Magistrate ought to have tried the case.

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Reference.—On the 22nd July 1872, petitioner, Boodhoo Singh, zillahdar of Baboo Muddun Thakoor, proprietor of Ghoga indigo concern, brought a complaint against Ramdyal Singh, Bhagbut Singh, Rameshur Rae, Rungoo Misser, and Doorga Misser, defendants, servants of Baboo Heera Lall Seal, for committing theft and criminal trespass in regard to certain indigo plants, being the property and in possesssion of Muddun Thakoor, the master of the petitioner, petitioner being the zillahdar and in charge of the crops, in the Court of the District Magistrate of Bhaugulpore, who, after taking the deposition of the petitioner, made the case over to the Joint Magistrate for trial.

The Joint Magistrate, without hearing evidence in the case, for reasons recorded in his judgment dated the 25th July 1872, dismissed the complaint. The Joint Magistrate's order was as follows:—

"This charge is closely connected with a "dispute which has been before me a few "days ago under Section 318 Criminal Pro-"cedure Code.

"The dispute is as to the ownership of "some standing indigo. Now, the complain-"ant in this case is a mere pyadah, who can "in no sense be deemed to represent his "master Muddun Thakoor. He has no con-"trol whatever over the indigo, and is not "connected with it at all, except as a watch-"man or manager.

"In the Section 318 proceeding, it was "distinctly evident that one Roopun Singh "is Muddun Thakoor's representative on the "spot in charge of his factory: under such "circumstances, he is the only person author-"ized to complain of the cutting of the indigo. "The present pyadah complainant has no "interest in the crop, and has sustained no "damage. It is a favourite trick when "zemindars fall out to carry on the war by a "series of complaints in which mere men "of straw are put forward, against whom, "should the complaint turn out a false one, "no satisfaction can be had. Such a practice "should be checked in every way possible, "and the Courts are bound to insist that "responsible persons shall appear in all such "cases as complainants. In this case, Roopun "Singh is the only person competent to lodge "a complaint, as from the Section 318 pro-"ceedings it appears he is the person who "superintends the whole indigo cultivation "and looks after Muddun Thakoor's interests. "I consider his keeping back in this instance "a mere artifice for fear of ulterior pro-"ceedings.

"The accused have a perfect right to refuse "to answer any charge for damage to Mud-"dun Thakoor's indigo brought by an utter "stranger, such as complainant.

"The case must be therefore dismissed. "The proper person may however complain."

The Joint Magistrate appears to me to have dismissed this case on insufficient grounds.

The Magistrate of the district heard a complaint made by the zillahdar of an indigo factory.

The complaint referred to the cutting and carrying away of an indigo crop which was in his charge.

The Joint Magistrate, to whom the case was made over for trial, deeming that some more responsible servant of the Indigo planter ought to have laid the complaint, dismissed it.

I am of opinion, if the Joint Magistrate thought that the case was false and that the more responsible amlah of the Indigo Planter were endeavoring to elude the possible consequences by making the charge through an underling, it would have been easy for him to have called on the complainant to satisfy him that the Indigo Planter was cognizant of the case and causing it to be brought. This would, in the case of a false charge, have brought the master himself within the purview of Section 211.

The dismissal of the case on the grounds stated by the Joint Magistrate is manifestly unjust.

Judgment of the High Court.

Mitter, J.—Under the circumstances stated by the Sessions Judge, the Joint Magistrate ought to have tried the case, and we therefore direct him to try it.

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The 27th September 1872.

Present:

The Hon'ble W. Ainslie and C. Pontifex, *Judges.*

Witness—Cross-examination.

The Queen

versus

Tulsi Dosadh, *Appellant.*

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Gya, on a charge of intentionally giving false evidence.

A witness ought to be allowed on cross-examination to qualify or correct any statement which he has made in his examination-in-chief.

Ainslie, J.—I AM of opinion that this conviction ought to be quashed. The only evidence against the prisoner is in his own deposition before the Deputy Magistrate. This contains two statements which the Courts below have taken to be contradictory ; but I am by no means satisfied that the accused, when he made the first statement, really meant to imply that he never left the threshing-floor between the 3rd Kartick and the second Sunday in Pous. If his whole statement is examined, there really is no contradiction. What he first said only amounts to this, that he was not away for any entire day or night, and it is not reasonable to suppose that he meant to convey the impression that he did not attend to his ordinary duties as village watchman during these six weeks. As soon as his attention was called to the loose and inaccurate form of his statement, he admitted its incorrectness, and stated that he had gone to the Police outpost to make his weekly reports; and the fact that he did go to the Police outpost does not prove his first statement to have been intentionally false. If a witness is not allowed on cross-examination to qualify or correct any statement which he has made in his examination-in-chief on pain of being convicted of perjury out of his own mouth, the result will be that a man who has through carelessness made an inaccurate, or through partiality made an exaggerated, statement will be driven to stick to it, and thus the object of cross-examination will be defeated.

It does not appear for what purpose the Judge allowed the prosecution to put on the record the evidence of Hurdyal Koormee, Avatar Pande, Malichund Koormee, Ajoodhya Pande, Hurnam Misser, Chummun Lall, Meghoo Pasee, and Hunooman Lall, recorded by the Deputy Magistrate ;—none of this was evidence in the case against the prisoner.

The conviction and sentence are set aside, and the prisoner is to be released immediately.

The 4th October 1872.

Present :

The Hon'ble W. Ainslie and C. Pontifex, *Judges.*

Act XXV of 1861 *s.* 290—*Recognizance—Security to keep the Peace.*

(Criminal Motion.)

Gooroo Dass Roy, *Petitioner.*

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The Advocate-General and *Baboos Nilmadhub Bose* and *Jadub Chunder Seal* for the Petitioner.

Notwithstanding that a person has been bound down by bond to keep the peace for a stated period, a Magistrate has power, under Section 290 of the Code of Criminal Procedure, to increase the amount of the security required before the expiry of that period.

Ainslie, J.—THIS is an application to stay the proceedings of the Magistrate of Furreedpore, who has issued a summons to Baboo Gooroo Dass Roy, calling upon him to show cause why he should not enter into a recognizance to the amount of Rs. 5,000, together with four sureties for Rs. 5,000 each, to keep the peace for one year.

The first ground taken is that the form of the summons is not according to the requirements of Section 283, Criminal Procedure Code.

The substance of the information upon which the summons was issued has no doubt been set out rather curtly, and it would have been much better if the complaints made by Muffeezoodeen had been stated more fully. But we do not see that this a sufficient excuse for the party summoned not appearing as required.

It is next urged that the summons had not been properly served. This is a point which is at present the subject of a judicial inquiry, and it is open to the petitioner to show to the Magistrate in his defence that the summons had not been served according to law. We do not think it right to stop that inquiry, or to interfere with the Magistrate's discretion in any way.

It is further urged that the Magistrate should have proceeded under Section 290. But the time for that has not yet arrived, because it is after the Magistrate satisfies himself under Section 288 that there is a necessity for taking a bond that he is to refer the matter to the Sessions Judge, and he cannot ask the Sessions Judge to confirm his order before he is himself satisfied that there is a necessity for making an order: we do not think that the Magistrate has acted otherwise than according to law.

Then it is said that the petitioner has been already bound down under an order of the 20th of May 1872, under which he entered into a bond for a sum of Rs. 3,000, to keep the peace for one year from that date; and that while this order is standing, it is not open to the Magistrate to increase the amount of the security required.

There is nothing in Section 290 to show that the Magistrate cannot increase the amount of the surety. On the contrary, it appears from the wording of that Section that, in case of personal recognizance being taken without security, the Sessions Judge can authorize the Magistrate to take a bond with surety; and it is quite possible that circumstances may arise after a man has once entered into recognizances which may render it necessary to take a much larger amount of security than that taken in the first instance. There is no authority shown to us against this construction of the Section. On the contrary, there is a judgment of the late Mr. Justice Norman, reported in 7 Weekly Reporter, Criminal Rulings, page 23, showing that that learned Judge was of opinion that the Magistrate has power to take larger and further security under that Section.

For these reasons this application must be rejected.

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The 5th November 1872.

Present:

The Hon'ble F. A. Glover and C. Pontifex, *Judges.*

Procedure—Jury—Assessors—Act XXV of 1861, *s.* 426.

The Queen

versus

Norkoo and others, *Appellants.*

Committed by the Deputy Commissioner, and tried by the Officiating Judicial Commissioner of Assam, on a charge of having in possession a counterfeit coin with guilty knowledge, &c.

Where a trial was held with a jury, instead of, as it ought to have been, with assessors, the High Court refused, with reference to the provisions of s. 426, Code of Criminal Procedure, to reverse the sentence as it could dispose of the appeal on the evidence instead of merely restricting itself to questions of law.

Glover, J.—THE first point to be considered is whether the conviction of these prisoners is bad on account of the trial having been held with a jury, instead of, as it ought to have been, with assessors.

Section 426, Code of Criminal Procedure, lays it down that no finding or sentence of a competent Court shall be reversed on account of error or defect in the proceedings on trial unless the accused persons shall have been prejudiced by such defect. Now, in this case, they have not been prejudiced, because this Court can dispose of their appeal on the evidence, and need not restrict itself, as it would have done had the trial been held with a jury, to questions of law. Moreover, the Judicial Commissioner, who discovered the error of procedure before the case left his Court, states that he concurs with the finding of the jury, considering them for the nonce as assessors. The prisoners, therefore, have not been prejudiced in any way by the substitution of a jury for assessors, and the conviction cannot be quashed on that grouud.

With regard to the woman Soozea, the evidence is, I think, very clear as to the finding of counterfeit Queen's coin in her possession. There is evidence that the coin so found is made of base metal and is counterfeit, and under the circumstances there can be no doubt that the prisoner knew it to be counterfeit, and kept it with a fraudulent intent. The conviction of this prisoner under Section 243, Penal Code, should, I think, be supported.

The prisoners Norkoo and Kamai were identified both before the Deputy Commissioner and the Judicial Commissioner as the parties who had passed the counterfeit Queen's coin. The identification might no doubt have been more satisfactory; but considering the length of time that had elapsed between the first and second examination of the witnesses, and the fact that these wandering *nuths* or gypsies are physically very much like each other, I do not attach much importance to the discrepancies in the evidence which undoubtedly exist; the less so as that evidence is entirely unrebutted on the part of the prisoners, and was, moreover, thought satisfactory by the assessors and Judicial Commissioner before whom it was recorded.

Under the circumstances, I do not think that this Court would be justified in interfering with the conviction of these prisoners, and would reject their appeals.

Pontifex, J.—I concur in rejecting these appeals.

The 7th November 1872.

Present:

The Hon'ble F. A. Glover and C. Pontifex, *Judges.*

Acquittal—Act XXV of 1861, *s.* 272—*Re-hearing.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Mymensingh.*

Guru Churn Sirkar, *Petitioner,*

versus

Meer Saman Ali and others, *Opposite Party.*

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Certain persons having been charged under s. 352, Indian Penal Code, the hearing of the case was adjourned to a certain day on which complainant having reported that his witnesses were present, they were called but did not reply. The accused pleading "not guilty," the Deputy Magistrate acquitted him under s. 272, Code of Criminal Procedure.

The Sessions Judge having referred to the High Court under s. 434, reported that the complainant had been present agreeably to order on 5th April, had continued to be present with his witnesses from 5th to 9th April, and that the trial had been adjourned to suit the convenience of the Deputy Magistrate, and that complainant's plea for the temporary absence of his witnesses on the day of hearing was that, after attending from 8 to 10 o'clock, they had gone to the bazaar. The High Court under the circumstances quashed the proceedings of the Deputy Magistrate, and directed a rehearing, if complainant wished it.

Reference.—A COMPLAINANT had charged certain persons under Section 352, Indian Penal Code, in the Court of the Deputy Magistrate of Attiah; and it seems from the orders passed by the Deputy Magistrate that the hearing of the complaint had been adjourned.

On 20th April last, the day to which the hearing had been last adjourned, the Deputy Magistrate recorded the following order:—"Plaintiff has reported that his witnesses are present. They have been called, but have not replied. Defendant is present. Plaintiff has been till a few moments ago. Defendant, questioned under Section 265, pleads not guilty. The defendant is acquitted under Section 272, Code of Criminal Procedure."

It is evident from the terms of this order that the Deputy Magistrate treated the complainant, though absent, as if he was actually present, for the procedure laid down in Section 265 of the Code of Criminal Procedure with respect to the examination of the accused is applicable only when *both parties* to the complaint are present.

It was under the circumstances impossible for him to do what the law requires shall be done when an accused person pleads "not guilty" when questioned by the Court, because the Section immediately following (266) provides that, if the accused person do not admit the truth of the complaint, the Magistrate shall proceed to hear the complainant.

Thus it follows that the procedure laid down by Sections 265 and 266 is applicable only when the complainant and the accused are *both present.*

The Deputy Magistrate's order of acquittal under Section 272 was also irregular, as the case was one clearly dismissed on default under Section 259, and there were no proceedings held which justified an order of acquittal under Section 272, Code of Criminal Procedure.

Upon the same day the complainant petitioned the Deputy Magistrate to the effect that his witnesses had been in attendance from 8 o'clock till 10 o'clock, and had then gone to the bazaar—that he had gone to call them, and had found on his return that orders had been passed in his case.

On this petition the Deputy Magistrate passed the following order one month afterwards, *i. e.*, on 21st May:—"Defendant has been already acquitted under Section 272, Code of Criminal Procedure, on 20th ultimo. This petition must therefore be rejected."

The record shows, however, that the complainant had been present agreeably to order so far back as the 5th April, had been present from the 5th to 9th April with his witnesses, and that the trial was then adjourned to suit the convenience of the Magistrate.

The explanation of the Deputy Magistrate appears to be altogether unsatisfactory, and besides the questions at issue.

Considering the summary action taken by him in acquitting the accused, it is difficult to understand how the Deputy Magistrate could feel himself in a position to contend that he "had reasonable and proper grounds for considering him present, even though he may for the few moments have been absent looking for his witnesses."

The Deputy Magistrate's meaning appears also obscure when, referring to the accused's plea of not guilty, he writes of "having given him the benefit of a doubt, and acquitted him under Section 272, Code of Criminal Procedure."

The Deputy Magistrate fails to see that even on his own showing he has taken up an impossible position with regard to his dealing with the complainant as if present, for the law lays down that, if the accused plead "not guilty," the Magistrate *shall proceed to hear* the *complainant*, and this the Deputy Magistrate was clearly unable to do as the complainant was absent.

I see no reason whatever for assuming, as the Deputy Magistrate has done, that the complainant acted from disingenuous motives.

The charge was a simple one of assault under Section 352, Indian Penal Code; but I think that the complainant has good reason to be dissatisfied with the proceedings of the Deputy Magistrate.

I submit to the Court that his order should be quashed on the ground of the illegality of the order of acquittal, and I trust that the

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Court will be pleased to order that the complaint be heard.

Judgment of the High Court.

Glover, J.—Under the circumstances detailed by the Judge, we quash the proceedings of the Deputy Magistrate, and direct that the complainant's case shall (if the man wishes it) be re-heard.

The 8th November 1872.

Present:

The Hon'ble F. A. Glover and C. Pontifex, *Judges.*

Act XXV of 1861, *s.* 415—*Cheating—Watered Milk—Sweetmeats.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Sessions Judge of East Burdwan.*

1. The Queen
versus
Kalee Modock.

2. Tumizooddeen
versus
Kangalee Gwala.

Where the accused were convicted of cheating under Section 415, Penal Code,—the one of selling watered milk, and the other an inferior sort of sweetmeats,—they were acquitted: the former, because the purchaser knew, and was told the milk was watered, and so there was no deception; and the latter on the ground that the purchaser might have tasted the sweetmeats before buying, and the sweetmeats were not composed of any material injurious to health.

Glover, J.—THESE convictions appear to me illegal. The essence of the offence of cheating (Section 415, Penal Code) is that the party should be "deceived." Now, in the milk case, the person who was sent by the Police Inspector to purchase, knew perfectly well what it was he was buying: indeed his object was to buy "watered" milk, in order to prove a case against the seller and so put an end to the practice of watering milk.

In the sweetmeat case, there was no deception. The sweetmeats were openly exposed for sale, and the purchaser could have tasted them before buying, if he had liked to do so. As the Judge says, whether the sweetmeats were nasty or not is a matter of taste; at all events, their being nasty, affords no ground for a conviction under Section 415.

The convictions should be quashed, and the fines remitted.

Pontifex, J.—I concur in thinking that these convictions should be quashed, and the fines remitted for the following reasons:—

In the sweetmeat case, because there is no evidence that they were composed of any material injurious to health (Section 272, Indian Penal Code.)

In the milk case, because the price seems to have been below the fair price for pure milk, and because there is evidence that the seller told the actual purchaser that to supply the quantity at the price, some proportion of water must be mixed with the milk.

The 13th November 1872.

Present:

The Hon'ble F. A. Glover and C. Pontifex, *Judges.*

Recognizance—Security to keep the Peace—Summons.

Reference to the High Court by the Sessions Judge of Gya.

Isree Pershad, *Petitioner.*

A Magistrate is not justified in increasing the amount of security and in demanding sureties on a summons to show cause which provided only for a recognizance of much smaller amount, and made no mention of sureties at all.

Reference.—I HAVE the honor to request that you will be so good as to submit the record of this case to the Judges of the High Court for an expression of their opinion upon the point, whether in a case in which a party is bound over to keep the peace, the Magistrate is by law limited in his ultimate demand to the amount, the nature of the security, and the time specified in the summons served upon the party in the first instance. It appears to me that according to the letter of the law the Magistrate is so limited. In the case now under consideration, the party was called upon by the summons to show cause why he should not be required to enter into his own recognizances to keep the peace for 6 months, the amount specified being Rs. 200. Subsequently, on appearing before the Magistrate, he was

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required to enter into his own recognizances to the amount of Rs. 4,000, and to find 2 sureties in Rs. 1,000 each, the period being at the same time extended to one year. It has been contended before me that the Magistrate was not authorized by law in either increasing the amount, altering the nature of the security, or extending the period for which it was required, but was bound to observe in all respects the wording of the summons. I should be glad to be favored with the opinion of the High Court upon the point.

Judgment of the High Court.

Glover, J.—We think that the Sessions Judge is correct in his view of the law and that the Magistrate was not justified in increasing the amount of security and in demanding sureties on a summons which provided only for a recognizance of much smaller amount and made no mention of sureties at all.

The order of the Magistrate, directing recognizances to the amount of Rupees 4,000 and sureties to that of 1,000 to be taken, is quashed. If the Magistrate still thinks that heavier security should be taken than that first determined upon, he should issue a fresh summons setting forth the amount intended to be taken, so that the party concerned may have full opportunity of showing cause against the order, if he wishes to do so.

The 13th November 1872.

Present:

The Hon'ble F. A. Glover and C. Pontifex, *Judges.*

Act XXV of 1861, *s.* 169—*Sanction to Prosecution—Appeal.*

(Miscellaneous Case).

Seetaram Sahoo, *Petitioner,*

versus

Rai Baboo Shewgolam Sahoo, Bahadoor, *Opposite Party.*

Mr. J. T. Woodroffe and *Baboo Kally Kishen Sein* for the Petitioner.

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for the Opposite Party.

The words "such sanction may be given at any time" in s. 169, Code of Criminal Procedure, must be construed reasonably, and "any time" means a time which does not unduly prejudice the party to be prosecuted, or put him in a worse position than he was before.

No appeal lies against a Judge's order sanctioning such prosecution.

Glover, J.—We think that this rule must be discharged.

It might be possibly contended that the sanction given by the Judge for a prosecution under Section 471 of the Penal Code was sufficient to cover the charge as altered subsequently; but in any case, the sanction given on October 3rd to the prosecution of a charge under Section 196, Penal Code, cured, we think, any defect of the original procedure, because it was given within the time as required by Section 169, Criminal Procedure Code.

The words used in that Section "such "sanction may be given at any time," must be construed reasonably, and we consider that "any time" means a time which does not unduly prejudice the party to be prosecuted, or put him in a worse position than he was before. In this case it is clear that Seetaram Sahoo was in no worse a position after the issue of instructions to prosecute under Section 196, Penal Code, than he was before, when a prosecution had been sanctiond against him on a charge under Section 471, Penal Code; and although the warrant of arrest for an offence under Section 196, Penal Code, was issued three days before the Judge's sanction to a prosecution in terms of Section 169, Code of Criminal Procedure, the subsequent sanction cured the defect, which was after all one of a technical character. There is, therefore, we think, nothing illegal in the present carrying out of the warrant of arrest, the prosecution being one which has been, and is now, regularly sanctioned by a competent authority, and there is admittedly no appeal against the Judge's order sanctioning such prosecution.

But although we feel bound to say that this rule should be discharged as not raising any valid point of law on which we could interfere, we also think it right to express a strong opinion as to the unadvisability of both the Judge's and the Magistrate's proceedings; the effect of which has been entirely to shut Seetaram Sahoo out from all chance of being able to reverse the decision in the certificate case on appeal to this Court. It would have been in every respect better to have delayed taking action under Section 169, Code of Criminal Procedure, until the certificate case had been finally disposed of. As it is, Seetaram Sahoo will be arrested and tried on a charge of using fabricated evidence, and in the mean time his time for appealing will have expired.

We make no order for the present as to costs.

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evidence all the proceedings subsequently taken by the Magistrate are without jurisdiction. On referring to the record, we find that the Magistrate did not proceed upon the report of the Police officer alone, in which case, perhaps, under the rulings of this Court, the objection might avail; but we find that the Magistrate refers to evidence taken in other cases, which we must assume he inspected, and he goes on to say that he is satisfied upon that evidence that there was a likelihood of a breach of the peace. This objection is therefore overruled.

The next objection is that the petitioner has not had a proper hearing, inasmuch as the Magistrate held that the law did not confer upon him the power to summon witnesses in cases of this description, and when the petitioner prayed the Magistrate to summon his witnesses, no order beyond placing his petition on the record was passed. On referring to the judgment of the Magistrate, we find that he states that he can find no provisions in Chapter XXII for the summoning of witnesses. No doubt, there is no mention in that Chapter of any particular provisions under which witnesses are to be summoned; but in cases coming under Section 318, oral evidence as to the fact of possession is always adduced, and it is the duty of the Court, if the parties cannot produce their witnesses, to issue summonses for their attendance. Now in this case it is clear that the petitioner petitioned the Magistrate, urging his inability to produce his witnesses, and asking for the assistance of the Court to summon these witnesses. It does not appear that any proper order was passed upon this application, and therefore it amounts to this that the petitioner has not had a proper hearing.

We, therefore, send back the case. The Magistrate will summon the witnesses for the petitioner, and, after hearing and considering their evidence, pass a fresh decision.

The 19th November 1872.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Act XLV of 1860 *s.* 206—*Fine—Transfer of Property.*

(Criminal Motion).

Balmokoond Brojobasi, *Petitioner.*

Baboo Amerendronath Chatterjee for the Petitioner.

To bring a case under s. 206 of the Penal Code there must be a fraudulent removal, sale, or transfer of property, or of some interest therein, intending thereby to prevent that property from being taken as a forfeiture or in satisfaction of a fine.

Kemp, J.—We think the conviction in this case must be quashed and the fine remitted. The petitioner has been convicted under Section 206 of the Penal Code. The words of that Section are "whoever fraudulently removes, conceals, transfers or delivers to any person any property, or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine ..... &c." In this case the petitioner was sentenced to six months' rigorous imprisonment and to pay a fine of Rs. 200. He underwent the term of imprisonment, and it appears from the record, and is not disputed, that out of the fine of Rs. 200 more than three-fourths have been realized from time to time. Under Section 61 of the Procedure Code, in cases in which offenders are sentenced to a fine, it is competent to the Court to issue a warrant for the levy of the fine by distress and sale of their moveable property. In this case it would appear that whenever the police put a pressure upon the petitioner, small sums were recovered from time to time. The present charge arises out of an alienation made by the petitioner of a house and certain moveable properties to a woman who is said to be in his keeping. It is alleged that the house was sold for an inadequate price, but with that part of the case we have nothing whatever to do, inasmuch as that house could not be taken in execution, nor was that house liable for the fine inflicted upon the petitioner; but the conveyance also transfers certain moveable property for a consideration, and the transaction was duly registered. It also appears that subsequent to this transfer, the police recovered by distraint and sale of the moveable property of the petitioner Rs. 49 odd annas. To bring the offence within Section 206, there must be a fraudulent removal, sale, or transfer of property, or of some interest therein, intending thereby to prevent that property from being taken as a forfeiture or in satisfaction of a fine.

Now, in this case it is very clear that the gist of the offence, namely, fraud, is altogether absent. The petitioner has publicly registered the alienation. Subsequently, other moveable property of the petitioner was

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sold, and it is alleged (for there is a petition to that effect on the record) that if that property had been sold in a legal manner, it would not have been sacrificed, as it has been, at an inadequate price. The petitioner asked the Magistrate for redress on that point, but it does not appear that any enquiry was made. Looking to the conduct of the petitioner and to the whole of the circumstances in the case, together with the total absence of fraud, which is the gist of the offence under Section 206, we acquit the petitioner, and reverse the order of the Court below.

The 28th November 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

High Court—Procedure—New Trial—Assessors.

The Queen

versus

Muthoora Singh, *Appellant.*

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of voluntarily causing grievous hurt.

Mr. W. Jackson and *Baboo Ishur Chunder Chuckerbutty* for the Appellant.

Where there is a failure of justice, or where the prisoner has been prejudiced by the defective summing up of the Judge, the High Court can interfere either by discharging the prisoner if the evidence on the record is not sufficient to convict him, supposing the trial to have taken place with the aid of assessors, or to direct a fresh trial.

Kemp, J.—THE prisoner in this case has been convicted of voluntarily causing grievous hurt, an offence under Section 326 of the Indian Penal Code. It appears that at the request of the learned Counsel who defended the prisoner, a selection was made out of the jurors present of jurymen acquainted with the English language. The jury consisted entirely of Hindoo gentlemen; and the parties, who were so far concerned that their servants on both sides were mixed up in the offence which took place, are influential Hindoo Rajahs. One of the Rajahs has four or five professional wrestlers in his service, and the other Rajah appears to have countenanced gambling in the joint-market of the two Rajahs. Mr. Cavanagh, the Sub-Inspector of Police, deposes that for some time past there have been disputes between these two Rajahs. It appears from the evidence that on the day on which the offence was committed, Moteeullah, one of the servants of one of these Rajahs, finding that Muthoora Singh, a servant of the other Rajah, was playing at the game of "kupun" in the bazar in question, directed him to desist playing. This led to some words passing between Moteeullah and Muthoora Singh, and Moteeullah proceeded to the rajbaree to give information to his master. On the way he appears to have fallen in with Shere Ali Khan, who is also in the service of the Rajah, and described to be a professional wrestler. Shere Ali Khan told Moteeullah that it was not necessary to inform the Rajah; that he would himself proceed to the market and stop the gambling. On this, Shere Ali Khan proceeded to the market, and his story is that he observed the prisoner, Muthoora Singh, strutting about in the market with a drawn sword. The story for the defence, on the other hand, is that Muthoora Singh had not then drawn his sword. Words then passed between Muthoora Singh and Shere Ali Khan, and there is evidence that Muthoora Singh stuck Shere Ali Khan with his sword and cut off one of his thumbs. There can be no doubt as to the extent of the injury inflicted, for we have the doctor's evidence to satisfy us on that point. The case was tried, as already observed, by a jury, who cross-examined some of the witnesses, and came to an unanimous finding that the prisoner was guilty of the offence charged.

In appeal, 19 grounds have been taken on behalf of the prisoner, and we have carefully considered the whole case. The leading case with reference to questions of this kind is that in Vol. V, Weekly Reporter, Criminal Rulings, beginning at page 80. I allude to the case of Elahee Bux. Under Section 379 of the Criminal Procedure Code, as observed by the late Chief Justice, Sir Barnes Peacock, it is the duty of the Judge to sum up the evidence on both sides. That Section no doubt requires the Judge to sum up properly; and if it appears clearly to the High Court that a failure of justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge in the exercise of a sound judicial discretion ought to give upon questions of fact, the High Court can interfere; but further on in the judgment, the learned Chief Justice observes that although he was of opinion that the Legislature intended that this Court should have the power of setting aside a verdict of guilty pronounced by a jury upon an erroneous or defective summing up of the

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evidence by the presiding Judge, he was of opinion that it was not the intention of the Legislature that a verdict of guilty should be set aside in every case in which there is a defective or erroneous summing up; that it was their intention to provide protection for the innocent, but not chances of escape for the guilty. This decision has been followed by other decisions which have been quoted by the learned Counsel in the course of his argument. It appears to me, upon a careful consideration, that the gist of these decisions is this, that where there has been a failure of justice, or where the prisoner has been prejudiced by the defective summing up of the Judge, this Court can interfere either by discharging the prisoner if the evidence on the record is not sufficient to convict the prisoner, supposing the trial to have taken place with the aid of assessors, or to direct a fresh trial. There are certain statements made in the charge to the jury which are not altogether borne out by the evidence, but these statements are not such as to have prejudiced the prisoner, and are in our opinion of no great importance. With reference to the remarks of the Judge to the jury as to the discrepancies in the evidence to the effect "that many "juries had given verdicts which surprised "him, and that on his enquiring the reason for "such verdicts, he was imformed that there "were discrepancies in the evidence," we think that the Judge was wrong in making these remarks; but at the same time, after carefully considering the evidence, we do not think that these remarks have in any way influenced the verdict at which the jury have arrived, or prejudiced the prisoner. The story of Muthoora Singh that he was acting in self-defence is not borne out by any evidence on the record, nor do we find that he offered any evidence. It is to be regretted that the four Police Constables who were specially appointed by Mr. Cavanagh to keep the peace in this haût were not examined, and there is also the evidence of Dr. Green to the effect that Muthoora Singh was severely beaten; but it appears to us from the evidence on the record that that beating was probably inflicted after Muthoora Singh had used his sword and cut off the thumb of Shere Ali Khan. From the evidence, we would infer that the "puhlwâns" of the rival Rajah gave Muthoora Singh a good thrashing after he had attacked and wounded Shere Ali Khan. On the whole case, therefore, we are not disposed to interfere with the conviction or sentence, and we reject the application.

The 29th November 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act V of 1861 *ss.* 15 *and* 17—*Special Constables —High Court—Jurisdiction.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Rajshahye.*

Rohoman Sirkar and another, *Petitioners.*

Where a Magistrate appointed special constables under Section 17 Act V of 1861 on the ground that a murder had occurred, and he was apprehensive that frequent murders would take place, it was held that his order was illegal, that Section referring to cases of unlawful assembly, riot, or disturbance of the peace only; but that as the order was one of a purely executive nature, the High Court had no power to interfere with it. The Magistrate should rather have proceeded under Section 15 of the Act, and applied for sanction to an increase in the Police force.

Reference.—In February 1872, a traveller passing along a foot-path opposite the village of Chobari was set upon in open day by two men, who murdered and robbed him. The Assistant Magistrate of Sherajgunge obtained sufficient evidence against two of the inhabitants of Chobari on which to commit them for trial before the Sessions Court for the aforesaid murder; but the principal witnesses on whose evidence he so committed those two persons, retracted before the Sessions Court the statements they had made before the Assistant Magistrate, and the case consequently broke down in the Sessions Court, and the accused persons were discharged on the 22nd of April last. On the 10th of May, the Assistant Magistrate drew up a proceeding in which, after remarking that there had been a serious murder in Chobari, and that many *budmashes* lived in that village, he called upon the Police Inspector to report whether it was necessary to appoint special constables for the security of the lives and property of people passing by or through Chobari during the then approaching rainy season; and if such a measure were necessary, to submit a list of five of the principal residents of that village.

The report of the Inspector being in favor of the appointment of such special constables, the Assistant Magistrate, on the 27th

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of May, appointed Rohoman Sirkar, Moonshee Akhund, and three other inhabitants of Chobari as special constables under the provisions of Section 17 Act V of 1861, directing them to state within ten days any objections they might have to being so appointed. No objections having been made by any of those five persons by the 8th of June, the Assistant Magistrate on that date declared them duly appointed special constables, and bound to perform the duties of officer of Police under the provisions of Sections 17, 18, and 19 of Act V of 1861. On the 6th of July, Rohoman Sirkar and Moonshee Akhund petitioned the Assistant Magistrate to withdraw his order with regard to them, complaining at the same time of the hardship and pecuniary loss entailed upon them by the operation of that order; they being *mahajans* and traders, and their profits and success in business depending in a great measure on their travelling about the country, and being free to leave Chobari whenever and for as long as it was to their interest to do so—a freedom of which they were deprived under the Assistant Magistrate's order. The Assistant Magistrate did not comply with their prayer, and they petitioned this Court under Section 434 of the Code of Criminal Procedure.

I consider the Assistant Magistrate's order is illegal, because the circumstances which could alone render such order legal did not exist, nor was any one of those circumstances reasonably to be apprehended at the time of the passing of that order.

The reasons assigned by the Assistant Magistrate in his proceeding of the 10th May 1872 for the appointment of special Police officers in Chobari, under the provisions of Section 17 Act V of 1861, are—

(1). That there was a murder lately committed in Chobari; and (2) that many *budmashes* live in that village.

Neither of these reasons appears to me to constitute a lawful reason for compelling the petitioners or any of the residents of Chobari to perform the duties of special Police officers against their will, and to their personal inconvenience and pecuniary loss arising from partial stoppage of business. It is not alleged that there had been, or that there was, any reasonable apprehension of any unlawful assembly or riot in Chobari; and the committing of a single murder, most daring and atrocious though that murder was, is not a disturbance of the peace in the sense in which the words "disturbance of the peace" are apparently used in Section 17 of Act V of 1861.

The Assistant Magistrate was apparently apprehensive that, during the rainy season, murders of a similar character to that which was perpetrated in February of 1872 on a traveller passing through Chobari might be committed; but assuming that good grounds existed for such apprehension, the appropriate law to be applied in such a case would be Section 15, and not Section 17, of the Police Act V of 1861.

I am doubtful whether I have jurisdiction to entertain this application of petitioners, it being one which ought perhaps to have been preferred to the Commissioner of Circuit, but the case is one which appears to me to call for an immediate order of annulment of the Assistant Magistrate's proceedings with reference to the appointment of petitioners as special Police officers; and the High Court will best determine the question of jurisdiction. As delay will be injurious to petitioners, I submit the records at once to the High Court, without calling upon the Assistant Magistrate for any explanation to accompany the record.

Judgment of the High Court.

Glover, J.—The order of the Assistant Magistrate appears to us to be one of a purely executive nature, and one with which this Court has no power to interfere.

We may say, however, that we agree with the Sessions Judge in thinking the order illegal, inasmuch as Section 17 Act V of 1861 refers to cases of unlawful assembly, riot, or disturbance of the peace only, and not to crimes of the nature referred to in this proceeding.

If the Assistant Magistrate considered the Police force already entertained insufficient to prevent crime in the village of Chowbari, he should have applied for sanction to an increase under Section 15 of the Act.

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RULES AND ORDERS OF THE HIGH COURT.

Regarding Despatch of Monthly Returns by the Small Cause Courts.

CIVIL CIRCULAR MEMO. No. 9.

To all Judges of Courts of Small Causes, dated Calcutta, the 25th April 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble L. S. Jackson, *Judge.*

THE attention of all Judges of Courts of Small Causes is drawn to para. 19 of the proceedings of the late Sudder Court embodied in their resolution of 1st July 1861 (which was communicated to all Judges of Small Cause Courts), which requires the submission of their Monthly Returns to the Court not later than the 10th of each month following that to which the statement refers; and they are requested, with a view to secure certainty of receipt by the above date, to despatch the returns in question not later than the 5th.

For ensuring Uniformity in the Preparation of the comparative tables "Original Jurisdiction" and "Appellate Jurisdiction" in the Annual Reports.

CIVIL CIRCULAR MEMO. No. 10.

To all District Judges and Judicial Commissioners, dated Calcutta, the 23rd May 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble L. S. Jackson, *Judge.*

THE Annual Reports for 1871, which have been received, show a want of uniformity in the preparation of the comparative tables

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superscribed respectively "Original Jurisdiction" and "Appellate Jurisdiction," provided by Circular Order No. 4, dated 2nd February 1871. To ensure uniformity in their preparation, District Judges and Judicial Commissioners are hereby informed that the instructions given in the Circular Order No. 25 of 12th August 1871 must be understood to apply to the headings "Instituted" and "Disposed of" in the above tables. All transfers, therefore, though properly included in the black ink figures under the general heads just named, should be *excluded from* the red ink figures to be entered under the former, as is done in the Quarterly Returns.

2. Where the above tables in the reports for the year 1871 have been prepared on any other principle, amended ones should be sent without delay, and where they have been prepared on the above principle, *i. e.*, where the black ink entries have been made to include transfers (as they should have been), supplementary returns should be submitted, showing in red ink the cases actually *instituted* or *decided* in the Courts concerned, exclusive of transfers.

Classification of Values of Assets of Estates to be entered in the tabular form annexed to Civil Circular Order No. 20 *of* 1871.

CIVIL CIRCULAR MEMO. No. 11.

To all District Judges and Judicial Commissioners, dated Calcutta, the 3rd June 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble L. S. Jackson, *Judge.*

THE Court directs all District Judges and Judicial Commissioners to make the following entries in Column 1 superscribed "Declared Value of Assets of Estates" of the tabular form annexed to Circular Order No. 20, dated the 13th July 1871 :—

"Above Rs.	1,000	up	to	Rs.	5,000
" "	5,000	"	"	"	10,000
" "	10,000	"	"	"	50,000
" "	50,000	"	"	"	1,00,000
Above 1,00,000 Rupees."					

2. The above classification of values is not intended to affect the forms of *registers* which were ordered to be opened in Judges' Offices from the 1st July last; but they must be adopted in the *periodical returns* to be made to the Court for the information of Government, and should embrace the annual return for the current year 1872, and all future years.

3. It will not be necessary to include in the annual return in question any probates, letters, or certificates where the amount or value of the property "does not exceed one thousand rupees," no fee being chargeable in such cases—*Vide* Clause VIII, Section 19 Court Fees' Act (VII) of 1870.

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Revised Scale of Stationery Allowances sanctioned by the Financial Department for all Offices in Bengal.

CIVIL CIRCULAR ORDER No. 19.

To District Judges and Judges of Small Cause Courts, dated Calcutta, the 17th June 1872.

HIGH COURT, &c.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover and W. Ainslie, *Judges of the Court.*

AT the instance of the Government of Bengal, the Court circulates, for the information and guidance of all District Judges and Judges of Small Cause Courts, an extract from the revised scale of stationery allowances sanctioned by the Financial Department, under date 4th September 1871 for all offices in Bengal.

2. Attention is drawn to the supplement at the end of the tabular statement, in which the allowances sanctioned for Subordinate Judges and Moonsiffs are exhibited. In the case of the former, the allowance, it will be seen, continues as before; but in that of the latter the allowance has been raised from Rs. 8 to Rs. 12 for each Officer.

Extract from the Revised Scale of Stationery Allowances sanctioned for all Offices in Bengal, by letter No. 3302, dated 4th September 1871, from Assistant Secretary, Government of India (Financial Department), to Secretary, Government of Bengal.

PART I.

NAMES OF OFFICERS.	STATIONS.	Average Monthly Amount of Expenditure.	Amount proposed by Superintendent of Stationery.	Amount proposed by the Board, and sanctioned by the Government of India, as per letter No. 495, dated 31st May 1867, forwarded with Government Order No. 3159, dated 20th July 1867.	Amount not included in the original Statement, or which require formal sanction.	Increase per Month.	Decrease per Month.	REMARKS.
		Rs. A. P.		Rs. As. P.	Rs. A. P.	Rs. A. P.		
Zillah Judge of ...	Backergunge ...	30 13 4	.....	20 0 0				
Ditto (Additional) ..	Ditto ...	1 11 0	.....	2 0 0				
Ditto	Beerbhoom ...	16 6 0	.....	15 0 0				
Ditto	Bhaugulpore ...	27 7 9	.....	20 0 0				
Ditto (Additional) ...	Ditto ...	1 4 0	.....	2 0 0				
Ditto	Burdwan ...	31 12 10	.....	30 0 0				
Ditto	Bancoorah ...	7 9 4	.....	10 0 0				
Ditto	Behar ...	20 10 9	.....	15 0 0				
Ditto	Chittagong ...	17 13 9	.....	15 0 0				
Ditto (Additional) ...	Ditto ...	4 4 8	.....	2 0 0				
Ditto	Cuttack ...	28 3 9	.....	20 0 0				
Ditto	Dacca ...	39 9 11	.....	30 0 0				
Ditto (Additional) ...	Ditto ...	2 7 0	.....	2 0 0				
Ditto	Dinagepore ...	40 0 3	.....	30 0 0				
Ditto	Hooghly ...	30 12 9	.....	30 0 0				
Ditto	Jessore ...	25 7 10	.....	20 0 0				

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PART I.—(*Continued.*)

NAMES OF OFFICERS.	STATIONS.	Average Monthly Amount of Expenditure.	Amount proposed by Superintendent of Stationery.	Amount proposed by the Board, and sanctioned by the Government of India, as per letter No. 495, dated 31st May 1867, forwarded with Government Order No. 3159, dated 20th July 1867.	Amount not included in the original Statement, or which require formal Sanction.	Increase per Month.	Decrease per Month.	REMARKS.
		Rs. As. P.		Rs. As. P.	Rs. A. P.	Rs. A. P.		
Zillah Judge of ...	Midnapore ...	18 11 0	.....	15 0 0				
Ditto	Moorshedabad...	24 4 7	.....	20 0 0				
Ditto	Mymensingh ...	36 6 5	.....	30 0 0				
Ditto	Nuddea ...	23 0 11	.....	20 0 0				
Ditto (Additional) ...	Ditto ...	2 2 7	.....	2 0 0				
Ditto	Patna ...	38 4 0	.....	30 0 0				
Ditto	Purneah ...	2 10 6	.....	2 0 0				
Ditto	Rajshahye ...	29 0 7	.....	30 0 0				
Ditto	Rungpore ...	38 14 9	.....	30 0 0				
Ditto	Sarun ...	27 9 6	.....	20 0 0				
Ditto	Shahabad ...	35 9 11	.....	30 0 0				
Ditto	Sylhet ...	16 15 0	.....	15 0 0				
Ditto	Tipperah ...	29 6 9	.....	20 0 0				
Ditto	Tirhoot ...	12 5 9	.....	15 0 0				
Ditto	24-Pergunnahs	64 9 2	.....	40 0 0				
Ditto (Additional) ...	Ditto ...	9 6 9	.....	6 0 0				
Judge of the Small Cause Court	Arrah ...	.....	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Backergunge ..	1 13 0	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Bhaugulpore ...	8 15 4	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Beauleah ...	9 8 2	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Chooadangah ...	7 2 0	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Comerkhally ...	2 0 8	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Cuttack ...	9 8 4	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Chittagong ...	7 2 1	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Dacca ...	8 9 0	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Dinapore Cantonment	.....	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Hooghly ...	2 7 11	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Jhenidah ...	10 8 0	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Jessore ...	11 5 6	.....	2 0 0	4 0 0	2 0 9		
Ditto ditto ...	Kooshtea ...	11 13 8	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Kishnaghur ...	6 10 8	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Moorshedabad...	8 9 6	....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Magoorah ...	5 1 7	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Meherpore ...	3 12 4	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Midnapore ...	12 2 10	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Monghyr ...	12 5 5	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Nurail ...	10 12 4	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Nattore ...	3 7 0	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Patna and Dinapore	9 9 0	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Pubna ...	8 2 2	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Santipore ...	12 15 7	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Sealdah ...	14 15 10	.....	2 0 0	*4 0 0	2 0 0		
Ditto ditto ...	Tirhoot ...	1 0 0	.....	2 0 0	4 0 0	2 0 0		
Ditto ditto ...	Assam ...	12 14 6	.....	10 0 0				

NOTE.—The fixed allowance to include all charges on account of paste, glue, oil, thread, twine, sand-pounce, sand-pots, pounce bags, vinegar, oil for stamps, oil for lamps, oil for sealing and for sharpening knives, stamping inkstand, stamping ink, country ink, country paper of all kinds, and book-binding (*vide* Chapter XXII Section 1 Clause 11 pages 310 and 311 of Board's Rules).

PART II.

	Present Scale.	*Revised Scale.*
27 Subordinate Judges	405 Rs.	405 Rs.
206 Moonsiffs	1,648 "	2,472 "

* A separate allowance of Rs. 4 has been sanctioned for Howrah.

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Cost of Service of Notice of Appeal on Respondent how and when to be paid.

CIVIL CIRCULAR ORDER No. 20.

To all Judges and Judicial Commissioners, dated Calcutta, the 25th June 1872.

HIGH COURT, &c.

(Civil Side).

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble W. Markby, F. A. Glover, and W. Ainslie, *Judges of the Court.*

THE Court direct that, from and after the 1st July next, the cost of service of notice on the respondent in every appeal in a civil case preferred to the District Judge, or to a Subordinate Judge especially empowered to receive appeals, shall be paid at such Court at the time of presenting the appeal by an adhesive Court Fee Stamp, such as is prescribed in Circular Order No. 37, dated 22nd December 1870, to be affixed to the petition of appeal.

Arrangements as to the Sittings of Judges of two or more Small Cause Courts.

CIVIL CIRCULAR ORDER No. 21.

To all Judges of Courts of Small Causes, dated Calcutta, the 26th June 1872.

HIGH COURT, &c.

(Civil Side).

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover and W. Ainslie, *Judges of the Court.*

THE Court is pleased to declare that the previous confirmation, by Government, of arrangements made under Section 14 Act XI of 1865, is not necessary in order to give them legal validity. The Court accordingly directs, with the approval of His Honor the Lieutenant-Governor, that arrangements as to the sittings of Judges of two or more Small Cause Courts shall, for the future, be merely reported to the Local Government through the High Court, the notification as to the times of circuit and dates of sitting appearing simultaneously in the *Calcutta Gazette,* under the signature of the Small Cause Court Judges themselves, "subject to the orders of Government."

Regarding the Sale of a particular Description of Paper by the Vendors of Court Fees Stamps when adhesive Stamps come to be exclusively used.

CIVIL CIRCULAR ORDER No. 22.

To all Judges, Judicial Commissioners, and Magistrates, dated Calcutta, the 28th June 1872.

HIGH COURT, &c.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover and W. Ainslie, *Judges.*

THE Governor-General in Council, in Notification No. 1756, dated 8th March last, has, in the exercise of the powers conferred by Section 26 of the Court Fees Act of 1870, directed that the stamps used to denote any fee chargeable under the said Act may be either impressed or adhesive; and the Court have reason to believe that, on the present stock of impressed stamps being exhausted, the exclusive use of adhesive stamps for the above purpose will be enjoined. It is important, therefore, to provide against stamps of the latter description being affixed

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to documents written on paper unfitted for the purposes of record. It will also be convenient that the component parts of a record should be, as far as possible, of one uniform size.

2. The Government of India have approved of a description of paper, which appears well calculated to answer the purpose intended, being supplied to the vendors of Court Fees Stamps for sale to the public at one pice per sheet. The size of this paper is 13½″ long by 8½″ wide, and samples can be obtained on application to the Superintendent of Stationery.

3. It may be a question whether Judicial and Magisterial Officers could refuse to receive an application or a petition merely because it was not written upon paper of a particular size or description, provided that it was of a kind sufficiently durable to be adapted for record; but they clearly would be justified in refusing permission to the filing of a document written upon paper obviously unfitted for this purpose. If due notice be given that such a discretion will be exercised whenever necessary, and at the same time that paper of an approved quality can be obtained from the stamp vendor attached to each Court, it is not likely that the public will refuse to make use of it.

4. The Court direct, therefore, that all Judges, Judicial Commissioners, and Magistrates of districts will have a notice to the above effect put up in some conspicuous place in their Courts, and that they will instruct their respective subordinates to do so likewise. The price at which this paper will be sold should be mentioned in the notices above referred to. The Superintendent of Stationery should also be communicated with, through the Collector of the district, as to the quantity of paper that will be required, which, at the outset, will probably not be large. This, however, will mainly depend upon the stock of impressed stamp paper in each district, and on this point the Court have no information.

Regarding the Submission of Judicial Indents for Stationery by Civil and Criminal Authorities.

CIVIL AND CRIMINAL CIRCULAR ORDER No. 23.

To all Civil and Criminal Authorities, dated Calcutta, the 3rd July 1872.

HIGH COURT, &c.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover and W. Ainslie, *Judges.*

AT the instance of His Honor the Lieutenant Governor of Bengal, the Court is pleased to direct all Civil and Criminal Authorities under their control to submit their annual indents to the Superintendent of Stationery for the authorized judicial forms in use in their own and their Subordinate Courts during the month of April of each year.

2. Unless judicial indents are unusually large, they can, under ordinary circumstances, the Court are assured, be all complied with within two months' time of their receipt. Emergent indents, however, can be sent in, and will be complied with at any time of the year. The Court, however, expect that the necessity for submitting such indents will only arise under exceptional circumstances, such as could not reasonably have been foreseen at the time of the submission of the annual indent.

3. Emergent indents should be sent in through the High Court.

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Circular Order No. 13 *of* 4*th June* 1870 *withdrawn.*

CIRCULAR ORDER No. 24.

To District Judges, Judicial Commissioners and Courts of Small Causes, dated Calcutta, the 24*th July* 1872.

HIGH COURT, &c.

(Civil Side.)

Present:

The Hon'le Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble W. Markby, F. A. Glover, and W. Ainslie, *Judges.*

CIRCULAR Order No. 13, dated 4th June 1870, not having been found to answer the purpose for which it was issued, and having been extensively taken advantage of by parties to prefer appeals not warranted by law, the Court is pleased to withdraw it, and it is withdrawn from this date accordingly.

Applications under s. 12 *Act VIII of* 1859 *and s.* 4 *Act XXIII of* 1861.

CIRCULAR ORDER No. 25.

To all Civil Courts, dated Calcutta, the 15*th July* 1872.

HIGH COURT, &c.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, F. A. Glover, and W. Ainslie, *Judges.*

THE High Court is very frequently called upon to pass orders upon applications made under Section 12 Code of Civil Procedure, by District and other Judges, for leave to proceed with the trial of suits for property situate within the limits of different districts, and also upon applications, chiefly from Courts of Small Causes, for orders to be made under Section 4 Act XXIII of 1861.

2. These applications, in a great number of instances, have not been accompanied by any sufficient statement of the facts of the case, and it seems to have been the common belief that such applications, and the orders of the High Court to be made upon them, are mere matters of form. But the controlling power entrusted to the High Court by the Sections above mentioned, is meant to be really exercised, and it cannot be exercised without sufficient materials.

3. The Court therefore find it necessary to direct that in all applications under Section 12 Code of Civil Procedure, the facts shall be fully set forth, *i. e.* the names and residences of all the parties, and the nature and value of the different portions of the property in dispute, which are situated in various jurisdictions; and that when any of the defendants reside beyond the local jurisdiction of the Court in which the suit has been commenced, it shall appear that such defendants have had an opportunity of showing cause.

4. When the Court is asked to make an order under Section 4 Act XXIII of 1861, the fact should be similarly stated, and it should appear that, in the opinion of the Judge, it will be just and reasonable as regards defendants as well as plaintiffs, that the trial should take place in a jurisdiction within which one or more of them do not reside.

Certificated Mookhtars allowed Access to Record-rooms of Mofussil Civil Courts.

CIRCULAR ORDER No. 26.

Dated Calcutta, the 3*rd August* 1872.

HIGH COURT, &c.

(Civil Side.)

Present:

The Hon'ble Sir. R. Couch, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, W. Markby, F. A. Glover, and W. Ainslie, *Judges.*

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All District Judges and Judicial Commissioners

ARE hereby informed for their own guidance, as well as for that of the Civil Courts subordinate to them, that the High Court has resolved that Mookhtars holding certificates under the Rules which have been, or may be, passed by the Court under Section 4, Act XX of 1865, may be allowed access to the record-rooms of Mofussil Civil Courts in order to facilitate the preparation by them of briefs for the use of Counsel or Vakeels.

Accounts prescribed in C. O. No. 9 to be kept in English.

CIRCULAR ORDER No. 27.

To all Civil Authorities, Lower Provinces, dated Calcutta, the 10th August 1872.

HIGH COURT, &c.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Markby and W. Ainslie, *Judges.*

IN connection with Court's Circular Order No. 9 of the 8th March last, the Court direct that the accounts therein prescribed be kept in the English language, and not in the Vernacular.

Earnings of, and Processes served by, Extra Peons, to be shown.

CIRCULAR ORDER No. 28.

To all Judges of Districts and Judges of Small Cause Courts, dated Calcutta, the 14th August 1872.

HIGH COURT, &c.

(Civil Side.)

Present:

The Hon'ble F. A. Glover, *Judge.*

IN modification of Circular Order No. 18 of the 11th May 1866, the Court desire that, in the Returns therein called for, showing the number of extra peons employed for the service and execution of processes and the cost of their employment, there should also be shown the amount earned, and the number of processes served by them. A form is subjoined :—

COURTS.	For what Period.	Number of Peons.	Number of Processes served.	Amount of Fees realized.	Cost of Employment.	REMARKS.

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Language of Warrants sent for Execution to another District, where a different Language is used.

CIRCULAR ORDER No. 3.

To all Criminal Authorities, dated Calcutta, the 25th July 1872.

HIGH COURT, &c.

(Criminal Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, W. Markby, F. A. Glover, and W. Ainslie, *Judges.*

INCONVENIENCE having resulted in certain cases from processes sent from Bengal to Courts in the Madras Presidency being in Hindoostanee, the Court are pleased, at the instance of His Honor the Lieutenant-Governor, to issue the following orders on the subject.

2. Warrants issuing out of a Magistrate's Court should be written "in the language in ordinary use in the district in which it is held," that is to say (with certain exceptions), the language in which the proceedings of the several Courts are conducted. But where a warrant is sent for execution to the Magistrate of a District where a different language is in ordinary use, the warrant should be accompanied by a translation, certified by the transmitting Magistrate to be correct, into such other language, or into English. Moreover, in such cases it would be proper that the warrant should always be accompanied by a letter in English requesting its execution.

Directions as to the Manner in which the Record of Criminal Appeals and References should be made up.

CIRCULAR ORDER No. 4.

To all Sessions Judges and Magistrates, dated Calcutta, the 10th August 1872.

HIGH COURT, &c.

(Criminal Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover and W. Ainslie, *Judges.*

CONSIDERABLE inconvenience having been felt by the Judges composing Criminal Benches of this Court from the manner in which the record of Criminal appeals and references is frequently made up in the Courts of Sessions Judges and Magistrates, the following directions are, for the future, to be strictly attended to.

2. The evidence of the witnesses should, in all cases, be recorded on printed or lithographed Forms; and care should be taken that the headings are carefully and accurately filled up. No more than one deposition should be written on each sheet; and when the evidence of a witness does not fill the whole of the paper, care should be taken to affix the memorandum required by Section 199 of the Code of Criminal Procedure, exactly at the close of the writing. In many cases, the Court have found the deposition ending on one page, and the memorandum filled in at the end of the other page, and there is no security against the blank being filled in after the record has been returned to the sherishta, with something that the witness did not say.

3. The attestation required could be impressed at the end of a deposition by a stamp, which would be, for obvious reasons, a better plan than affixing it as a label by means of gum or paste.

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4. The Court also desire that all documents referred to by the Sessions Judge, and used by him as evidence (such as medical depositions, confessions of accused, &c., &c.), should be put up with the Sessions *nuthee.* Considerable inconvenience, as well as delay, is caused by the Appellate Court having frequently to search through the Magistrate's proceedings for papers which ought to form part of the Sessions record. Copies can, if necessary, be placed in the Magistrate's records.

5. When confessions of accused persons made before a Magistrate form part of the evidence against the persons committed for trial to the Court of Sessions, they should be accompanied by translations into English fairly written out. The Court has frequently to notice the great difficulty experienced in the reading of the vernacular papers of the local Courts by persons unaccustomed to the peculiarities of the writing and local idiom.

Examination of Vernacular Registers of Fines by Sessions Judges no longer required.

CIRCULAR ORDER No. 5.

To All Sessions Judges and Magistrates, dated Calcutta, the 17th August 1872.

HIGH COURT, &c.

(Criminal Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble W. Markby, F. A. Glover, and W. Ainslie, *Judges.*

ALL Sessions Judges and Magistrates are informed that the Vernacular registers of fines in their offices, required to be kept up by paragraph 2 of Circular Order No. 14, dated 16th December 1867,* need no longer be examined by the Sessions Judges, as they are required to be examined and dealt with by the Commissioner of the Division in his annual tour of inspection or at other suitable seasons.

Suspends C. O. No. 18, *dated* 16*th May last, and calls for Report as to the Practice in respect of making Deductions from Proceeds of Property sold in Execution.*

CIRCULAR ORDER No. 29.

To All District Judges and Judicial Commissioners, dated Calcutta, the 5th September 1872.

HIGH COURT, &c.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble W. Markby, F. A. Glover, and W. Ainslie, *Judges.*

THE Court is hereby pleased to suspend the operation of Circular Order No. 18, dated the 16th May last,† and to request all District Judges and Judicial Commissioners to report as to the practice in their own and the subordinate Courts in respect of making deductions from the proceeds of property sold in execution, either in open Court or out of Court, and either by themselves or by subordinate officers.

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* 9 W. R., Crim. Cirs., 1.
† 17 W. R., *Rules,* 16.

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States that in making over charge of the current Duties of their Offices, Civil Authorities should act under the provisions of s. 8 of the Bengal Civil Courts' Act, and not under Circular Order No. 131, *dated 6th February* 1835, *which is now obsolete.*

CIVIL CIRCULAR ORDER No. 30.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all Civil Authorities, dated Calautta, the 26th November 1872.

(Civil Side).

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, W. Markby, F. A. Glover, and W. Ainslie, *Judges.*

THE Court, having observed that Judicial Officers are still, in some cases, guided by Circular Order No. 131, dated the 6th February 1835, of the late Sudder Dewanny, when making over charge of the current duties of their offices, desire to point out that that Circular Order is in fact obsolete, and that they should now act under the provisions of the 8th Section of the Bengal Civil Courts' Act.

Calls for Report regarding the working of the Rules, laid down by previous Circular Order, as to certifying Appeals filed in the Lower Appellate Courts.

CIRCULAR MEMO. No. 14.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, to all District Judges and Judicial Commissioners, dated Calcutta, the 13th December 1872.

(Civil Side).

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, F. A. Glover, and W. Ainslie, *Judges.*

I AM directed to request that you will be so good as to favor the Court with your views as to how far the rules laid down by Circular Order No. 17, dated 23rd May 1871,* with regard to certifying appeals filed in the Lower Appellate Courts, have been successful in checking the abuse against which they were directed; how they have been carried out; and whether you can suggest any desirable modification of them.

An early reply is requested.

* 16 W. R., Civil Cirs., 1.

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CRIMINAL LETTERS.

Jurisdiction to determine Question of Identity. No Appeal lies from Magistrate's Decision on such a Question, it not being a Conviction.

Letter No. 201, *dated the 6th March* 1872, *from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Beerbhoom.*

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

SIR,—With advertence to your letter No. 18, dated the 17th ultimo, I am directed to state that the Court are of opinion that the question of the identity of the accused person with the Kirtee Chunder Ghose convicted of rioting in 1852, should have been enquired into by the Magistrate within whose district the place where the riot occurred is now situate. As, however, the accused has been in no way prejudiced by the way in which the investigation has been conducted by the Magistrate of your district, the Court see no reason for re-opening the enquiry; and if it were necessary, the Court would, under the circumstances, apply the provisions of Section 34 of the Code of Criminal Procedure.

2. As to Kirtee Chunder's appeal to you, the Court are not told on what point it was preferred; but assuming it to have been on the question of his identity, the Court think that no appeal lay. Section 409 Code of Criminal Procedure gives an appeal to any person "convicted" on a trial held by a Magistrate; and the question therefore is, was the result of the Magistrate's enquiry into Kirtee Chunder's identity a "conviction?" The Court think not. A person can only be "convicted" of something that is an offence; and as the identity question had no direct connection with the *factum* of the riot, it cannot be said that the Magistrate's decision on that point was a conviction; and if there was no conviction, there is no Section of the Procedure Code which would give an appeal, and, therefore, Section 414 would apply.

3. The accused, Kirtee Chunder, will have to undergo the sentence passed upon him in 1852.

Section 404 *Code of Criminal Procedure inapplicable to Reports by Magistrates of Decisions of Sessions Judges.*

Extract (*para.* 3) *from letter No.* 10, *dated the 8th January* 1872, *from the*

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Registrar of the High Court, Appellate Side, to the Magistrate of Monghyr.

3. In conclusion, I am to add that the Court must consider it to be a misconception of the functions of a Magistrate of the district that he should employ the provisions of Section 404 of the Code of Criminal Procedure for the purpose of bringing before the High Court the decisions of the Sessions Court wherein he entertains a view opposed to that of his superior, as, in a judicial point of view, the Sessions Judge undoubtedly is.

Deputy Magistrate's Order against the Holding of a new Hât.

Letter No. 653, *dated the* 23*rd June* 1863, *from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Backergunge.*

Present:

The Hon'ble H. T. Raikes, H. V. Bayley, W. Morgan, and F. B. Kemp, *Judges.*

SIR,—Having laid before the Court your letter No. 39, dated the 1st instant, in which you refer for their consideration certain questions arising out of an order of the Deputy Magistrate, desiring one Kristo Coomar Roy to abstain from holding his bazar at a particular locality on certain days, I am directed to observe as follows :—

It would appear from your letter that the above order was passed on the representation of the owners of another *hât* that the fact of Kristo Coomar Roy's converting his bazar into a *hât* on the days on which *their hât* was held caused injury to their property. It would seem also that the Deputy Magistrate believes himself to have acted in conformity to Section 62 Act XXV of 1861 in passing the order which he has passed, and which he declines to keep in abeyance pending the present reference.

The Deputy Magistrate is right in supposing that the power of altering the said order, except upon appeal, rests with the High Court alone, as laid down in Section 434 of the Code of Criminal Procedure. But his order in the case is not borne out by Section 62. The "injury to property" complained of appears to be the loss that one man fears may be entailed upon him by the competition of another in the same line of business, and cannot be the kind of injury contemplated in the Section cited. Such a construction would be fatal to the fairest competition in trade which threatened the interests of particular tradesmen.

The Court are pleased accordingly to direct that the Deputy Magistrate be required to recall his order in the case under review.

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REVENUE CIRCULARS.

JANUARY 1872.

V. H. SCHALCH, ESQ.

Claims to Compensation for Land taken for public Purposes.

No. 1.

IN future Registers Nos. 22, 23, 24, 25, 45, and 46, as well as papers of cases of claims to compensation for land taken up for public purposes, are to be preserved permanently and entered under Schedule A.

Accordingly, the following alterations are made in the classification of records specified in the Appendix, at pages 212 and 213 of the Board's Rules :—

Under "b" Registers, heading II, class A, insert after "inclusive" the words "Nos. 22 to 25," and insert the word "to" between "44" and "47."

Omit "25" from "b" Registers, heading I, class B.

Expunge from heading II, class B, the words "claims to compensation for lands taken for public purposes," and transfer them to para. 2 of heading III, class A.

A. MONEY, ESQ., C.B.

Fines and Forfeitures under Abkaree Act XXI of 1856.

No. 2.

CLAUSE 5 A, Section 18, Chapter V, page 81 of the Board's Rules, is cancelled, the High Court having, in their decision of the 13th January 1872, in the case of Queen *v.* Junglee Beldar,* ruled that the provisions of Section 61, Act XXV of 1861, do not apply to fines and forfeitures under Act XXI of 1856.

Income-Tax Collections.

No. 3.

THE member in charge is glad to find from the Income-Tax Returns now coming in, for December 1871, that satisfactory progress has been made in the assessments generally. The collections do not, however, keep pace with the assessments, as they should do, and earnest and constant attention must be given to the matter, proceedings under Section 37 being taken in every case to which they can be applied, so that the operations under the Act may be entirely completed with the end of this year.

Income-Tax Returns.

No. 4.

THERE is reason to believe that paragraph 14 of the Rules issued by the Lieutenant-Governor of Bengal for the working of Act XII of 1871 has not been properly attended to. It was there ordered that the register prescribed in paragraph 12 of the Rules issued under Act XVI of 1870, or, in other words, the register prescribed by paragraph 22 of the Rules issued under Act IX of 1869, should be kept up.

Reference to paragraph 22 of the Rules for 1869 will show that a register containing 47 pages, each page having for its heading one of the 47 sources of income shown in the Annual Return, was to be written up at the close of every month. The Rules of 1869, of 1870, and of 1871 have directed that, as every assessment is finally made, the name of the principal source of income, as shown in the Annual Return required by the Government of India (and prescribed as Return No. IV under the present Act), should be entered in the column of remarks of Register No. 1,—see extract as per margin, from paragraph 2 of the Rules under Act XII of 1871. At the close of every month all these entries were then to be made in the Special Register first prescribed in paragraph 22 of the Rules for 1869, which showed how the totals could then be easily struck at the end of the year.

When the assessment has been finally made, the name of the principal source of income, as given in the form of Annual Return (Form K), must be entered in column 17.

Unless the above directions have been carefully attended to, the Annual Returns for the

* 17 W. R., Cr., 7.

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last two years will have been untrustworthy, and in like manner the Return for this year will be either incorrect, or much delayed in submission. Every Collector and Deputy Commissioner is therefore now desired personally to satisfy himself that the Special Register has been kept up as directed. If it has not been kept up, the arrears must be at once brought up to date, a report to that effect being made to this office, and the Rules above quoted must be carefully observed in all remaining assessments under Act XII of 1871.

FEBRUARY 1872.

V. H. SCHALCH, ESQ.

New Civil Pension Code.

No. 1.

THE attention of all Commissioners and District Officers is drawn to the New Civil Pension Code, a copy of which will be forwarded for their information and guidance. By this Code, Chapter X of the Board's Rules is superseded, except in respect to those Rules which apply exclusively to political and territorial pensions. Special attention is drawn to the general procedure laid down in Chapter XIV of the Code.

Butwarra Proceedings.

No. 2.

As an instance has lately occurred in which certain papers, prepared by a Butwarra Ameen and submitted to the Board, contained errors which indicated such gross carelessness as to compel the Board to order his removal from his appointment, and as it is exceedingly discreditable that such papers, so seriously affecting the interests of the sharers in the estate, should have passed through the Collector's and Commissioner's offices without detection of the gross discrepancies which they contained, it is hereby ordered that, prior to the submission of Butwarra proceedings to Commissioners for confirmation, Collectors will, in future, take care to annex to the records a *kaifiyat*, signed by the Sheristadar, declaring that he has examined the papers, that the map and *khateonee* agree, and that the totals of area are the totals of the separate figures.

2. In cases appealed to the Board, it will be the duty of the Sheristadar to bring to the notice of the Member by whom the appeal is heard, any disregard of this order or incorrectness in the Collectorate Sheristadar's *kaifiyat*.

Refund of Excess Deposits by Proprietors under Sale Law XI of 1859.

No. 3.

THE following should be added as Clause 11 A. page 189, Board's Rules—

"A proprietor or co-proprietor of an estate paying revenue to Government is not entitled to a refund of any sum, which may have been paid by him on account of the revenue of the estate of which he is proprietor or co-proprietor, in excess of the amount due from the estate up to the date of such payment, unless such payment shall have been specially made as a deposit under Section 15 Act XI of 1859."

Compensation Bills under Act X of 1870.

No. 4.

DISTRICT OFFICERS are requested, when submitting, under para. 36 or 37 of the Instructions for the administration of Act X of 1870, their compensation bills (Appendix I), to supply in the column of remarks of the Abstract the date on which the price of the land referred to in the bill has been fixed.

A. MONEY, ESQ., C.B.

Assessments of Profits from Land under Act XII of 1871.

No. 5.

THE following instructions, issued by Government, are to be carefully carried out in regard to all past and future assessments of profits from land, under Act XI of 1871 :—

If in assessments already made it appears on the face of the assessment papers that a tenant's holding not exceeding 50 acres has been assessed, the assessment is to be cancelled, and any sum collected is to be refunded.

Where, however, the quantity of land has not been specified, and no complaint is made, no further enquiry need be instituted. But when a complaint is brought forward, although the papers show no quantity of land, enquiry must be made.

Similarly, in all future assessments under the Act, tenants of such holdings are to be altogether exempted from taxation.

Further, in estimating the profits of a cultivator, lands are not to be assessed at any higher rate than the rack-rent of such land, whatever the crop may be, and in all past assessments, the papers of which show the rack-rent, any excess collections should be refunded. Where the papers do not, however, show the rack-rent, no refund need be made, save on satisfactory proof in cases regularly appealed.

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V. H. SCHALCH, ESQ.

Partition—C. O. No. 9 of January 1870.

No. 6.

AFTER the words, "may be permitted" in the 11th line of Circular Order No. 9 of January 1870, insert the following—"provided the proprietors of each and every "estate of the holding in question, other than "the original estate under partition, give "their consent to it."

Wards' Accounts—Amendment of Rule 38.

No. 7.

THE following are substituted for Rule 38, at page 349 of the Board's Rules—

38. "A monthly abstract of these accounts "prepared by the Director is submitted in "the form of a bill to the Board of Revenue, "who make the necessary payments by a "cheque on the General Treasury at the "Bank of Bengal.

38A. "In order to obtain the necessary "funds, the Director submits to the Board, "one month before the expiration of the then "current half-year, an estimate of the probable expenditure on account of each ward "during the ensuing half-year. On these "estimates the Board, in communication "with the Collectors concerned, obtains the "money which is deposited in the General "Treasury at the Bank of Bengal.

38B. "Advances are made to the Director "as may be found necessary from time to "time for the expenses of the institution "from the fund at the Bank of Bengal on "the authority of the Board."

Collectors will be shortly informed of the amounts, which it will be necessary for them under this new arrangement to remit to the Bank of Bengal, as advances for the first half-year of 1872-73.

Land Acquisition Instructions.

No. 8.

DISTRICT Officers are informed that, in future, when the nature of operations under Act X of 1870 requires submission of monthly bills (Appendix I of Land Acquisition Instructions), the value of abatements of revenue should be included in the items of cost entered, and the abstract in every case filled up. The concluding sentence of the note at foot of the Abstract (page 23 of the Instructions) should be expunged. District Officers will regard the passing of these monthly bills as sufficient authority for including in their Quarterly Return No. IX, all abatements of revenue covered by such passed bills, the Board's Orders being quoted in each instance.

Corrections in Board's Rules, c. 12, *s.* 5, *pp.* 196—198.

No. 9.

THE following corrections are to be made in Chapter XII, Section V, pages 196, 197, and 198 of the Board's Rules—

Schedule to Clause 1, paragraph 1. Omit the words "judicial or quasi-judicial," and after "office" add "in which such Court or "office may be authorized by law to grant "costs."

Clause 8 should be omitted, and the numbering of the subsequent clauses altered accordingly.

Clause 14. Omit the words "in any case "other than those provided for in clause 8."

Rule 1*D*, *c.* 2, *s.* 12, *p.* 32 *expunged.*

No. 10.

RULE 1D in Chapter II, Section XII, at page 32 of the Board's Rules is expunged.

A. MONEY, ESQ., C.B.

Income-Tax—Half-Yearly Returns.

No. 11.

FROM the delay that has occurred in the submission of the Half-Yearly Returns, prescribed by the Government of India, from several Districts, there is reason to believe that the Income-Tax Registers have not been properly kept up. District Officers are therefore requested to look into this matter at once, and to see that all such Registers are kept up to date, and that the Returns for the year ending March 1872 are submitted as soon as they are due, *i. e.*, by the end of April 1872.

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License for Sale of Majun, Fermented Tari, &c.

No. 12.

WITH reference to paragraph 16 of the Government Resolution, dated 27th January 1872, on the Board's Excise Administration Report for 1870-71, circulated separately, the Member in charge directs that no license for the sale of Majun, Fermented Tari, Pachwai, Charas, and Siddi or Bhang, shall be issued in future at a less rate than one rupee per mensem from the commencement of the next official year 1872-73.

2. With reference to the above order, add after the words "for the shop" in Clause 2, Section XIII, and at the end of Clause 35, Section XVIII, Chapter V, pages 72 and 80 of the Board's Rules, the words "the minimum rate being one rupee per month."

MARCH 1872.

V. H. SCHALCH, ESQ.

Remittances of Treasure to Bank of Bengal, to be made in charge of proper Agents.

No. 1.

THE attention of the Board having recently been drawn to the heavy loss sustained by a Mofussil Treasurer, in consequence of a deficiency alleged to be due to short weight and to the presence of uncurrent and spurious coin in a large remittance made to the Bank of Bengal, Calcutta, in charge of a poddar, the Member in charge desires that in future, when large remittances are made from the Mofussil, the Treasurer should be allowed to send some agent of his own of more weight and intelligence than an ordinary poddar, who would be better able to protect his interests by promptly bringing any irregularity in the examination of the treasure to the notice of the Secretary and Treasurer of the Bank.

Addition to Indent at p. 337 of Board's Rules.

No. 2.

THE following additions should be made to the indent at foot of Clause 3, Chapter XXIV, Section 2, at page 237, of the Board's Rules :—

Milk,

Fowls,

other articles, such as eggs, &c.

Clause 6 of the same Section should be expunged.

Land Acquisition Act X of 1870—Temporary Agreements.

No. 3.

THE following para. is added as 16A to the instructions for the administration of Act X of 1870—

16A. Whenever the proprietor of any land covered by a declaration may offer to give up his land to Government without compensation, on condition that such land shall be restored to him when no longer required for the purpose specified in the declaration, the Collector may accept the offer and conclude the bargain on his own authority, when he is satisfied that the title of the donor is good; when not so satisfied, he must proceed to acquire the land by the procedure required by the Act. In order to keep a permanent record of the agreement, when such an offer as that above alluded to is accepted, it will be sufficient to enter a note of the circumstances in Register No. 26.

A. MONEY, ESQ., C.B.

Adjustments between the Opium and Excise Departments for Opium supplied to latter.

No. 4.

THE Government of India in the Financial Department has ruled that adjustments between the Opium and Excise Departments for Opium supplied to the latter should cease in the present form of a charge under Excise, which is met by a credit *per contra* under Opium; and that, in future, there should be no charge to the Excise Department for the Opium supplied to it by the Opium Department, under the Government of Bengal; but on the sale of the Excise Opium, the credit for the gross proceeds should be divided between Opium and Excise, a sum equal to the cost of the drug being credited to Opium, and the balance as Excise Revenue.

2. The above order will come into effect from the first of April next, and District Officers are requested to exhibit in their Quarterly and Annual Excise Returns Nos. XIV and XLII for 1872-73 and future years, the net revenue derived from the sale of Opium after deducting the cost of the article calculated at Rs. 7-4-0 per seer.

3. The Excise Returns No. XIV for the quarter ending 31st March 1872 and No. XLII for 1871-72 should be filled in as heretofore, and submitted as soon as possible.

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Notice of Remittance of Money to local Treasury by Excise or Income-Tax Officer.

No. 5.

THE following is added as Clause 9, Section 12, Chapter II, page 32 of the Board's Rules :—

When money is remitted to a District or Sub-Divisional Treasury through the Police, by an Excise or Income-Tax Officer, such Officer shall give notice of the despatch at the same time, through the post or other separate channel, to the receiving Officer of the Treasury.

Enquiries as to exclusive Use of Stamped Papers to the Purposes for which they are intended.

No. 6.

THE following Government Orders,* respecting the importance of ascertaining how far stamped papers are applied to the purpose for which they are intended, are circulated for information and guidance :—

"It is apprehended that in exhibiting the "amount of stamp revenue derived respec- "tively from the sale of general and judicial "stamps, no attempt is made to ascertain "whether the prescribed classes of stamped "papers have been used exclusively for the "purpose for which they were intended.

2. "It might be said that the blue and "black stamps are not used in judicial pro- "ceedings, as in such cases their misuse "would be readily apprehended; but the "converse presumption is not maintainable, "for there is reason to suspect that stamp "vendors find it more convenient to keep a "larger stock of judicial stamps (the demand "for which can be calculated with some "certainty) than of other stamps; and that "there is sometimes a tendency on their part "to force judicial stamps instead of non- "judicial stamps on purchasers who are not "aware of the difference.

3. "Although the gross stamp revenue "may not suffer from the use of a particular "class of stamped papers for a purpose "other than that for which it is intended, "yet the compilation of correct returns of "the proportionate contributions of the two "sources of stamp revenue is materially "affected where such misuse occurs.

4. "The Governor-General in Council is "therefore of opinion that it would be well "if the attention of the stamp revenue "supervising officers were directed to the "importance of ascertaining, during their "tours of inspection or otherwise as oppor- "tunities occur, how far stamped papers "are applied to the purpose for which they "were intended, and bringing to notice the "result of those enquiries in their periodi- "cal reports."

2. The result of the enquiries alluded to in the concluding para. of the Government Orders should be reported by District Officers in submitting their Annual Returns No. XXXV; and each Commissioner will submit his own report on the subject to the Board as soon as all the Returns No. XXXV of the Districts in his Division have been rendered.

Fines and Forfeitures under Abkaree and Opium Acts XXI of 1856 s. 76 and XIII of 1857 s. 30.

No. 7.

THE following should be substituted for Clause 5, Section XVIII, Chapter V, at page 81 of the Board's Rules :—

5. Fines and forfeitures realized and awarded under Section 76, Act XXI of 1856, and Section 30, Act XIII of 1857,

* No. 941, dated 12th February 1872, from the Officiating Additional Under-Secretary to the Government of India in the Financial Department.

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are to be disbursed at once, provided the amount does not exceed Rs. 100. When the award is for more than that amount, Rs. 100 only should be disbursed at once, the balance being paid away only when the period of appeal has expired, or the appeal has been rejected. In every such case a report should be made to the Board in the following form to show that this rule has been properly observed :—

District.	Particulars of the Case.	Amount of Fine.					Date on which Period of Appeal expired or Appeal was rejected.	Date of final Payment.	Remarks.
		Imposed.	Realized.	Distributed at once.	Balance since Distribution.				

V. H. SCHALCH, ESQ.

Cl. 27, c. 3, s. 2, p. 40 of Board's Rules expunged.

No. 8.

WITH reference to Circular Order No. 12 of August 1871, Clause 27, Chapter III, Section II, page 40 of the Board's Rules is hereby expunged.

Revised Forms of Land Revenue Returns.

No. 9.

THE entry against heading 21, "Miscellaneous Business," in Return No. VIII should be made in column 7 and not in column 8 (which is a misprint) as mentioned in the direction at the head of the form.

District officers should re-submit Returns in the revised form from the 1st to the 3rd quarter of 1871-72 with the least possible delay, as without such returns the Board will be unable to prepare a correct abstract for the next Land Revenue Report to Government.

If in any district the revised forms have not been as yet received, the Superintendent of Stationery should be addressed at once, and the Board informed simultaneously.

Taking Evidence of Witnesses in Mutation Cases on solemn Affirmation prohibited.

No. 10.

IT has been brought to the notice of the Member in charge that the practice of taking evidence of witnesses in mutation cases on solemn affirmation exists in some districts. The practice is illegal, such cases being entirely of an executive and not of a judicial nature. Collectors should, therefore, desist from the practice in future.

APRIL 1872.

V. H. SCHALCH, ESQ.

No. 1.

Land Acquisition—Return No. XVIII.

DISTRICT Officers are informed that Return No. XVIII should contain those land acquisition cases only in which declarations have been published in the Government Gazette, and that Column 2 of the Return should exhibit in each case the number and date of the usual orders to acquire the land, which are passed by the Board subsequently to the publication of the declaration.

No. 2.

Return No. XVIIIA cancelled.

The separate Return No. XVIIIA, prescribed in Circular Order No. 5 of June 1869,

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is hereby cancelled, and District Officers are requested to enter in Return No. XVIII all cases of lands taken up for embankment purposes under Act VII of 1866 (B. C.). These cases should, however, be shown under a separate head, Part II of the Return.

A. MONEY, ESQ., C.B.

No. 3.

Defalcation of Stamps.

SEVERAL cases of defalcation of Stamps have lately occurred in Sub-Divisonal Treasuries, arising in every instance from gross carelessness, lax supervision, and systematic disregard of the existing Rules which regulate the receipt and custody of Stamps at such Treasuries. These Rules are, however, plain and easy to follow, and a Sub-Divisional Officer has no excuse for not attending to them. At the request of the Board, the Accountant-General of Bengal has now further called on every Sub-Divisional Officer, in charge of Stamps, to certify that he has personally counted every month the Stamps in the Sub-Divisional Nazir's separate charge. If the Rules as thus amended are honestly followed, defalcation should be impossible; and every Sub-Divisional Officer, in charge of Stamps, is now warned that he will, in future, be held personally responsible for any loss that may occur.

Every Collector and Deputy Commissioner is requested, immediately on the receipt of the present Circular, to address each Sub-Divisional Officer in his District calling his special attention to the personal responsibility attached to the charge of Stamps, and requiring from him an assurance that he has received this Circular, and is fully aware of his liability to make good any deficiency which may occur during his incumbency of the Sub-Division owing to his neglect of orders.

No. 4.

Use of Post Cards by Collectors and Deputy Commissioners.

THE Member in charge directs that the use of *Post Cards* for the issue of reminders for replies, already authorized for Commissioners' offices, be extended to the offices of Collectors and Deputy Commissioners. District Officers are accordingly requested to indent upon the Superintendent of Stationery for a supply of these Cards, to be used after their present stock of the printed form of reminder letter has been consumed.

No. 5.

Annual Administration Reports—Excise and Income-Tax—Stamps.

IN a recent special letter, the Government has again urged upon the Board the necessity of submitting the several Annual Administration Reports at the earliest possible date, with a view to the completion of the General Administration Report of Government on the Lower Provinces in proper time. Divisional and District Officers are therefore reminded that their Reports on the Excise and Income-Tax Departments should, in accordance with previous orders, be submitted, at latest, by the 1st and 15th May respectively.

2. The submission of the Annual (Stamps) Return No. XXXV should not be delayed, on any account, beyond the 1st May.

No. 6.

Income Tax—Final Returns and Reports under Act XII of 1871.

IN order that the assessment and collection of Income-Tax for the year 1872-73 may be promptly and efficiently carried out, the Member in charge desires that all remaining work under Act XII of 1871 may be at once completed, and the final Returns and Reports submitted. Further, in accordance with Section 2 Act XII of 1871, all proceedings of every kind under Act XVI of 1870 have ceased to be of effect from the 1st instant, and the final Returns under that Act should therefore be at once made.

V. H. SCHALCH, ESQ.

No. 7.

Land Acquisition—Payment of Compensation Money.

WITH the view of preventing delay in the payment of compensation money when it becomes due, the Member in charge desires

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to call the attention of all district officers to the provisions of paragraph 23 of the instructions for the administration of Act X of 1870, which lays down that "the Collector is "personally responsible for the disbursement "of the amount as soon as it falls due," and to inform them that it has been ruled by Government "that on the first occasion of "proved carelessness in this respect, the Col-"lector will be required to pay the interest "which may accrue under Section 42 of the "Act."

A. MONEY, ESQ., C.B.

ERRATA.

IN Board's Circular letter No. 169, B. of the 26th March 1872 in line 5 for "1872" read "1871."

From line 5 of Circular Order No. 5 for April 1872 omit the word "Divisonal," and from line 6 omit the word "and."

No. 8.

Income-Tax (of 1871-72*)—Final Returns and Reports.*

ALL District Officers and Commissioners are requested to submit, as quickly as possible, their final Returns and Reports on the Income-Tax of 1871-72 (Act XII of 1871).

2. The Member in charge desires that the following points should be noticed in the Reports :—

1. The general feeling of the people as regards the tax of 1871-72.

2. How the tax has been worked, *i. e.* have the assessments and collections proceeded smoothly, or has there been much opposition or much complaint?

3. Each Collector should record his opinion whether his district has been fully assessed, *i. e.* whether all assessable persons have been assessed, and whether generally the assessments have been sufficient, neither too high nor too low.

4. If obtainable without delay, the number of surcharges made.

5. An account of any exceptional cases of hardship.

6. An account of any cases of oppression properly so called.

7. Any remarks on any other points which may suggest themselves.

No. 9.

Income-Tax Work under Act XII of 1871.

ALL District Officers are requested to report, through the Commissioner categorically, within one week of the receipt of this Circular Order, what Income-Tax work and what Statements and Returns still remain to be done under Act XII of 1871, and what, if any, Establishment is required. They are also desired personally to watch the progress made by the Income-Tax Establishments that may still be retained, towards the completion of the work. Unless looked after properly, temporary Establishments never finish work.

Considering the light nature of the work under Act XII of 1871, the Member in charge cannot accept as satisfactory any excuse for arrears; and unless the work is quickly finished, and the Establishments soon discharged, he will be obliged to bring the officer in fault to the notice of Government.

No. 10.

Income-Tax—Assessees under Act XII of 1871.

DISTRICT OFFICERS are requested to send direct to the Board of Revenue a Statement showing, for each Sub-Division in their Districts, the number of assessees under Act XII of 1871 with incomes of Rs. 1,000 and upwards. These particulars can be got at once from the Registers, and no Sub-Divisional Officer should take more than 24 hours to prepare his Return.

In Districts where the assessment work last year was done by an Assessor wholly or in part, the Return should show separately the number of assessees with incomes over Rs. 1,000 on his Register, as well as the numbers on the Register of each Sub-Divisional Officer and of the Sudder Sub-Divisional Officer.

Immediate compliance with this order is requested.

No. 11.

Court Fees' Act—Exception of Probates of Wills and Letters of Administration relating to Trust Property.

THE following notification of the Government of India in the Financial Department, is published for general information.

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Notification No. 2135, *dated Fort William, the* 22*nd March* 1872.

The Governor-General in Council is pleased to direct that the provisions of Financial Notification No. 2004, dated 14th July 1871 (of which a copy is hereto appended), shall have retrospective effect from the 1st day of April 1870, the date on which the Court Fees Act VII of 1870 came into force.

Notification No. 2004, *dated Fort William, the* 14*th July* 1871.

In exercise of the power vested in him by Section 35 of the Court Fees Act, 1870, the Governor-General in Council is pleased to remit in the whole of British India the fees chargeable under the said Act, Schedule I, Article II, in respect of probate of wills or letters of administration, in so far as such wills or letters of administration relate to property which a deceased person was possessed of or entitled to, not beneficially, but as a trustee for any other person or persons.

Provided that this remission shall not extend to cases in which a trustee has the power of appointing or otherwise conferring a beneficial interest in the trust property.

No. 12.

Salt Seizures—Rewards.

THE following should be added as Rule 7A at page 16 of the Salt Manual :—

Rewards adjudged under the two preceding rules should not, ordinarily, exceed the value of fines and proceeds of seizures in any one case.

No. 13.

Income-Tax Establishments under Act XII of 1871.

DISTRICT OFFICERS are requested to report if the establishments, entertained under the Income-Tax Act XII of 1871, have been discharged by the 31st March 1872. If the establishments have not been discharged, a Statement should be submitted shewing the strength of the establishments still retained after that date, and entertained now, and the period, from 1st May 1872, for which they may be required. Details of work remaining to be done should be given in every instance in which establishments are required to be kept on after receipt of this letter.

The reply to this should be submitted within one week of its receipt.

MAY 1872.

V. H. SCHALCH, ESQ.

No. 1.

Sales of Land for Realization of Government Demands realizable as Arrears of Revenue.

THE attention of Local Officers is called to the High Court's judgment in the case mentioned in the margin, reported at p. 21, Vol. XVII, Weekly Reporter, wherein it has been laid down that, in all sales held by the Collector for the realization of Government demands realizable as arrears of revenue, the procedure laid down in Act VII of 1868 (B. C.) is to be followed.

Vide case of Mohun Ram Jha (Defendant) *vs.* Baboo Shib Dutt Sing and others (Plaintiffs), page 21, Vol. XVII, Weekly Reporter.

2. Therefore where a fine had been imposed for non-attendance of proprietors before a Deputy Collector for the purpose of a partition under Regulation XIX of 1814, and the amount had been ordered to be paid on a given day, but was not so paid, but tendered subsequently, it was held that the Collector ought not to have sold the property of the defaulters, but should have received the amount tendered.

No. 2.

Release of Persons confined for Non-payment of Government Debt.

THE following is added as Clause 1A Section 13 Chapter XI page 187, Board's Rules :—

When any person is confined in the Civil Jail for non-payment of a debt to Government, the sanction of the Board is necessary to his release, so long as a sum exceeding Rs. 1,000 remains due from him.

No. 3.

Road Cess Act—Estates coming under Settlement.

IT is hereby notified for general information that the Board of Revenue having referred to Government the question whether, with reference to the Road Cess Act, the additional one per cent., under Clause 4 Section 8 Chapter XX page 282 of the Board's Rules, should continue to be levied in all estates coming under settlement, the Government has decided that the extra one per cent.

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should be retained where it is paid under existing engagements, and that arrangements for its payment at future settlements should continue to be effected, at any rate until the Road Cess Act is in full operation.

No. 4.

Coin—Legal Tender.

THE latter part of Clause 1A at page 32 of the Board's Rules, which was corrected by Circular Order No. 6 of December 1871, is restored, and should be read as it stood in Circular Order No. 6 of February 1871:—"And either return the pieces to the person tendering the coin, or, at the option of the latter, receive it at the rate of Re. 1 per tolah."

2. The following is added as Clause 1G, at page 32:—"One-fourth and one-eighth of a rupee coin should be received as legal tender for the corresponding fractions of a rupee at their nominal value, irrespective of the diminution in their weight for reasonable wear and tear, provided that they have not been clipped or filed, or defaced or diminished otherwise than by use."

No. 5.

Land Acquisition Act X of 1870—*Awards.*

THE following Rule is added as para. 19A of the instructions for the administration of the Land Acquisition Act X of 1870:—

19A.—Whenever an award is made by an Assistant or Deputy Collector empowered to act as a Collector under Section 3 of the Act, it must receive the approval and confirmation of the Collector of the district, before the sum awarded is tendered under Section 11 to the persons entitled to receive it. To allow time for the necessary reference to the Collector, an Assistant or Deputy Collector engaged in making an award should, after making the requisite enquiries under Section 11, postpone his final award under the provisions of Section 12, and report his opinion on the case to the Collector, forwarding at the same time all documents which may seem necessary to enable that officer to judge of the propriety of the proposed award. On receiving such report, the Collector will pass orders upon it, which orders will be final. The completion report of every case under the Act, and every progress report when such reports are submitted, must be subscribed with a certificate signed by the Collector, that the prices awarded are not in excess of those for which similar lands are actually sold in the same parts of the district, or, in case the Collector should be unable to find evidence of the circumstances of actual sales, that the prices awarded are not greater than those which similar lands in the same parts of the district might be reasonably expected to command. When the lands to be occupied are considerable in extent, the Collector may, after confirming a few initial awards, authorize the adoption of the same rates in regard to *similar* lands to be subsequently occupied under the same declaration. In such cases the officer engaged in making the awards may tender compensation at the rates so fixed without further reference, merely certifying with each progress report that no compensation has been tendered by him, except under sanction of the Collector, either express or constructive, as above prescribed. It will be the duty of the Commissioner in forwarding the progress reports to the Board to record his opinion in respect to the suitability or otherwise of the awards shown in them.

No. 6.

Business Return No. VIII—Notices of Enhancement and Relinquishment.

IN preparing the Business Return No. VIII, District Officers should include "notices of enhancement and relinquishment" served by orders of the Collector under Sections 14 and 20 Act VIII (B. C.) of 1869, under heading 4 of the revised form of that return.

A. MONEY, ESQ., C.B.

No. 7.

Income-Tax—Monthly, Half-yearly, and Annual Returns.

THE monthly return, prescribed in para. 9 of the rules issued by the Lieutenant-Governor of Bengal for the guidance of all officers engaged in carrying out the provisions of Act VIII of 1872, will bear the number VIA on the Board's list of periodical returns.

The half-yearly returns required by the Government of India (Returns Nos. 1, 2, and 3, in the Financial Resolution No. 2887, dated 19th April 1872) will bear the numbers XXIIIA, XXIIIB, and XXIIIC, respectively, on the Board's list.

The annual return required by the Government of India (Return No. 4 in the Resolution above quoted) will take the place of the present Income-Tax Return No. XLIII in the periodical return list.

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No. 8.

Circular Order No. 8 for April 1872—Reports.

REFERRING to Circular Order No. 8 for April 1872, District Officers are requested to send the reports therein called for through the Commissioner of their Division, who will forward them with his own report to the Board.

No. 9.

Income Tax—Assessment upon Income derived from Profits of Land.

UNDER the orders of Government, the following rule is issued for the guidance of officers engaged in assessments of Income-Tax under Act VIII of 1872:—

If any person whose income is derived from the profits of land alone shall object to the assessment made upon him, and shall prove that he is a farmer or under-tenant of lands paying less than Rs. 1,000 as rent to landlords, and that he has no permanent rights, but is a mere tenant, such person shall be exempted from income-tax.

No. 10.

Distilleries—Use of Hydrometer.

ADD the following as Clause 29A Section XI Chapter V page 68 Board's Rules:—

29A.—In using the hydrometer, special care should be taken that no saccharine matter is introduced into the liquor after it has been drawn from the still, and before it is tested. This is sometimes done by allowing the liquor to trickle over a little bag into the vessel which receives it for testing. The effect of the addition of sugar, or other soluble matter to spirit, is to heighten the specific gravity, and to weaken its strength, thereby entailing loss of revenue.

JUNE 1872.

V. H. SCHALCH, ESQ.

Estates under the Court of Wards—Uniform System of making Disbursements.

No. 1.

THE following Rules have been inserted as Clauses 16 to 19, Section I, p. 341, Board's Rules; para. 14 has been cancelled; the present para. 15 has been made para. 14, and para. 16 para. 15:—

16. To secure uniformity in the system of making disbursements on account of estates under the Court of Wards, the following procedure must in future be followed:—

An annual budget, in sufficient detail to admit of proper check, and based on the actual expenditure of previous years, will be prepared and submitted for the sanction of the Court of Wards. Items entered in this budget will belong to one of these three classes:—

I. Current and continuous expenses which have been sanctioned once for all (as establishments and their contingencies).

II. Cost of special projects and measures, for execution of which final executive sanction has been obtained independently of the budget estimate.

III. Projects which it is proposed to carry out during the year, which have not yet been formally sanctioned.

17. All items of the third class, and all increases in items of the first class, should be succinctly explained; and if they are generally approved, the provision for carrying them out will be admitted into the budget estimate provisionally, it being distinctly understood that no expenditure may be incurred on such items until a formal executive sanction, irrespective of, and distinct from, the general approval which is conveyed by passing the item in the budget estimates, shall have been obtained from competent authority for entertainment of the increased establishment, or for execution of the work.

18. Monthly bills supported by vouchers will be submitted to the Collector for audit, that officer, and not the Commissioner, being the auditing officer by law; but the budget estimates must receive the sanction of the Commissioner, and an account current will also be submitted at the end of every month to that officer for his information and approval.

19. Disbursements in accordance with these Rules can be made by the manager from the proceeds at his disposal, the balance of the proceeds being remitted to the Collector's treasury.

Procedure when Estate of Male Minor is first brought under the Court of Wards.

No. 2.

THE following has been added to the Board's Rules as Clause 1A, Section III, page 341:—

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When the estate of a male minor is first brought under the Court of Wards, a statement should be submitted to the Board, showing as accurately as possible all fixed annual charges against the estate, the amount of debt, &c.

The Board will thus be enabled to fix the amount that is to be considered as the net income of the estate, and thereby to determine whether the ward should be sent to the Institution. They will thus also have the data for calculating the proportion of the general expenses of the Institution to be borne by each ward after his admission.

Expenses other than for Education of Minor.

No. 3.

THE following is added as Rule 38C, at page 349, Board's Rules :—

Whenever the Director proposes incurring expenditure on account of any minor in the Ward's Institution, other than such as may be absolutely necessary for his education; that is to say, when he proposes to allow riding horses, drawing lessons, and other such indulgences; it is his duty to refer the subject to the Board of Revenue, who will consult the Commissioner of the Division in which the ward's estate is situated on his proposal, and will decide whether the estate of the ward concerned can afford the expense.

A. MONEY, ESQ., C.B.

Cotton Cultivation—Whether Suttahs are transferable without Payment of Stamp Duty.

No. 4.

A CLASS of documents exists in the Province of Berar, known by the name of suttahs, which are generally executed by cultivators to deliver their cotton produce; and a question has now arisen whether these suttahs are transferable without the payment of stamp duty.

2. In connection with this question, information is required by the Government of India as to whether the definition of "Negotiable Instruments," in Section 2 of the General Stamp Act XVIII of 1869, is anywhere held to include any document, besides Bills of Exchange, Promissory Notes, and Cheques; and also, whether any documents, like the suttahs referred to above, circulate in the Lower Provinces as negotiable instruments, and without the payment of stamp duty upon transfer.

3. An immediate report on the subject should be forwarded by each District Officer to the Commissioner of the Division, who will submit his own complete report as soon as he has received replies from all his District Officers.

Income-Tax—Final Return under Act XVI of 1870.

No. 5.

DISTRICT Officers are requested to submit a final return under Act XVI of 1870 in the form of Return No. 43, showing the final assessments after objection and appeal, from the beginning of the operations under the Act till the close of the accounts. Sums which were outstanding as a balance on the 31st March 1872, and which have been struck off as unrealizable, should not be included in the final return now called for.

Income-Tax—Progress Return under Act VIII of 1872.

No. 6.

DISTRICT Officers are reminded that their Statement No. 1, called for in para. 3 of the Income-Tax Rules just issued, should be now submitted at the earliest possible date.

2. Hitherto the member in charge has trusted in matters of income-tax to Commissioners to supervise Collectors, and to Collectors to supervise Sub-Divisional Officers. The experience of the last two years has, however, proved that, while in some cases, the supervision has been full and sufficient, in others there has been little or none. Mr. Money has determined, therefore, for the current year to exercise, from the Board's office, a more complete control over every officer in charge of income-tax duties. He desires that the following statement may be submitted without fail, on the 18th of every month, direct to the Board, at the same time as the monthly return prescribed under Rule 9. A copy of this statement should also accompany the monthly return sent to the Commissioner :—

Statement showing Progress of Work under Act VIII of 1872 in each Sub-Division.

Column 1.—Name of each sub-division (including, of course, sudder sub-division).

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Column 2.—Total number of persons assessable as per Column 4 of Statement No. 1 (Rule 3 of Rules issued for working Act VIII of 1872).

Column 3.—Number who paid their tax within the month allowed by notice under Rule 3.

Column 4.—Number of notices under Section 27 of the Act issued up to the end of last month.

Column 5.—Number of notices issued this month.

Column 6.—Total number of notices issued.

Column 7.—Number who have paid after notice up to the end of last month.

Column 8.—Number who have paid after notice during the month.

Column 9.—Total of Columns 3, 7, and 8.

The Superintendent of Stationery will be directed to supply fifty copies of the form of statement to each District Officer, and any further quantity wanted should be obtained on indent. The non-receipt of the forms, however, is in no case to be held as a reason for non-submission of the statement, which must punctually be forwarded to the Board's office on or before the 18th. On receipt of this Circular Order, each Collector should send a copy of the statement to each subdivision, enjoining punctual submission to himself at the beginning of each month. It will be understood that the submission of these statements in noway relieves Commissioners or Collectors of their responsibilities of supervision.

Income-Tax—Commencement of Act VIII of 1872.

No. 7.

THE attention of District Officers is drawn to paras. 10 and 12 of the Financial Resolution No. 2887, dated 19th April 1872, and to Section I Clause III of Act VIII of 1872, which declares that the Act shall be deemed to have come into force on the first day of April 1872. Accordingly income-tax is payable on all salaries, annuities, and pensions, as well as on instalments of interest on Government securities which became due on or after 1st April 1872, and in case any such salaries, annuities, pensions, or instalments of interest have already been disbursed without deduction of income-tax, care should be taken to have the proper deductions made according to the provisions of the law at some subsequent time of payment.

Rules for Supply and Retail Sale of Court Fee Stamps.

No. 8.

THE following Rules under Section 27, Act VII of 1870, for the supply and retail sale of Court fee stamps, have been approved by the Government of India, as already intimated in the separate orders issued to the Commissioners of Divisions, and are now published for general information :—

1. "The use of adhesive Court fee stamps, for all fees required to be paid under the Court Fees Act (VII of 1870), having been permitted from the* Collectors and Treasury officers are enjoined to carry out the following Rules for the supply and retail sale of the said stamps.

* Date will be filled in hereafter.

2. "Indents shall be made on the Superintendent of Stamps under the Rules now in force, and contained in Chapter XXI of the Board's Rules, Section I.

3. "On the receipt of a supply, the officer in charge of stamps shall, with his own hands, open and himself count every stamp of the value of 4 annas and upwards, so that any deficiency may be at once detected. Adhesive stamps being supplied in sheets, each containing a number of stamps, the receiving officer must, for his own security, see that each sheet contains the full number. Stamps of the value of less than 4 annas should be counted also in the presence of the receiving officer. They are then to be compared with the invoice, and a receipt forwarded by the first post to the depôt whence they were received.

4. "All other Rules now prescribed for the receipt and custody of stamps, shall be applicable to adhesive Court fees stamps.

5. "These stamps shall be issued from the store under double locks, under the Rules contained in Section 3 of the Chapter of the Board's Rules above quoted.

6. "Stamps of any value, and in any quantity, are at all times to be sold at district headquarters by the Treasurer of the Collector's office, or, where there is no Treasurer, by the Stamp Darogah ; and at subdivisions, by the Nazir, to any one requiring them, on payment of the full value of the stamps in cash.

7. "The presiding officer of any Court where adhesive Court fee stamps are used shall, in the exercise of his discretion, be competent to issue a certificate for the renewal, free of charge, of the stamp or stamps on any document, in cases when the re-writing

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of such documents has, through inadvertence or accident, been, in his opinion, rendered necessary ; or where, after being duly stamped, and the stamps cancelled, it is found that the reason for presenting it to, or filing it in, the Court, has ceased to exist. Such certificates shall be sufficient authority to the Collector or officer in charge of a subdivision, as the case may be, to issue to the holder of the certificate other stamps of the value specified in the certificate, on delivery of the stamps which have been rendered useless.

"In Calcutta, stamps shall be sold by salaried vendors, to be appointed by the Board of Revenue."

2nd,—The date on which these Rules are to come into effect will hereafter be made known by Notification in the Gazette, when all necessary arrangements are reported to be complete.

V. H. SCHALCH, ESQ.,

ERRATUM.

The asterisk opposite the Annual Return of Irrigation Statistics, referred to in Circular Order No. 2 of September 1871, *should be expunged.*

Settlements of Land Revenue.

No. 9.

IN connection with the present system of conducting the settlements of land revenue in the Lower Provinces, the Government have approved of the following amendments being made in Chapter XX of the Board's Rules :—

1st,—Add a column, headed "Nature of tenure under which land is held," after the last column, in each of the forms Nos. 2 to 7, and after column 8 in form No. 8.

2nd,—For the fourth heading of form No. 19 substitute : "Persons capable of be-" ing admitted to settlement under each of " the modes of settlement prescribed in Gov-" ernment Order No. 3156, of 21st August " 1871, with full explanation of their rights " and position, and of the reason for the " selection of the mode of settlement pro-" posed to be adopted."

3rd,—With reference to the eleventh heading of the Ameen's report, Form No. 10, add a column in Form No. 19, thus—"Settle-" ment Officer to make a clear and distinct " statement of the rights claimed by each " class of tenants in the estate, and to what " extent such claims have been admitted, " with an expression of his opinions in re-" spect to the mode of settlement which should " be adopted, and his reasons for that opinion " in full."

4th,—For Clause 3, Section 9, substitute : "When all the subordinate arrangements " have been completed, the settling officer " should procure the attendance of the party " entitled to settlement and call upon him to " sign the *kubooleut*, or state in writing his " objections. These objections, if any, must " receive consideration and be obviated if " practicable ; but should they be such as are " not entitled to attention, the reasons for " rejecting them and otherwise disposing of " the estate should be recorded"

5th,—Add to the above Section as Clause " 3A : "When it is found necessary, in con-" sequence of the recusance of the party " entitled to settlement, to engage with other " parties for the payment of the Government " revenue, the preference should be given " (1st) to a farming settlement with one or " more of the head ryots on the estate ; (2nd) " to khas management ; (3rd) to a farming " lease to an outsider."

6th,—Clause 5 in the above Section should be corrected thus : "In effecting the settle-" ment of alluvial land with the proprietor of " a temporarily settled estate (see Act XXXI " of 1858), the settling officer should, with " his consent and with the consent of the " Board of Revenue, incorporate the assess-" ment of the increment with that of the " parent estate, taking one revised engage-" ment for the amalgamated revenue of the " whole as an integral estate. If the parent " estate be permanently settled, or if, in the " case of a temporarily settled estate, either " the proprietor or the Board decline to as-" sent to the course above prescribed, the in-" crement must be assessed as a distinct estate " and be henceforward held separately liable " for the revenue assessed upon it."

7th,—Omit Clauses 3 and 5, Section 10, adding the words " or on expiry of the lease" after the word "lessee" in the second line of Clause 4, which will be numbered Clause 3.

8th,—The first sentence in Clause 1, Section 12, should be altered to correspond with the recent orders thus : "The record of every " settlement should be forwarded as soon as " it is completed through the Commissioner's " Office to the Board, and with it must

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"invariably be submitted by the officer making the settlement, a report in English in the Form of Appendix No. 19, and an abstract of the information contained in the settlement proceedings in Form No. 20."

A. MONEY, ESQ., C.B.

Salt Sales.

No. 10.

IT is believed that Sub-Divisional Officers in Districts within the Saliferous tracts are not kept sufficiently informed of the state of salt sales within their jurisdiction. The monthly sale returns furnished by salt vendors will henceforth be submitted by them to the Sub-Divisional Officer, who, after examination, will forward them, with his remarks, to the Collector.

Rule XL of the Salt Manual is therefore amended as follows:

For "Collector of the District" read "Sub-Divisional Officer within whose jurisdiction he resides."

After "Abkaree Darogah" read "for transmission to the Sub-Divisional Officer."

At the end of the Rule, add "The Sub-Divisional Officer will forward the returns to the Collector with his remarks."

Supervision of Distillery Establishments.

No. 11.

THE attention of all officers engaged in supervising the working of the Sudder Distillery System is called to the necessity for constant watchfulness on their part over the proceedings of Distillery Establishments.

2. A Sub-Divisional Officer, finding lately that the daily sales at a Distillery were smaller than at the same period of the preceding year, watched those who removed spirits under pass, and stopping by hazard a man carrying spirits which the pass showed to have paid 3 annas per gallon, had it at once again tested by the same Distillery Officer who had passed it, and found it to be of a strength which should have paid duty at 9 annas per gallon.

3. There is no doubt that similar frauds are constantly executed with success, and active vigilance can alone detect them. Under the Sudder Distillery System, Government is liable to be defrauded in many ways. By connivance with the Distillery Establishment, the holder of a pass often takes out from the Distillery more spirits than are covered by the pass, as well as spirits of a higher strength than that at which the duty paid by him was calculated. Again, an old pass may be used with the date altered, to protect a fresh supply of spirits. The most common form of fraud is the taking of liquor from the Distillery without payment of duty, the Distillery Darogah being paid for his connivance. Sometimes the Darogah alone is concerned in the fraud, which consists in not crediting to Government sums received as duty.

4. No detailed rules for the check of these malpractices have ever yet been published. Attention has been called to the examination of statements, but no amount of such examination will avail to prevent practices as above defined.

5. Before issuing rules, the Member in charge would wish to be favored with the opinion of each Commissioner and Collector as to the best checks.

JULY 1872.

V. H. SCHALCH, ESQ.

Recovery of Arrears of Rents from Ryots not holding transferable Tenures in Government Khas Mehals.

No. 1.

FROM reports which have been received, it appears that arrears of rents from ryots not holding transferable tenures in Government khas mehals have hitherto been realized either by the enforcement of the old summary procedure under Section 25, Regulation VII of 1799, although that procedure has been repealed by Act VII (B. C.) of 1868, or by applying the certificate procedure of Act VII (B. C.) of 1868, which can be enforced for the recovery of arrears of rent from the holders of transferable tenures only (see definition of "Tenure" in Section 1 of the Act). District Officers should clearly understand that arrears due from ryots not holding transferable tenures must be sued for in the Civil Court, or recovered by process of distraint, either under Act X of 1859, or Act VIII (B. C.) of 1869, whichever may be in force in the district.

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Education, &c., of Male Minors.

No. 2.

FOR the year 1872-73, and for the future, Commissioners are requested to submit, at the end of each financial year, particulars regarding the education, &c., of male minors in their Divisions in the form prescribed below. The Member in charge particularly requests that *full* information may be given in the last column—

9	Arrangements made for his Education.	
8	Net Collection from the Estate during the past year.	
7	Caste.	
6	Religion.	
5	Place of Residence.	
4	Age of Ward.	
3	Name of Ward.	
2	District.	
1	Division.	

Alteration in page 121 *of the Board's Rules.*

No. 3.

AS Return No. XXXVI is not now submitted to the Board, the word "Commissioner" should be substituted for "Board" in line 5, Clause 7 B, Section VI, Chapter VI, page 121 of the Board's Rules.

Caution to Revenue Officers against taking over Under-tenures or Farms of Persons whose Property has been declared under Section 184 *Code of Criminal Procedure to be at the Disposal of Government.*

No. 4.

ALL Local Revenue Officers are hereby cautioned against taking over on behalf of Government under-tenures or farms of persons whose property has been declared under Section 184 of the Code of Criminal Procedure to be at the disposal of Government, without first satisfying themselves whether the under-tenure or farm is likely to result in a loss to Government. An instance recently occurred in which the Government had not only to pay to the landlord a sum of money considerably in excess of the rents collected, but was also sued by one of the co-sharers in the tenure for a refund of his share of the amount advanced as zarpeshgi.

A. MONEY, ESQ., C. B.

Income Tax—Retention of Establishments under Act XII of 1871.

No. 5.

CASES having occurred in which the income tax establishments, sanctioned under Act XII of 1871, have been retained beyond the period for which they were sanctioned, all officers engaged in carrying out the provisions of Act VIII of 1872 are informed that no retention of the establishments, sanctioned under the latter Act, will be allowed, or excess salaries afterwards sanctioned, unless at least a month's previous notice has been given for the Board's approval.

Attention called to paragraph 3 *of Lt.-Governor's Rules under Act VIII of* 1872.

No. 6.

THE immediate attention of District Officers is drawn to paragraph 3 of the Rules issued by the Lieutenant-Governor of Bengal for the guidance of all officers engaged in carrying out the provisions of Act VIII of 1872. The month for which notice was to be given has now expired, or nearly expired, in every district, and the Statement No. 2 there called for should be at once sent up through the Commissioner. Commissioners should see that no delay is allowed to occur in their office, and that the Statements are forwarded to the Member in charge as soon as they are received by them.

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AUGUST 1872.

V. H. SCHALCH, ESQ.

Alterations in Board's Rules, p. 346.

No. 1.

THE following alterations have been made in Clause 1 Section VI, page 346, Board's Rules—

In the 4th and 5th lines, the words "Abstracts (No. XXXII) of all Returns No. XXXI for" have been struck out, and the words "a list of" substituted in their place.

The words "with the first Return No. XXXI" have also been added after the last word in the last line of the rule.

Scale of Maximum Charges for effecting Batwaras.

No. 2.

THE attention of all Revenue Officers is specially requested to the following scale of maximum charges to be allowed in future for effecting Batwaras—

On 200	Acres,	@	36	Rs. per	100	Acres.
From 200 to 300	"	"	30	"	"	"	"
" 300 " 500	"	"	18	"	"	"	"
In excess of 500	"	"	10	"	"	"	"

The rates now laid down include cost of Amin's establishment, stationery, and miscellaneous expenses; but in every case the Collector should, before recommending a Batwara establishment for sanction, make careful enquiries from the applicants in respect to the condition and position of the lands, and after considering all the circumstances, especially in relation to the value of the estate and its Government revenue, propose the smallest establishment with which he thinks the work can be effectually performed. It will be the Commissioner's duty carefully to check and revise the Collector's applications, and return them for further report when necessary.

Alterations in Board's Rules, p. 341.

No. 3.

THE following alterations have been made in Clause 16 Section I, page 341, Board's Rules—

After the words "on account of" in line 2, insert "trust and attached estates, and".

For the words "Court of Wards" in lines 6, 7, substitute "Commissioner".

Alterations in Margin of Board's Rules, p. 194.

No. 4.

THE following alterations should be made in the margin of Clause 7 Section IV, Chapter XII, page 194, of the Board's Rules—

For Regulation X of 1793, Act II of 1855, Act X of 1862, and Act XVIII of 1865, substitute respectively Act IV (B. C.) of 1870, Act I of 1872, Act XVIII of 1869, and Act VII of 1870.

Expunge Act X of 1859 and Act VI (B. C.) of 1862.

Column for "Road Cess" to be omitted when lands, the property of Government, is to be sold revenue-free. Ruling applies to Column for "Revenue assessed."

No. 5.

IT has been noticed that the advertisements for the sale of the Government proprietary right of lands, which have recently appeared in the Government Gazette, contain a column blank for "Road Cess." As this blank column is liable to misconstruction, the Member in charge requests that, when land, the property of Government, is to be sold revenue-free, and the one per cent. road cess has therefore not been stipulated for, the column for "Road Cess" should be omitted. The same ruling will apply to the column for "revenue assessed."

A. MONEY ESQ., C.B.

Lays down Form for District Officers in reporting annually the Result of Inspection of the Stock of Ganja.

No. 6.

WITH reference to Clause 25 Section XVII, Chapter V, page 79 of the Board's Rules, District Officers are requested to observe in future the following form in reporting annually the result of inspection of the stock of Ganja in their respective districts.

2. Add after the word "possible" in line 4 of Clause 25, page 79, Board's Rules, cited above, the words "and the result reported to the Commissioner in Form 34A, Appendix A."

3. The Member in charge has reason to believe that District Officers are not sufficiently careful to enquire into the condition of Ganja warehouses. Their attention is therefore drawn to Clause 20 Section XVII, Chapter V, page 78 of the Board's Rules, and they are requested to submit, as soon as possible, a statement of the Ganja warehouses

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in their respective districts. This statement should contain a description of each warehouse, and should show how it is constructed, and whether, in the opinion of the District Officer, Ganja stored in it is "secure against fraud or depredation."

FORM 34A.

(SECTION XVII CLAUSE 25.)

Statement showing the Result of Inspection of Stock of Ganja in the District for the year 18 .

1	2	3	4			5			6			7			8			9									10			11
Sub-Divisions.	Number of Goiahs.	Names of Goindars.	Balance at close of the last year.			Quantity stored during the current year.			Total of Cols. 4 and 5.			Quantity disposed of during the year.			Balance in Store.			QUANTITY RECOMMENDED TO BE WRITTEN OFF.									Quantity remaining in Store after writing off.			REMARKS.
																		Refuse to be destroyed.			Dryage or Deficiency in Weight.*			Total.						
			Mds.	S.	Ch.	Mds.	S.	Ch.	Mds.	S.	Ch.	Mds.	S.	Ch.	Mds.	S.	Ch.	Mds.	S.	Ch.	Mds.	S.	Ch.	Mds.	S.	Ch.	Mds.	S.	Ch.	

* This column will show the total deficiency (exclusive of refuse) which the Collector recommends to be written off.

Prescribes Rule for the guidance of Assessing Officers with reference to the Assessment under Act VIII of 1872 *of Persons having Incomes of Rs.* 1,000, *or more or less than Rs.* 1,000.

No. 7.

To remove misapprehension, assessing officers are informed that if a person was assessed under Act XII of 1871 on an income of Rs. 1,000, or above Rs. 1,000, he must be assessed under Act VIII of 1872 at the same rate. If he was assessed last year under Rs. 1,000, he must be assumed to be unassessable this year. If he was not assessed at all under last year's Act, he may be assessed this year according to an average of income for such period as the Collector may direct.

V. H. SCHALCH, ESQ.

Erratum in C. O. No. 3 *of July* 1872.

ERRATUM.

FOR "Section VI," in Circular Order No. 3 of July 1872, read "Section V."

Rescinds cl. 2 *s. IV Ch. XII of Rules at page* 195.

No. 8.

CLAUSE 12 Section IV Chapter XII at page 195 of the Board's Rules is hereby rescinded.

V. H. SCHALCH, ESQ., AND

A. MONEY, ESQ., C.B.

Issues revised Instructions, in supersession of previous Rules regarding the submission, &c., of supplementary Budget Estimates and extra Allotments.

No. 9.

GOVERNMENT has recently sanctioned certain changes in the procedure to be adopted

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in the submission and disposal of applications from local officers under the orders of the Board for extra budget allotments; and as there is reason to believe that, owing to the meagreness of the information supplied by Sections 5 and 6 of Chapter II, Board's Rules, the powers and duties of the several authorities concerned, in relation to supplementary budget estimates and extra allotments, are not generally understood, the Board take the present opportunity of issuing revised instructions on the subject, in supersession of the Sections above alluded to. For those Sections the following will accordingly be substituted—

"SECTION V.—EXTRA AND SUPPLEMENTARY BUDGET ALLOTMENTS.

The budget estimates of local offices for any particular year being prepared and submitted in the middle of the previous year, emergencies not unfrequently arise which have not, and could not have, been provided for. It may also happen that, through inadvertence or the non-receipt of the necessary information, duly sanctioned charges are omitted from a budget estimate.

2. In the latter case the omission, if brought to light at a sufficiently early period, may be supplied by the submission of a *supplementary* estimate, to the preparation of which all the rules and conditions under which the regular budget is drawn up apply. Such supplementary estimates will usually be received by the Board up to the end of November; but local officers should, by carefully preparing within the prescribed time complete estimates of expected expenditure, provide, as far as possible, against the necessity for the submission of supplementary estimates, as they cause trouble both in the Board's and the Accountant-General's office. After the end of November, no such estimates can, in any case, be admitted.

3. Should the necessity for making a disbursement during the year budgetted for come to light after the period within which a supplementary budget can be submitted, an *extra* budget allotment must be applied for in the form given below, together with the necessary application for departmental sanction. The same course should be adopted in all cases in which a disbursement, for which no budget provision has been made, becomes necessary during the year then current—

Application for an extra Budget Allotment in the District of—

1	2	3	4	5	Remarks by			
Budget Head.	Assignment under the Head for the year.	Additional Grant now required.	Financial year in which the amount has been, or is to be, actually paid.	Explanation of cause of additional requirement.	Commissioners.	Board.	Accountant-General.	Government of Bengal.

4. The report containing this double application must be submitted to the Commissioner, who will, if departmental sanction has been already accorded, or if he considers that it should be accorded, to the work on which the money is to be spent, forward the report to the office of the Board in the proper department with his remarks, and at the same time send a copy of the *budget* application only to the Accountant-General's office. This copy will be forwarded by the Accountant-General to the Board, with information in regard to the head in the provincial budget under which funds are available to meet the required expenditure. With the Commissioner's and the Accountant-General's reports before them, the Board will be able to form a judgment on the merits of the application, and will reject or forward it to Government as may seem proper.

5. In all cases in which it may appear from the Accountant-General's report that the expenditure can be defrayed from funds available under the same sub-head of the provincial budget, the Board's reference to Government will be for departmental sanc-

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tion only, the transfer of a charge from one detailed heading to another within a sub-head being within their competence. Should it appear to be necessary to transfer a portion of a grant to a sub-head to which it does not properly belong, the orders of Government will be necessary for such transfer, as well as for departmental sanction to the work.

6. These rules in no way supersede the necessity for submitting applications for departmental sanction to previously unsanctioned works, provision to meet the cost of which exists in the budget of the office by which the expenditure is to be incurred."

In Section II Clause 1, for the words "classes," "departments," "and sections," substitute "major heads," "minor heads," and "sub-heads," respectively.

A. MONEY, ESQ., C.B.

Further Rule added to Rules at page 121 *regarding Deposit of Cash Securities in District Savings Banks.*

No. 10.

THE following addition is made to Clause 10 Section V, Chapter VI, at page 121 of the Board's Rules :—

Cash securities are to be placed in deposit in District Savings Banks, provided the maximum amount of security of an officer does not exceed Rs. five hundred.

Explains Government's Rules of April 1872 *regarding the Assessment of Persons under Act VIII of* 1872.

No. 11.

ANY person assessed under Act VIII of 1872, whether he was assessed under Act XII of 1871 or not, is liable, on appeal, to have the assessment increased under Sections 31 and 32 of the Act. The last sentence of paragraph 16 of the Supreme Government's rules of 19th April 1872 refers to the original assessment only.

Draws attention to High Court C. O. of 28*th June* 1872 *regarding the Paper to be used for adhesive Stamps under the Court Fees' Act.*

No. 12.

THE attention of District Officers is drawn to the Circular Order No. 22, dated 28th June 1872, of the High Court, Fort William, published at page 67 of the Calcutta Gazette, dated 24th ultimo, regarding the paper to be used for adhesive stamps under (the Court Fees) Act VII of 1870.

2. It will be seen that paragraph 2 of the above Circular Order authoritatively decides the size and price of the paper required to be used; but as the Superintendent of Stationery has reported that the description of the paper in his stock is double the size required by the High Court order, the Member in charge has ruled that the paper should be cut to the size required at the different Treasuries instead of at the Stationery office. Accordingly the Superintendent has been instructed to send out whole sheets of the paper, and informed that the price of each half sheet at the Treasury before issue will be one pice. Local Officers, at their discretion, may either cut the paper themselves or let the vendors do so.

3. District Officers are requested to take the same kind of care of the paper now under notice as they do of stamped paper.

Issues Instructions for the Preparation of Returns Nos. 23*A*, 23*B*, *and* 23*C under Act VIII of* 1872.

No. 13.

To prevent delay in the submission to Government of the Board's Returns under Act VIII of 1872, for the half-year ending 30th September 1872, the following instructions are issued for the guidance of officers concerned in the preparation of Returns Nos. 23A, 23B, and 23C.

2. *Return No.* 23 *A.*—Columns 2 and 3 of this Return should agree class by class with columns 6 and 7 of Return No. VI-A for September 1872. Column 4 should show half the amount shown in column 3, and should tally with column 8 of Return No. VI-A. Column 5 of this Return and column 9 of Return No. VI-A should tally. Column 7 should tally with column 13 of Return No. VI-A. This column will include all payments made whether on account of 1st or 2nd instalment. Column 8.—The actual balance outstanding should be shown in this column. In the column of remarks should be entered, opposite each class, the amount paid voluntarily on account of the 2nd instalment.

3. *Return* 23 *B.*—The instructions for the preparation of Return 23A should be followed in the preparation of this Return, which should be prepared from Register No. I-A.

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4. *Return* 23 *C.*—Column 2 should show the number of servants of Companies, &c., who have paid up to the date of the submission of the Return, and column 3 should show the amount paid by them. Government officials should not be shown in this Return.

5. Fractions of an anna should not be shown in any of these Returns.

6. If the last two Returns are blank, the fact should be reported at the time Returns Nos. VI-A and 23A are submitted, which should not be later than the 18th October 1872. Otherwise they should be submitted on the same date.

SEPTEMBER 1872.

V. H. SCHALCH, ESQ.

Erratum in C. O. No. 1 *of April* 1872, *line* 5.

ERRATUM.

IN Circular Order No. 1 of April 1872, line 5, expunge the words "number and," and insert "receipt of" after "date of."

With reference to Government Resolution of 12*th July* 1872 *calls on Officers to submit in good time budget demands for Expenditure for Improvement of Government Estates.*

No. 1.

IT has been ruled* by the Government of India, Financial Department, that in future the expenditure to be incurred on account of considerable undertakings for the improvement of Government estates must be budgetted for like any other works.

* Resolution No. 1100, dated the 12th July 1872.

2. Under instruction from Government, the Member in charge requests, therefore, that local officers will "send up budget demands for such works for the ensuing year in good time, after consulting Public Works Department officers and procuring necessary details. Such expenditure will be imperial, and will be kept apart from provincial estimates."

3. It is presumed that in most districts the budgets for 1873-74 will have been submitted before the receipt of these orders, but charges to be admitted under the Government Resolution above alluded to may be included in supplementary budgets, which are now receivable up to the end of November next.

Cancels s. 9 *ch. VIII, page* 154 *of Settlement Rules.*

No. 2.

WITH reference to para. 1 of the revised settlement rules, which have been circulated with orders No. 419 B., dated 24th July 1872, Section IX Chapter VIII, page 154 of the Board's Rules, is hereby cancelled.

Correction in cl. 5 *ch. II s. X, page* 31 *of Rules.*

No. 3.

IN Clause 5 Chapter II Section X at page 31 of the Board's Rules, for the words "at the commencement" in line 2, substitute the words "on the last day."

Addition to cl. 8*B, page* 284 *of Rules,—regarding possession of island, whether channel be fordable or not throughout year, being merely temporary.*

No. 4.

THE following is added as clause 8 B at page 284, Board's Rules—

"Possession assumed under the last preceding rule should be merely temporary "until it has been ascertained whether or

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"not the channel round the island is fordable "throughout the year. If the channel be "found to be not so fordable, the land should "be considered the property of Government "and should be settled."

A. MONEY, ESQ., C.B.

Lays down Form of Explanations to be submitted at the close of each Year regarding the Increase or Decrease in the Sales of each description of Stamps.

No. 5.

IN recently submitting to Government the Administration Report on the Stamp Department for the official year 1871-72, the Member in charge found it necessary to record the following remarks—

"Notwithstanding the special instructions "issued by the Board to District Officers in "Circular Order No. 8 of September 1869, "the explanations regarding the fluctuations in "the revenue furnished to the Superintend-"ent of Stamps by local officers have gene-"rally been found very insufficient, so much so "that the Superintendent reported his in-"ability to supply for the *Annual Report* the "reasons of increase and decrease in the "respective districts. More stringent orders "will now be issued to District Officers to "furnish their explanations at the close of "each year in a form to be specially pre-"scribed by the Board, and to submit copies of "those explanations to the Board."

2. It was apparent, in most instances, upon reference to the original returns rendered to the Superintendent of Stamps, that the explanations offered by Treasury Officers had been sent on without any examination or revision such as ought to have been made by the District Officers in view of the means at their disposal of ascertaining full particulars of all *causes* of fluctuation in the stamp revenue in their respective districts, which Government expect to be properly and fully explained.

3. District Officers are now specially requested, in continuation of para. 2 of Circular Order No. 8 of September 1869, to give their careful attention to the submission of intelligent and complete explanations in the monthly returns sent to the Superintendent of Stamps, regarding any increase or decrease in the sales of each description of stamp. To secure uniformity, the Member in charge desires that the explanations at the close of each year be submitted in the undernoted form—

DESCRIPTION OF STAMP.	AMOUNT OF		Brief Explanation of Cause.
	Increase.	Decrease.	
Adhesive, including Receipt, Revenue, Share Transfer, Foreign Bill, and Customs Stamps.	Rs.	Rs.	
Hoondie or Bills of Exchange, including Bills of Lading Stamps.			
Judicial, including bi-color and adhesive, "Court Fees" Stamps.			
Non-judicial, including bi-color non-judicial, Customs and Salt Bond, Waste Land Deed, and Sulphur and Arms License Stamps.			

One copy should be sent direct to the Superintendent of Stamps, and another to this office, to which a *quarterly* Return, in the same form, should also be submitted *through the Commissioner.* No copy of the "quarterly" Return is required for the Superintendent of Stamps, to whom monthly returns are furnished.

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Errata in Circular Orders Nos. 10 *and* 11 *of August* 1872.

ERRATA.

Above Circular Order No. 10 *of August* 1872, *add* "V. H. SCHALCH, ESQ.," and *before* "A. MONEY, ESQ., C.B.," *and above Circular Order No.* 11, *enter* "A. MONEY, ESQ., C.B."

V. H. SCHALCH, ESQ.

Expunges Return No. XIII from List of Returns.

No. 6.

As all settlements now require the sanction of the Board of Revenue, Return No. XIII is no longer necessary, and should be expunged from the "List of Returns" at page 262 of the Board's Rules.

Alterations in para. 18, *Section I, page* 341, *Board's Rules.*

No. 7.

IN the first line of para. 18, Section I, page 341, Board's Rules, substitute the words "monthly accounts current" for the words "monthly bills," and expunge the last Clause in the para. beginning, "and an account current, &c."

A. MONEY, ESQ., C.B.

Addition in Circular Order No. 7 *of August last.*

No. 8.

AFTER the words "this year" in line 7 of Circular Order No. 7 of August last, insert the words "upon his income during the year "ending 31st March 1872 (*vide* column 4 of "Form C prescribed in Financial Resolution "No. 2887 of 19th April 1872), provided "that, in the case of a person first becoming "chargeable under this part within the year "of assessment, or within the year next "before such year, he may be assessed."

Substitutes new form of Certificate in Chapter XXI, Section II, Clause 5, *of Board's Rules.*

No. 9.

FOR the present form of certificate in Chapter XXI, Section II, Clause 5, pages 304 and 305 of the Board's Rules, substitute the following:—

I do hereby certify that I have personally counted the stamps in store *at the Sudder or Head Quarters Station of the District*, on the , the actual value of which is Rupees* , and that the Rules prescribed in Chapter XXI of the Rules of the Board of Revenue are duly observed in the District.

* NOTE.—Here enter the amount in words and figures.

I also hold similar certificates as to the stamps at all sub-divisions in the district having been counted by the officers concerned on the dates as per margin, the actual value of which is Rupees* .

I further certify that I have compared the balance as shown by this account with the balance shown in the memorandum at foot of the Monthly Cash Account of this office for and that they agree. (Where they do not agree, substitute, "and that they disagree to the extent of . I am enquiring into the cause of this difference.")

N. B.—In districts where there are no sub-divisions, the words in italics in para. 1, and the whole of para. 2, of the above form of certificate are to be omitted.

Circulates Government Ruling sanctioning refund of Stamp Duty when estimate of the assets of an estate exceeds duty which has been paid under Court Fees' Act.

No. 10.

IN continuation of Circular Order No. 11 of April 1872, the following orders of the Government of India, Financial Department, No. 2025, dated Simla, the 15th August 1872, addressed to the Chief Secretary to the Government of Bombay, are published for general information:—

I am directed to acknowledge the receipt of your letter No. 3099—21AR, dated 1st July 1872.

2. It appears that the Government of Bombay has sanctioned the refund of the excess stamp duty paid on Letters of Administration of an estate the assets of which were subsequently proved to be less than what they had been estimated to be at the time duty was paid; and it is suggested that as the Court Fees' Act, 1870, does not authorize the grant of refunds of stamp duty under such circumstances, provision might be made by law to meet similar cases in future.

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3. In reply, I am to say that the Governor-General in Council confirms the sanction accorded by the Local Government to the refund of the excess duty paid, but that His Excellency in Council does not consider it expedient to legislate on this point at present. The suggestion of the Bombay Government will, however, be borne in mind whenever the law is revised.

4. In the meantime, the Local Governments may sanction refunds of stamp duty when the estimate of the assets of an estate is shown to have exceeded the amount on which the Act says that duty shall be paid, *viz.*, the actual value of the property in respect of which the Letters of Administration are granted.

Expunges item for "Discount on Sale of Court Fees' Stamps" in Budget Estimates for 1873-74.

No. 11.

DISTRICT Officers are informed that the figures entered in their Budget Estimates for 1873-74, now coming in, on account of "discount on sale of Court Fees' Stamps" *in that year*, will all be expunged before transmission of the Estimates from this office to the Accountant-General of Bengal; as, with reference to para. 6 of the Rules printed with the Board's Circular Order No. 8 of June last, no discount on the sale of Court Fees' Stamps will be payable when those Rules come into effect.

OCTOBER 1872.

V. H. SCHALCH, ESQ.

Addition to Clause 18, *Section I, page* 35 *of Rules.*

No. 1.

THE following addition is made to Clause 18, Section I, page 35 of the Board's Rules—

"The Government Pleader should furnish every pleader appointed under this rule with a vakalutnamah."

Circulates Government Orders regarding Officers under Court of Wards not being Government Servants, &c.

No. 2.

THE following orders are published for communication to establishments employed under the Court of Wards—

"The Lieutenant-Governor has been pleased to decide that officers under the Court of Wards are not to be considered as Government servants, unless they are Government officers lent to Wards Estates.

"His Honor, however, observes that in fit cases men, who have long and well served Courts of Wards, may be admitted to the examination of candidates for Civil appointments by special permission, under Clause (e), Rule 3 of the Native Civil Service Examination Rules."

Circulates Government Instructions regarding counterfeit Coins.

No. 3.

WITH reference to Clause 1 *b*, Chapter II, Section XII, at page 32 of the Board's Rules, the attention of Treasury Officers is drawn to the accompanying Circular No. 2068, dated the 28th August last, issued by the Government of India, in the Financial Department. The instructions therein contained should be carefully attended to.

CIRCULAR No. 2068.

GOVERNMENT OF INDIA, FINANCIAL DEPARTMENT,

MINT AND CURRENCY.

TO THE SECRETARY TO THE GOVT. OF BENGAL.

Simla, the 28*th August* 1872.

SIR,

Letter from the Mint Master, Calcutta, No. 458, dated the 19th July, and its enclosures.

IN forwarding to you a copy of the papers noted in the margin, I am directed to request that, with the permission of His Honor the Lieutenant-Governor, you will be good enough to arrange for counterfeit coins being sent to the Calcutta Mint whenever it can be done with the consent of the tenderers.

I have, &c.,

(Sd.) D. BARBOUR,

Offg. Under-Secy. to the Govt. of India.

Substitutes new Rule for second Clause, Rule 16, *Section I, regarding the Annual Budget.*

No. 4.

THE following has been substituted for the second Clause of Rule 16, Section I, page 341, Board's Rules :—

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An annual Budget, in the form of Table VI, Return No. 31, headings II to XVI, based on the actual expenditure of previous years, with a separate Statement of Ways and Means in the form prescribed below, will be prepared and submitted for the sanction of the Commissioner—

Statement of Ways and Means to accompany Budgets.

1. Estimated balance in hand on 1st April 18 .
2. Add Estimated Receipts as in Budget.
3. Deduct Estimated Expenditure as in Budget.
4. Probable Balance on 1st April 18 .

Items entered in this Budget will belong to one of these three classes.

A. MONEY, ESQ., C.B.

States the Changes which have been made in the selling Price of abkarry Opium from 1st January 1873.

No. 5.

THE following changes have been made, under the sanction of Government, in the selling price of abkarry opium, with effect from the 1st of January 1873—

Division.	District.	Selling Price per Seer. Present.	Sanctioned.
		Rs.	Rs.
1. Orissa ...	Balasore ...	22	25
2. Burdwan ...	All districts	22	24
3. Presidency	All districts	22	24
4. Rajshahye...	All districts	22	24
5. Chittagong	All districts	22	24
6. Orissa ...	Cuttack and Pooree	22	24
7. Dacca ...	All districts	22	23
8. Assam ...	All districts	22	23
9. Cooch Behar	Julpigoree	22	23
10. Bhaugulpore	Purneah ...	20	22

2. The selling price in the remaining districts will remain as at present.

Cautions.—Officers to be careful of adhesive Court Fees Stamps.

No. 6.

IN a case recently reported to the Member in charge, a large number of Adhesive Court Fees Stamps are said to have been rendered quite unfit for use through careless exposure to damp; the sheets of Stamps becoming firmly fixed together by the gum on the back.

2. To prevent similar loss in future, all District Officers are enjoined to take extra precautions to preserve the Adhesive Stamps supplied to them from damp. The present stocks should be carefully examined, and dried when necessary, and the place where they are stored should be always kept properly dry. The sheets also, as far as possible, should be kept face to face, and never back to back.

Prohibits re-employment of a late Income-tax Clerk.

No. 7.

GUNGA NARAIN BANERJEE, late income-tax clerk at Jehanabad, in the district of Hooghly, has absconded to avoid his trial under a charge of fraud, and general notice is therefore given that he may not be elsewhere re-employed in any capacity under Government.

Directs Sub-Divisional Officers to manage the Excise in accordance with Government Orders cited.

No. 8.

AGREEABLY to the orders of Government, the Member in charge directs that, in all districts where the Sub-Divisional system has been introduced, the Officers in charge of Sub-Divisions shall, in future, manage the Excise within their jurisdiction in accordance with the following instructions embodied in para. 5 of Board's letter to Government, No. 39 of 27th January 1863, a copy of which was circulated with Board's Circular No. 13, dated 16th March 1863.

2. The system here prescribed is already followed in some districts; as regards other districts where it will now be introduced, the Commissioners concerned are requested to report to this office the date from which it comes into effect.

"I would make the Darogahs and their "establishments subordinate to the Sub-Divi-"sional Officer, who should be as strictly "responsible for the administration of this "portion of the duties of his Sub-Division "as for every other. But I would not mul-"tiply work and burden the Sub-Divisional "Establishment by making the Sub-Divi-"sional Officer's records distinct from the Ab-"karry Darogah's. The Darogah should not "send up to the Sub-Divisional Officer state-

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"ments and reports to be recorded there, "and a copy made for transmission to the "Sudder Office. The Abkarry Darogah's "office and records should be the office "and records of the Sub-Divisional Officer. "Applications, reports, and orders should "pass between the Sub-Divisional Officer "and the Abkarry Darogah just as they do "between the Sub-Divisional Officer and his "Sheristadar or Nazir. Statements drawn "up by the Abkarry Darogah should be ex-"amined, corrected, passed, and submitted to "the Sudder Office by the Sub-Divisional "Officer just as if they had been drawn up "by his Sheristadar, and the record of all "this should be in the Abkarry Cutcherry "only. This plan would obviate any com-"plaints of additional work thrown on the "Sub-Divisional Establishment.

"The Deputy Collector at the Sudder Sta-"tion in charge of the Abkarry Department "and Income-tax, should receive all returns "and statements direct from the Sub-Divi-"sional Office; they should be compiled and "aggregated in his office, and he should be res-"ponsible for pointing out to the Collector any "irregularity, slackness, or objectional prac-"tice in the Sub-Divisions: he would be the "Officer whom the Collector should consult "in all general questions affecting the whole "District. But the Sudder Deputy Collec-"tor's authority to issue instructions direct "to the Sub-Divisional Officers should be con-"fined to matters connected with the draw-"ing up of Statements. He should also have "the power of calling for information on *any* "point, as he would be answerable for the "consistent working of details all over the "District. All general arrangements which "the Sudder Station Deputy Collector might "resolve to introduce would, if approved, "be communicated to Sub-Divisional Officers "through the Collector."

NOVEMBER 1872.

V. H. SCHALCH, ESQ.

Cancels Clause 16 *Section* 3 *of Rules regarding periodical transfer of Ministerial Officers.*

No. 1.

CLAUSE 16 Section 3, page 175 of the Board's Rules, is cancelled, periodical transfers of ministerial officers having been discontinued.

Alterations in Clause 12, *page* 42 *of Board's Rules.*

No. 2.

THE following alterations should be made in Clause 12, page 42 of the Board's Rules—

After the word "Government," in line 2, add "or to the Court of Wards"; for the words "the Government," in line 6, substitute "such"; after the word "Government," in line 16, add "or the Court of Wards"; and after the word "Statement," in the 20th line, add "in two parts, one including Government, and one Wards' cases."

Requires insertion in Return No. XX of dates on which Fines under Act XX of 1848 *are levied.*

No. 3.

THE Member in charge has noticed that the dates on which fines under Act XX of 1848 are levied are frequently omitted from Return No. XX, column 10. District Officers are requested to be careful to avoid such omissions in future.

A. MONEY, ESQ., C.B.

Issues instructions regarding Assessment of Income-tax under Act VIII of 1872.

No. 4.

UNDER the orders of Government, the following instructions are issued for the guidance of officers engaged in assessments of income-tax under Act VIII of 1872:—

In calculating the net profits of Joint Stock Companies under Section 10 of the Indian Income-tax Act, VIII of 1872, an abatement may be allowed on account of taxes, local rates, and cesses *paid* by such Companies.

No abatement, however, should be allowed on account of any income-tax previously paid by any such Companies.

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V. H. SCHALCH, ESQ.

Addition to Circular Order No. 1 *of November* 1872.

No. 5.

IN Circular Order No. 1 of November 1872, after the words "Act XXVII of "1860," in the sixth line, insert the words "limited to such portions of the property "of the estate as consists of the Govern-"ment Securities which it is proposed to "sell."

How Column 18, *Table I of Return No. XVI, should be filled up.*

No. 6.

As there appears to be some misconception in respect to the mode of filling up column 18, Table I of Return No. XVI, District Officers are hereby informed that that column should show arrears that may remain unpaid after an estate is exempted from sale, and such arrears only. Arrears remaining unpaid on the last day of payment, but paid before exemption, should not be entered.

Substitutes new Clauses for Clause 1*a*—1*c and* 1*e*—1*g Section XII Chapter II of Rules regarding Coinage.*

No. 7.

THE following orders, issued by Government, are substituted for Clauses 1*a*, 1*b*, 1*c*, 1*e*, 1*f*, and 1*g*, Section XII, Chapter II, at page 32 of the Board's Rules :—

1*a*. When any silver coin, purporting to be coined and issued under the authority of the Government of India, is tendered to any of the officers authorized by this notification to act under Section 16 of the Indian Coinage Act, 1870, who has reason to believe it to be counterfeit, or to have been reduced in weight otherwise than by reasonable wearing, he must cut and break such coin, and, under Section 16 of the said Act, return the pieces to the person tendering the coin.

1*b*. When any rupee or half-rupee, purporting to be coined and issued under the authority of the Government of India, is tendered to any such officer, who has reason to believe it to have lost by reasonable wearing more than two per cent. in weight, he must cut or break such coin, and at the option of the person tendering the coin, return to him the pieces, or retain them and pay to him their value at the rate of one rupee for one hundred and eighty grains Troy weight.

1*c*. A quarter-rupee, or an eighth of a rupee, tendered to such an officer, must under Section 13 of the Act be accepted as legal tender for a fraction of a rupee, even though it have lost by reasonable wearing more than two per cent. in weight.

1*d*. If by reason of the obliteration of the device upon it, or for any other cause, any quarter-rupee, or eighth of a rupee, that shall come into the possession of such an officer shall appear to him to be unfit for further circulation, it is not to be cut or broken, but must, whatever be its weight, be withdrawn from circulation and dealt with in the manner prescribed in Clause 1*e*. But quarter-rupees and eighths of a rupee are not to be withdrawn from circulation if they appear to be otherwise fit to circulate, only because they have lost by reasonable wearing more than two per cent. in weight.

1*e*. The pieces of coin cut or broken and paid for under clause 1*b*, and the coin withdrawn from circulation under clause 1*d*, must be sent by the first convenient opportunity to the Master of the Mint at Calcutta. Meanwhile, the actual sum paid for the cut or broken pieces, and the nominal value of the coin withdrawn, must be entered in the statement of the cash balance of the officer who has received them, as "uncurrent coin." Upon their receipt at the Mint, the Master of the Mint will give credit for them at the same values, and any loss incurred in their recoinage will be a charge of the Mint.

Additions to Clause 4, *page* 179, *Board's Rules.*

No. 8.

AFTER the words "real property," in the last line but one of Clause 4, page 197, Board's Rules, insert—"and should take

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immediate possession of such property on the part of Government." At the end of the same clause, add—"Should the Collector's action be opposed by any person actually in possession, he must desist from occupying the property, and report the circumstances with his opinion in regard to the propriety of instituting a suit for the establishment of the right of Government."

Addition to Clause 5 Section 2 Chapter XXVI, page 352, Board's Rules.

No. 9.

AFTER the words "issue of the notice," Clause 5, Section 2, Chapter XXVI, page 352, Board's Rules, insert the words "in the *Government Gazette.*"

How searching Fees are to be credited in future.

No. 10.

As under Financial Resolution No. 669, dated 29th June last, searching fees are no longer credited to imperial revenue, District Officers are requested to exclude them from Table V, heading *F* of Return No. X, and from the Land Revenue Registers and Cash Accounts, and to credit them in future as miscellaneous receipts in the Provincial Service Day Book.

How Trees, Houses, &c., standing on land required for public purposes are to be valued.

No. 11.

As under Section 3, Act X of 1870, trees, houses, and other immoveable things standing on land under acquisition for public purposes, are included in the definition of the word "land," the value of such things should always be included in the Collector's estimate of the market value of the land, and the additional compensation under Section 42 of the Act should be paid on the lump sum. When a case is referred to the Civil Court for adjudication, the Collector should, if necessary, move the Court to adopt the form of valuation above specified.

Areas in Columns 2 to 5, Part I A-1 of Return No. 41B to be given in Acres and Square Miles.

No. 12.

THE areas in columns 2 to 5 of Part I A-1 of Return No. 41 B., should be given in acres as well as square miles.

A. MONEY, ESQ., C.B.

Court Fees Labels to be cancelled at the time they are affixed.

No. 13.

A QUESTION having been submitted as to the time when the labels used to denote the Court fees on such documents as copies, certificates, &c., which are in the first instance *issued* by a Court or Collectorate office, should be cancelled,—*i. e.*, whether they should be cancelled by the Courts at the time of issuing the documents, or at the time of filing the same,—it has been ruled by the Government of India, in the Financial Department, that the Courts and officers are to cause the labels affixed to documents *issued* by them and liable to a fee under the Act to be cancelled *at the time that they are affixed.*

The foregoing ruling is published for the information and guidance of Divisional and District Officers, who are requested to see that the orders of Government are invariably carried out.

As a temporary measure, allows a Discount of one anna per rupee to Stamp-vendors for sale of Court Fees adhesive Stamps.

No. 14.

WITH advertence to Circular Order No. 12 of August last, District Officers are informed that Government has sanctioned, as a temporary measure, the payment of discount of one anna per rupee to stamp-vendors for the sale of the paper now to be used for the Court Fees Adhesive Stamps. In letting vendors of stamp paper know this, it should also be explained to them that when the new rules for the sale of Court Fees' Labels through salaried vendors come into force, all unsold paper then in their hands will be taken back at the price paid for it to the Collector.

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DECEMBER 1872.

THE HON'BLE V. H. SCHALCH.

Prescribes form of re-conveyance of grants of waste land (to be added as Form L at page 365 of Board's Rules.)

No. 1.

THE following Form of re-conveyance of grants of waste land is added as Form L at page 365 of the Board's Rules, and is to be used when grants hypothecated for redemption or purchase-money remaining unpaid are fully redeemed—

This Indenture made the day of 1872 between the within-named Secretary of State for India in Council of the one part, and the within-named of the other part, witnesseth that, in consideration of the sum of Rs. to the said Secretary of State for India in Council paid by the said on or before the execution of these presents in full satisfaction of all principal moneys and interest secured by the Indenture secondly within written and the receipt whereof the said Secretary of State for India in Council doth hereby acknowledge and therefrom acquit and release the said and his heirs, representatives, and assigns.

The said Secretary of State for India in Council doth in virtue of all powers and authorities enabling him in that behalf, and so far as he lawfully can or may by these presents grant and convey unto the said his heirs, representatives, and assigns all and singular the lands and premises comprised in and granted, or otherwise assured by the said Indenture secondly within written or expressed so to be, to have, and to hold the lands and premises hereby granted or expressed, so to be unto and to the use of the said his heirs, representatives, and assigns freed and absolutely discharged from all principal moneys and interest secured or intended to be secured by the said Indenture secondly within written and all claims and demands on account thereof, and the said Secretary of State for India in Council doth hereby for himself and his successors covenant with the said his heirs, representatives, and assigns that he, the said Secretary of State for India in Council, hath not at any time done or executed, or knowingly suffered, or been party or privy to any act, deed, or thing, whereby the lands and premises hereby granted and conveyed or expressed so to be, or any of them, or any part thereof, are, is, can, or may be impeached, charged, or incumbered in title, estate, or otherwise howsoever. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered for and on behalf of the Secretary of State for India in Council, by , by order of the Lieutenant-Governor of Bengal, in the presence of

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Draws attention to Financial Department Notification exempting from stamp duty unauthenticated copies of settlement records furnished to landholders and cultivators.

No. 2.

THE attention of all Officers in the Revenue Department is invited to the Notification of the Government of India, in the Financial Department, No. 1906, published in the *Gazette of India*, under date the 9th August last, page 764, exempting from stamp duty unauthenticated copies of settlement records furnished to landholders and cultivators.

Suspends until further orders the submission of Return No. XII regarding settlements; directs that Board's orders be cited in cols. 4 and 5, Table II of Return No. X, &c.

No. 3.

As the power of confirming settlements has been withdrawn from the local officers, and as all settlements and re-settlements are now reported to the Board for confirmation, the submission of Return No. XII to this office is hereby suspended until further orders.

In cases in which entries in columns 4 and 5, Table II of Return No. X, appear in consequence of settlements which have been

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sanctioned by the Board, the number and date of the Board's orders should be cited in explanation of those entries. When such entries are due to new settlements made in anticipation of sanction, as directed in para. 9 of the Settlement Rules, communicated with the Board's endorsement No. 419B of 24th July last, the fact should be stated ; when to any other cause, the circumstances should be fully explained.

Adds further paragraph to Instructions for the acquisition of land for public purposes.

No. 4.

THE following is added as para. 29A of the Instructions for the acquisition of land for public purposes:—

"As soon as an award has become final, the Collector should give effect to any abatement of revenue which may have been determined on in connection with it, whether any delay does or does not occur in the payment to the parties concerned of that portion of the compensation awarded which is payable in cash."

Addition to paragraph 16 *of the Instructions under Act X of* 1870.

No. 5.

THE following has been interpolated after the word "law" in line 5 of paragraph 16 of the Instructions under Act X of 1870 :—

"Should the land to be occupied, or any "portion of it, belong to, or be in the possession of, Government, the personal notice "required by the law should be served on "the chief local representative of the department interested."

Draws attention to, and modifies, clause 9*A, page* 357, *Board's Rules, reserving right of Government to demand a royalty from mines on land sold.*

No. 6.

A CASE having recently occurred in which a tract of waste land was sold, without reservation of the right of Government to demand a royalty on any mineral products which might be found on it, whereby actual los may accrue to the State, the attention of local officers is called to Clause 9A, page 357, Board's Rules, which is hereby modified as follows :—

For the words, in lines 3 and 4, "that "which the State may be able to claim in the "way of royalty from mines discovered on "land which is private property," substitute "that of the demand of the State to a royalty "from any mines on the land so sold."

THE HON'BLE V. H. SCHALCH AND A. MONEY, ESQ., C. B.

Amount to be refunded from each deposit number, &c., to be stated in all future applications for refund of deposits of more than 3 *years' standing.*

No. 7.

DISTRICT Officers are requested to state, in all future applications for the refund of deposits of more than three years' standing, the amount that is to be refunded from each deposit number, and also the amount or balance of the deposit as per Registers.

A. MONEY ESQ., C. B.

Warns Officers to guard against the forgery of adhesive Court Fees' Stamps.

No. 8.

CERTAIN attempts to forge the adhesive Stamps lately issued for the purpose of denoting Court fees have been recently brought to light, and the Member in charge now calls the earnest attention of all District Officers to the risk of fraud arising from the greater facility with which such Stamps can be forged, in comparison with impressed Stamps.

Large quantities of these adhesive Stamps are daily presented in payment of process fees, and very seldom come under the actual observation of the head of a Revenue Court. Attempts to use forged Stamps are more likely therefore to occur in connection with this mode of using Stamps than with any other. Every head of a Court in which such fees are paid by Stamps is desired, in future, to call for, from time to time, papers which have been so stamped, and to satisfy himself thoroughly by personal examination that the Stamps used in his Court are genuine.

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THE HON'BLE V. H. SCHALCH.

Shows how Interest on current Demands of Rent should appear in Return No. 31.

No. 9.

IN the preparation of future Returns No. 31, District Officers and Commissioners are requested to see that interest on current demands of rent,—*i. e.*, on instalments not paid when they fall due, but paid within the year,—is shown in column 2 or 10 (as the case may be) of Table I, and that any difference between columns 10 and 23, which may result from this practice, is explained in the separate explanation sheet.

Similarly, interest on arrears of rent should appear in columns 3 and 11 of Table I, tests 4 and 11 being satisfied by an explanation on the separate sheet.

Interest which may have accrued during the year on debts due to and by the estate should be added to column 3 of Tables III and IV respectively, and, if paid, to the corresponding columns of realization.

A. MONEY, ESQ., C.B.

Draws Attention to Government Notification regarding Practice of Post-dating Hoondees

No. 10.

THE Board of Revenue has been directed by the Government to draw attention to the notification by the Financial Department, No. 1264, dated 28th July 1871, in which it was pointed out that the practice of post-dating hoondees or bills, in order to evade payment of stamp duty, was illegal; and that any person making, signing, issuing or (except as provided in Section 26 of the General Stamp Act, 1869) accepting, endorsing, paying or receiving payment of any such post-dated bill, was liable to the penalties provided in Section 29 of the Stamp Act.

2. The Government has reason to believe that the practice of post-dating hoondees still continues, and that a considerable amount of revenue is in this way lost. District Officers are, therefore, instructed to watch carefully against any such practice, and to institute prosecutions in all cases in which convictions can be obtained under Section 29 of the General Stamp Act.

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